Avoiding Arbitration Agreements

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Disclaimer

Nothing in this presentation constitutes legal advice or establishes an attorney-client relationship between the presenter and any attendee.

This presenter's thoughts and opinions on any matter are solely her own and do not represent or reflect any of the opinions, positions, or interests of Texas Tech University Health Sciences Center or The American Association of Nurse Attorneys.

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Learner Objectives

- Identify typical provisions in arbitration agreements.
- Evaluate "pros" and "cons" of arbitration agreements signed by patients and nurse-employees.
- Analyze the legal and ethical ramifications of arbitration agreements signed by patients and nurse-employees.

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What is Arbitration?

- Alternative Dispute Resolution (ADR)
- Out of court proceeding, not a lawsuit
- Neutral third party decision maker, usually an experienced attorney or former judge
- By agreement or forced by one party
- Usually binding

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Arbitration Hearing

- Initiating party usually has burden of proof
- May call & cross-examine witnesses
- Opening, closing, briefing issues
- Written decision by arbitrator after hearing

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Types of Arbitration Agreements

- Patient/resident admission paperwork, especially long term care facilities/nursing homes
- Employee new hire/annual paperwork, even in employment-at-will states
- Consumer disputes – credit cards, retail
- Disputes between businesses & contractors
- Other contracts

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AAA (American Arbitration Association)

"The American Arbitration Association (AAA®) is a not-for-profit, private, public service organization which offers a broad range of dispute resolution services, including arbitration and mediation, through offices located in 23 major cities throughout the United States, Mexico, Singapore, and the Middle East" (AAA, 2021).

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JAMS (Judicial Arbitration and Mediation Services)

"JAMS successfully resolves business and legal disputes by providing efficient, cost-effective and impartial ways of overcoming barriers at any stage of conflict… Our panel includes more than 400 retired state and federal court judges, attorneys and other ADR professionals with proven track records and extensive practice area and industry expertise" (JAMS, 2021).

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CPR (Conflict Prevention & Resolution)

"CPR Dispute Resolution provides leading edge dispute management services – mediation, arbitration, early neutral evaluation, dispute review boards and others -- as well as training and education. It is uniquely positioned to resolve disputes by leveraging the resources generated by the leaders who participate in the CPR Institute" (CPR, 2021).

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FMCS (Federal Mediation & Conciliation Service)

"The Federal Mediation and Conciliation Service, created in 1947, is an independent agency whose mission is to preserve and promote labor-management peace and cooperation. Headquartered in Washington, DC, with two Regions comprising of eight District Offices and more than 60 Field and Home Offices, the agency provides mediation and conflict resolution services to industry, government agencies and communities" (FMCS, 2021).

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NAA (National Academy of Arbitrators)

"The National Academy of Arbitrators was founded in 1947 as a not-for-profit honorary and professional organization of arbitrators in the United States and Canada. Members are chosen by involved parties to hear and decide thousands of labor and employment arbitration cases each year in private industry, the public sector and non-profits in both countries. Admission standards are rigorous in keeping with the goal of establishing and fostering the highest standards of integrity and competence.

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Pros

- Shorter timeline
- Flexible scheduling
- Less rigid rules of procedure & evidence
- PHI kept more private
- Usually less expensive for companies

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Pro-Arbitration Positions

"In most cases, both sides prefer arbitration to a lengthy court fight because arbitration is speedier and less expensive, and may be conducted without attorneys."

Experience/background of the author?

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Cons

- Patients & employees lack understanding and power to negotiate terms of contracts that force arbitration
- Neutrality and objectivity is questionable, companies usually pay arbitrators' fees
- Patients & employees lose their right to trial & appeals
- Patients & employees have to find an attorney who will agree to arbitration & front case expenses
- Lacks transparency, public not protected
- Less rigid rules of procedure & evidence
- No open court, bad acts hidden from the public

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Patient Arbitration Agreement

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Most Recent Case Law

Northport et al v. HHS & CMS et al (October 1, 2021)

Northport Health Services of Arkansas and other similarly situated LTC facilities appealed the district court grant of summary judgment in favor of HHS and CMS. Northport argued that a regulation promulgated by CMS through notice and comment rulemaking is unlawful and should be set aside for violating the Administrative Procedure Act, Federal Arbitration Act, and Regulatory Flexibility Act. The court of appeals affirmed summary judgment in favor of HHS and CMS.

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Example of State Law Prohibition

Texas Civil Practice & Remedies Code (CPRC) Sec. 74.451. ARBITRATION AGREEMENTS. (a) No physician, professional association of physicians, or other health care provider shall request or require a patient or prospective patient to execute an agreement to arbitrate a health care liability claim unless the form of agreement delivered to the patient contains a written notice in 10-point boldface type clearly and conspicuously stating:

UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

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Federal Arbitration Act (FAA)

- Enacted in 1925 to ensure the validity and enforcement of arbitration agreements in any "maritime transaction or a contract evidencing a transaction involving commerce."
- U.S. Supreme Court has recognized the FAA as evidencing "a national policy favoring arbitration."
- Congress sought to promote the enforcement of arbitration agreements

(Congressional Research Service, 2017)

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Federal Preemption

Per the U.S. Supreme Court in *Mastrobuono v. Shearson Lehman Hutton, "*the FAA does not have to be mentioned in the contract or arbitration provision to apply and preempt state law…. There is an express, but very limited statutory exception to the applicability of the FAA. Section 1 of the FAA, 9 U.S.C. § 1, expressly excludes arbitration agreements involving employment of any class of workers actually employed in foreign or interstate commerce, e.g., railroads, airlines, and telecommunications carriers" (Trantina, 2015).

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Stand-Alone Employee Arbitration Agreement


MUTUAL AGREEMENT TO ARBITRATE CLAIMS

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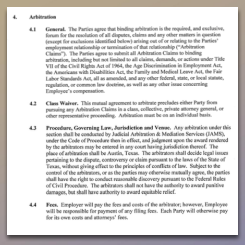
Arbitration In Other Employee Paperwork


4. Arbitration

- Contained within a 5-page *Confidentiality, Non-Disclosure & Arbitration Agreement*
- Presented to employee with a dozen other documents

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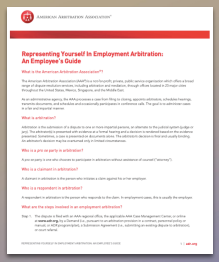
Pro Se Representation


American Arbitration Association®

Representing Yourself In Employment Arbitration:
An Employee's Guide

What is the American Arbitration Association®?

What is arbitration?

Who is a pro se party in arbitration?

Who is a claimant in arbitration?

Who is a respondent in arbitration?

What are the steps involved in an employment arbitration?

- *Pro se* employee vs. experienced litigators is unfair & unjust
- Employee usually has to pay filing fees
- Employee likely terminated

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Code of Ethics for Arbitrators

"Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters. An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions" (AAA, FMCS & NAA, 2007).

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Code of Ethics for Labor Disputes

The provisions of this Code deal with the voluntary arbitration of labor-management disputes and certain other arbitration and related procedures which have developed or become more common since it was first adopted.

Voluntary arbitration rests upon the mutual desire of management and labor in each collective bargaining relationship to develop procedures for dispute settlement which meet their own particular needs and obligations. No two voluntary systems, therefore, are likely to be identical in practice. Words used to describe arbitrators (Arbitrator, Umpire, Impartial Chair, Chair of Arbitration Board, etc.) may suggest typical approaches, but actual differences within any general type of arrangement may be as great as distinctions often made among the several types.

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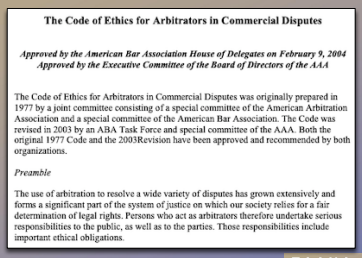
Code of Ethics for Commercial Disputes



The Code of Ethics for Arbitrators in Commercial Disputes

Approved by the American Bar Association House of Delegates on February 9, 2004
Approved by the Executive Committee of the Board of Directors of the AAA

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA. Both the original 1977 Code and the 2003Revision have been approved and recommended by both organizations.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

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How to Avoid?

(Easier Said Than Done)

- Read documents
- Do not sign without understanding terms
- Ask questions, request revisions
- Do not agree, walk away
- Find a different facility for patient
- Find a different employer

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How to Fight?

(Also Easier Said Than Done)

- No federal preemption - not related to a transaction involving interstate commerce
- Incorrectly or unnamed parties
- Unconscionable at the time signed
- Gross disparity in bargaining power
- Violates public policy

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References

American Arbitration Association. (2021). *About the AAA and ICDR*. https://www.adr.org/about

American Arbitration Association. (2021). *Arbitration*. hhttps://www.adr.org/Arbitration

American Arbitration Association. (n.d.). *Representing yourself in employment arbitration: An employee's guide.* https://www.adr.org/sites/default/files/document_repository/EmploymentArbitration_EmployeeGuide.pdf

American Bar Association. (n.d.). *ADR ethics resources.* https://www.americanbar.org/groups/dispute_resolution/resources/Ethics/

American Bar Association (2003). *The code of ethics for arbitrators in commercial disputes.* https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/commercial_disputes.pdf

Congressional Research Service. (2017). *Mandatory arbitration and Federal Arbitration Act*. https://sgp.fas.org/crs/misc/R44960.pdf

CPR (2021). *What we do*. https://www.cpradr.org/about

Federal Mediation and Conciliation Service. (2021). *About us*. https://www.fmcs.gov/aboutus/

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References Continued

JAMS. (2021). *About us*. https://www.jamsadr.com/about/

JAMS. (2021). *Arbitrators ethics guidelines*. https://www.jamsadr.com/arbitrators-ethics/

Ferrell, K. G. (Ed.) (2016). *Nurse's legal handbook* (6th ed.). Wolters Kluwer.

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-64 (1995).

NAA, AAA, and FMCS. (2007). *Code of professional responsibility for arbitrators of labor-management disputes.* https://adr.org/sites/default/files/document_repository/Code%20of%20Professional%20Responsibility%20for%20Arbitrators%20of%20Labor-Management%20Disputes_0.pdf

National Academy of Arbitrators. (2021). *Who we are.* https://naarb.org/who-we-are/

Northport Health Services of Arkansas et al. v. U.S. DHHS et al. (2021). https://ecf.ca8.uscourts.gov/opndir/21/10/201799P.pdf

Robert, A. (2021). Amazon drops arbitration requirement after facing over 75,000 demands. *ABA Journal.* *https://www.abajournal.com/news/article/amazon-drops-arbitration-requirement-after-facing-75000-demands*

Trantina, T. (2015). What law applies to an agreement to arbitrate? https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/fall-2015/7_trantina_what_law_applies.authcheckdam.pdf

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ARBITRATION AGREEMENT
(READ CAREFULLY)

This Arbitration Agreement ("Agreement") is made on this _____ day of October 20___, by and between NorthPoint (the "Facility") and _____ ("Resident" and/or "Resident's Authorized Representative", hereinafter collectively the "Resident"). Resident's Authorized Representative, if any acknowledges that he is signing this Agreement as a party, both in his individual and representative capacity.

I **What is Arbitration?** Arbitration is generally a cost effective and time-saving method of resolving disputes without involving the courts. If in using arbitration, the disputes are heard and decided by a private individual called an arbitrator. The dispute will not be heard or decided by a judge or jury.

II **Agreement to Arbitrate** The Facility and the Resident agree that, pursuant to the Maryland Uniform Arbitration Act, and except as provided in the last paragraph of this Section l, any action, dispute, claim, or controversy of any kind (i.e., whether in contract or tort, statutory or common law, legal or equitable, or otherwise) now existing or hereafter arising between the parties in any way arising out of, pertaining to or in connection with or relating to:

A. the provision of healthcare, nursing services, and/or any other goods or services to the Resident by the Facility, its affiliates, agents, servants, employees, independent contractors agents and/or representatives; and/or
B. other transactions, contracts or agreements of any kind whatsoever between the Facility, its affiliates, agents, servant e1npfoyees, independent contractors agents and/or representatives and the Resident and his or her representatives; and/or
C. any past, present, or future incidents, omissions, acts, errors, practices, or occurrence causing injury to either party hereto whereby the other party or its affiliates, agents, servants, employees, independent contractors agents and/or representatives may be liable, in whole or in part: and/or
D. any survival action or wrongful death claim; and/or
E. any other aspect of the past, present or future relationships between the parties hereto, shall be resolved by binding arbitration (the "Arbitration") in accordance with the Maryland Uniform Arbitration Act, and not by a claim brought before the Health Care Alternative Dispute Resolution Office, a lawsuit, or other resort to court process, except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or judicial enforcement of arbitration awards.

III **Arbitrator** The Arbitration shall be heard and decided by one arbitrator (the "Arbitrator"), and the Resident and the Facility expressly agree that the Arbitrator is employed to, and shall, resolve all disputes, including without limitation, any disputes about the making, validity, enforceability, scope, interpretation, voidability, unconscionability, preemption and/or waiver of this Agreement or the Admission Agreement, as well as resolve the Parties' underlying disputes as it is the Parties' intent to completely avoid involving the court system. Notwithstanding anything in this Section I to the contrary, this Agreement regarding Arbitration shall not apply to any claim by the facility and/or its affiliates against the Resident or any representative of Resident for nonpayment of any charge for nursing home or other services, which claim may be brought in any court of competent jurisdiction,

nor shall it apply to guardianship actions, actions for involuntary discharge, or actions brought pursuant to Maryland Health General Code Ann., §I 9-344.

IV **Initiation of Arbitration:** Arbitrator An Arbitration shall be initiated by the allegedly aggrieved party by submitting to the other party a written demand for arbitration (sent in accordance with the notice provisions of this Agreement) which shall state (i) the claim asserted, (ii) the facts alleged to support the claim, (iii) the applicable statute or principle of law upon which the legal basis for the demand is premised and (iv) the remedy being sought. The Arbitration shall be heard and decided by the Arbitrator, who shall be selected by mutual agreement of the parties; provided, however, if the parties are unable to agree on the Arbitrator within thirty (30) days of the serving of the written demand of arbitration (the "Mutual Arbitrator Period"), each party shall then designate in writing to the other party one (l) arbitrator within twenty (20) days after the expiration of the Mutual Arbitrator Period (the "Arbitrator Designation Period"), and the two (2) designated arbitrators shall select a third arbitrator within twenty (20) days after the Arbitrator Designation Period, which third arbitrator (sometimes hereinafter referred to as the "Designated Arbitrator") shall be the Arbitrator for the Arbitration. In the event a party does not designate an arbitrator during the Arbitrator Designation Period, then the arbitrator designated by the other party shall select the Designated Arbitrator. In the event that the two (2) arbitrators fail to select the Designated Arbitrator within twenty (20) days after the end of the Arbitrator Designation Period, then either party shall have the right, pursuant to the Maryland Uniform Arbitration Act, to petition a court for the Appointment of the Arbitrator. Each party shall pay the costs and expenses of the arbitrator designated by such party during the Arbitrator Designation Period. The costs of the Designated Arbitrator shall be deemed an arbitration expense and shall be split equally by the parties, except where the Arbitrator determines that the apportionment of such costs is prohibited by applicable law.

V **Rights of Parties** The following rights and procedures shall apply in the Arbitration:

A. Each party shall have the right to assert any claims or defenses in the arbitration which could be raised in a court of competent jurisdiction;
B. Each party shall have the right to counsel of his/her or its choice;
C. The party that raises a claim in the Arl1itration shall bear the burden of proof with respect to the claim.

VI **Damages** The parties agree that damages awarded, if any, in the arbitration shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action including any statutory caps or limitations on such damages. It is further agreed that the Arbitrator will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.

VII **Arbitration Hearing** Upon the appointment of the Arbitrator, the Arbitrator shall hold a conference with the parties (either by telephone or in person) for the purpose of establishing guidelines for discovery, establishing guidelines for the identification and presentation of testimony from expert witnesses, establishing deadlines for submissions to the Arbitrator and the exchange of information between the parties and confirming the time and place of the hearing. The Arbitrator shall establish a schedule for the identification of fact and expert witnesses, and during the course of discovery, the parties shall have the right to subpoena and depose any individual who is identified by the opposing party as a fact or expert witness at the arbitration, as well as the right to subpoena and depose custodians of relevant medical

records. Discovery disputes shall be resolved by the arbitrator in advance of the hearing and in accordance with the Maryland Rules of Procedure. The Arbitration hearing shall take place in the State of Maryland at a place mutually agreed upon by the parties, or, if no agreement, at FutureCare's corporate offices located at 8028 Ritchie Highway, Suite 118, Pasadena, MD 21122, and shall continue on consecutive business days until completed, unless the parties and the Arbitrator agree upon a different schedule. Either party shall have the right to cause the Arbitration hearing to be stenographically recorded; if so recorded, such cost shall be split equally by the parties. Each party shall have the opportunity to submit post-hearing briefs. The cost of the Arbitration, including the costs and fees of the Arbitrator shall be borne equally by each party. All claims based in part on the same incident, transaction, or related course of the care or service provided by the Facility to the Resident, shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or received by the Resident, and is not presented in the Arbitration proceeding. Nothing in this Agreement shall serve to extend any applicable statute of limitations.

VIII **Arbitration Award** The Arbitrator shall have the authority to award such relief as may be available in a court of law, subject to the limitations on damages set forth in Section IV of this Agreement. The decision of the Arbitrator shall be final and binding on the parties except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or judicial enforcement of arbitration awards.

IX **Notification by Parties** Any notices to be given under this agreement by either party to the other shall be effected by personal delivery in writing or by mail, registered or certified, postage prepaid with return receipt requested. Any notice to the Facility or Future Care shall be mailed to President, FutureCare, 8028 Ritchie Highway, Suite 210B, Pasadena, Maryland 21122. Any notice to Resident shall be mailed to the Resident's last address on file with the Facility. Each party may change his, her, or its address by written notice to the other party. Mailed notices shall be deemed communicated as of three (3) days after mailing.

X **Modification of Agreement** This Agreement cannot be modified except in writing signed by both Resident and the Facility and supersedes any and all other agreements, either oral or in writing, express or implied, between the Resident and the Facility relating to dispute resolution.

XI **Motion to Compel Arbitration** If any party is required to file a lawsuit to compel arbitration pursuant to this Agreement, or defend against a lawsuit filed in court contrary to this Agreement's mandatory arbitration provision, such party, if successful, shall be entitled to recover such party's reasonable costs and attorneys' fees incurred in such an action, including costs and attorneys' fees incurred in any appeal. The Resident and Facility hereby expressly agree that judicial review as to a motion to compel arbitration or similar petition shall be limited to the determination of whether a valid agreement to arbitrate exists (i.e., whether the instant Agreement is the product of a legally cognizable offer, acceptance and consideration). All other disputes as to the making execution, validity, enforceability, voidability, unconscionabillty, severability, scope, interpretation, preemption, waiver, or any other defense to the enforceability of this Agreement or the Admission Agreement, shall be determined solely by the Arbitrator.

XII **Intention of Parties** It is the intention of the parties to this Agreement that this Agreement shall inure to the direct benefit of and bind the parties and their respective personal

representatives, heirs, successors and assigns, including the agents, employees, affiliates, and servants of the Facility, any management company associated with or contracting with the Facility, and all persons whose claims derive through, or on behalf of, the Resident, including those of any parent spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident, as well as any survivor or wrongful death claim, or any person who previously assumed responsibility for providing Resident with necessary services such as food, shelter, clothing or medicine, and any person who executed this Agreement or the Admission Agreement. The parties agree that except as may be required by law, her neither party, nor the Arbitrator, may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of the parties. The parties understand and agree that bv entering in to this Agreement they are each relinquishing and waiving their right under applicable law to have any claim decided in a court of law before a judge and/or jury.

XIII **SEVERABILITY** If any term, provision, subparagraph, paragraph or section of this Agreement is adjudged by any court to be void or unenforceable in whole or in part, this adjudication shall not affect the validity of the remainder of this Agreement, including any other term, provision, subparagraph, paragraph or section. To the extent unenforceable, the Arbitrator may sever any term or portion of this Agreement, and such severance shall not affect the validity of the remainder of this Agreement. The provisions of the Maryland Arbitration Act will control and supplement the Agreement unless expressly contrary to the terms of the Agreement.

XIV **Rights of the Resident** The Resident acknowledges and understands that (1) the Resident has received a copy of this agreement and has had an opportunity to read it and ask questions about it before signing below; (2) the Resident has the right to seek legal counsel concerning this Agreement; (3) if the Resident does not accept this Agreement, he or she can still move into and receive services from this Facility; (4) this Agreement may be rescinded by written notice to the Facility from the Resident within 30 days of the signing hereof by the Resident; (5) if not so rescinded within 30 days of the signing hereof by the Resident, this Agreement shall remain in effect for all care and services rendered by the Facility, its agents, servants, employees or contractors; and (6) by signing this Agreement, the Resident and the Facility are giving up and waiving the right to have Disputes decided in a court of law before a judge and/or jury.

In Witness thereof, the parties have signed and sealed this Agreement as of the day and Year first above written.

MUTUAL AGREEMENT TO ARBITRATE CLAIMS

The above-named employer, (the "Company") and Employee hereby agree to resolve by final and binding arbitration any and all claims or controversies for which a court or other governmental dispute resolution forum otherwise would be authorized by law to grant relief, in any way arising out of, relating to or associated with Employee's employment with the Company or any of its affiliates, parent companies, holding companies, subsidiaries, service providers, or the termination of such employment. This mutual agreement to arbitrate includes any claims that the Company may have against Employee, or that Employee may have against the Company or against any of its officers, directors, employees, agents, parent companies, holding companies, subsidiaries, affiliated entities, or service providers. The Company and Employee agree that arbitration, as provided for in this Agreement, shall be the exclusive form for the resolution of any covered dispute between the parties. **In agreeing to arbitration, both the Company and Employee explicitly waive their respective rights to trial by jury.**

The claims covered by this Agreement include, but are not limited to, claims for breach of any contract or covenant, express or implied; claims for breach of any fiduciary duty or other duty owed to Employee by Company or to Company by Employee; tort claims; claims for wages or other compensation due; claims for discrimination or harassment, including but not limited to discrimination or harassment based on race, sex, pregnancy, religion, national origin, ancestry, age, marital status, physical disability, mental disability, medical condition, or sexual orientation; and claims for violation of any federal, state or other governmental constitution, statute, ordinance or regulation (as originally enacted and as amended), including but not limited to claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, the Fair Labor Standards Act ("FLSA"), the Employee Retirement Income Security Act ("ERISA"), the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), the Family and Medical Leave Act ("FMLA"), and the Texas Commission on Human Rights Act (collectively, "Arbitrable Disputes"). Both Employee and the Company forego and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity, unless such procedures are agreed to in writing by Employee and Company; any individual claim, however, is subject to this agreement to arbitrate.

This mutual agreement to arbitrate claims does not limit Employee's right to file an administrative charge with the Equal Employment Opportunity Commission or any state agency charged with enforcement of fair employment practice laws; however, binding arbitration, rather than the court system, is the only process that Employee may use for pursuing individual relief. This agreement also does not apply to or cover claims for workers' compensation benefits or compensation, claims for unemployment compensation benefits, or claims based upon an employee pension or benefit plan the terms of which contain an arbitration or other non-judicial dispute resolution procedure, in which case the provisions of such plan shall apply.

Both the Company and Employee waive any right either may otherwise have to pursue, file, participate in, or be represented in any Arbitrable Dispute brought in any court on a class basis, or as a collection action, or as a representative action. All Arbitrable Disputes subject to this Agreement must be arbitrated as individual claims. This Agreement specifically prohibits the arbitration of any Arbitrable Dispute on a class basis, or as a collection action, or as a representative action, and the arbitrator shall have no authority or jurisdiction to enter an award or otherwise provide relief on a class, collective or representative basis. The Company and Employee, therefore, do not waive and specifically retain a right to appeal in a court of competent jurisdiction any determination or award of an arbitrator made in contravention of this provision, including, without limitation, a determination that: (i) a claim may proceed as a class, collective, or representative action; or (ii) awards relief on a class, collective or representative basis. In such appeal, the standard of review to be applied to the arbitrator's decision shall be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.

A party with an Arbitrable Dispute must initiate the dispute resolution process by submitting a written request for arbitration under this Agreement within one year of the date the dispute first arose, or within one year of the termination of employment, whichever occurs first; provided, however, if the party's claim arises under any statute providing a longer time in which to file a claim, that statute governs. A request

submitted by the Employee must be directed to the President of the Company at the Company's principal place of business. A request submitted by the Company shall be sent to the Employee at the Employee's address as reflected on the Company's personnel records.

If an Arbitrable Dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by non-binding mediation administered by the American Arbitration Association under its National Rules for the Resolution of Employment Disputes, before resorting to arbitration. The mediator's fees and any administrative fees or costs associated with the mediation shall be paid by the Company. Each party shall bear its, his, or her own costs of legal representation at the mediation.

Any arbitration shall be conducted before a single arbitrator under the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA") then in effect. The Company shall pay any arbitration filing fee, and will bear all other costs of arbitration, including fees for the services of the arbitrator and any court reporter ordered by the arbitrator. Each party shall bear its, his, or her own costs of legal representation; provided, however, if any party prevails on a claim entitling the prevailing party to attorneys' fees and/or costs, the Arbitrator may award reasonable fees and/or costs to the prevailing party in accordance with such claim. If Employee lives within 50 miles of Dallas, Texas, the arbitration shall be held in Dallas, Texas. If Employee lives more than 50 miles away from Dallas, Texas, Employee may elect to have the arbitration held in Dallas or at a location within 50 miles of Employee's residence. The Arbitrator shall have the authority to order such discovery by way of deposition, interrogatory, document production, or otherwise, as the Arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration. The Arbitrator shall issue a written decision that reveals the essential findings and conclusions on which the decision is based, and the Arbitrator's decision shall be subject to such judicial review as is provided by law. This mutual agreement to arbitrate claims is enforceable under and subject to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA").

The Employee and the Company agree that nothing contained in this Agreement shall preclude either party from obtaining injunctive or other equitable relief to restrain violations of this Agreement or applicable law or to preserve the status quo pending the arbitration of any Arbitrable Dispute.

Nothing contained in this Agreement shall be deemed to alter or modify the Company's policy of at-will employment. Employment at the Company is at-will and can be terminated by either the employee or the Company at any time, for any reason or no reason, on notice to the other party.

The Employee and the Company hereby agree that this Agreement shall survive the termination of the Employee's employment with the Company.

Should any portion or provision of this Agreement be declared void or unenforceable, such portion or provision shall be considered independent and severable from the remainder of the Agreement, the validity of which shall remain unaffected. This Agreement constitutes the entire agreement between the parties concerning the arbitration of Arbitrable Disputes, and supersedes any and all other agreements, understandings, negotiations, or discussions, either oral or in writing, express or implied, between Employee and the Company.

My signature below certifies that I understand and agree to the above Arbitration Agreement.

Employee

4. Arbitration

4.1 General. The Parties agree that binding arbitration is the required, and exclusive, forum for the resolution of all disputes, claims and any other matters in question (except for exclusions identified below) arising out of or relating to the Parties' employment relationship or termination of that relationship ("Arbitration Claims"). The Parties agree to submit all Arbitration Claims to binding arbitration, including but not limited to all claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, all as amended, and any other federal, state, or local statute, regulation, or common law doctrine, as well as any other issue concerning Employee's compensation.

4.2 Class Waiver. This mutual agreement to arbitrate precludes either Party from pursuing any Arbitration Claims in a class, collective, private attorney general, or other representative proceeding. Arbitration must be on an individual basis.

4.3 Procedure, Governing Law, Jurisdiction and Venue. Any arbitration under this section shall be conducted by Judicial Arbitration & Mediation Services (JAMS), under the Code of Procedure then in effect, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The place of arbitration shall be Austin, Texas. The arbitrators shall decide legal issues pertaining to the dispute, controversy or claim pursuant to the laws of the State of Texas, without giving effect to the principles of conflicts of law. Subject to the control of the arbitrators, or as the parties may otherwise mutually agree, the parties shall have the right to conduct reasonable discovery pursuant to the Federal Rules of Civil Procedure. The arbitrators shall not have the authority to award punitive damages, but shall have authority to award equitable relief.

4.4 Fees. Employer will pay the fees and costs of the arbitrator; however, Employee will be responsible for payment of any filing fees. Each Party will otherwise pay for its own costs and attorneys' fees.

AMERICAN ARBITRATION ASSOCIATION®

Representing Yourself In Employment Arbitration: An Employee's Guide

What is the American Arbitration Association®?

The American Arbitration Association (AAA®) is a not-for-profit, private, public service organization which offers a broad range of dispute resolution services, including arbitration and mediation, through offices located in 23 major cities throughout the United States, Mexico, Singapore, and the Middle East.

As an administrative agency, the AAA processes a case from filing to closing, appoints arbitrators, schedules hearings, transmits documents, and schedules and occasionally participates in conference calls. The goal is to administer cases in a fair and impartial manner.

What is arbitration?

Arbitration is the submission of a dispute to one or more impartial persons, an alternate to the judicial system (judge or jury). The arbitrator(s) is presented with evidence at a formal hearing and a decision is rendered based on the evidence presented. Sometimes, a case is presented on documents alone. The arbitrator's decision is final and usually binding. An arbitrator's decision may be overturned only in limited circumstances.

Who is a *pro se* party in arbitration?

A *pro se* party is one who chooses to participate in arbitration without assistance of counsel ("attorney").

Who is a claimant in arbitration?

A claimant in arbitration is the person who initiates a claim against his or her employer.

Who is a respondent in arbitration?

A respondent in arbitration is the person who responds to the claim. In employment cases, this is usually the employer.

What are the steps involved in an employment arbitration?

Step 1. The dispute is filed with an AAA regional office, the applicable AAA Case Management Center, or online at **www.adr.org,** by a Demand (*i.e.*, pursuant to an arbitration provision in a contract, personnel policy or manual, or ADR program/plan), a Submission Agreement (*i.e.*, submitting an existing dispute to arbitration), or court referral.

Step 2. The filing documents are reviewed. In order for the AAA to process employment cases, three requirements must be met. First, the AAA must be named in the clause or arbitration agreement as the administrative agency. Second, the arbitration clause or agreement must substantially and materially comply with the *Employment Due Process Protocol*. This *Protocol*, developed by a special task force comprised of individuals representing management, labor, employment, civil rights organizations, private administrative agencies, government, and the American Arbitration Association, seeks to provide fairness and equity in resolving workplace disputes. Finally, the appropriate fee must be submitted with the filing documents. If any one of these requirements is not met, the AAA may decline to initiate the case.

Step 3. The file then is assigned to an AAA Case Manager who reviews the information about the dispute, examines the documents, and sends the parties an initiating letter acknowledging receipt of the case and providing the respondent an opportunity to file an answer. The parties also receive an identical list of the names of arbitrators who are members of the Employment Dispute Resolution Roster. The parties will have fifteen (15) days from the date of the letter in which to select the name of a mutually acceptable arbitrator. If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable.

Step 4. By the end of the fifteen (15) day period, the AAA likely would have received a statement raising the question of whether the claim is properly in arbitration (if applicable), an Answering Statement (*i.e.*, the response to the Demand, which should contain any affirmative defenses), any objection to the requested hearing locale, counterclaim(s), and/or requests for an administrative conference with the case manager or a preliminary hearing with the arbitrator(s).

Step 5. If applicable, an administrative conference is held among the AAA Case Manager and the parties' representatives.

Step 6. Upon receipt of the parties' lists, the AAA appoints an arbitrator pursuant to the rules and based on the parties' preferential rankings of those submitted on the list. The selected arbitrator(s) is screened for potential conflicts of interest. A management conference is then scheduled. If the arbitrator(s) makes any disclosures, they are communicated to the parties. Based on objections received from any party, the arbitrator(s) is either removed from the case because of the substantive nature of the disclosure or affirmed by the AAA because the nature of the disclosure does not warrant the arbitrator's removal.

Step 7. The arbitrator conducts an Arbitration Management Conference with the parties and/or their representatives, in person or by telephone, to explore and resolve matters that will expedite the arbitration.

Step 8. An evidentiary hearing is conducted with additional hearings scheduled as needed.
Note: This step is omitted if hearings are conducted on documents only.

Step 9. The evidentiary hearing is closed and the arbitrator's award (decision) is due within thirty (30) days.

Step 10. The award is transmitted to the parties.

How long do I have to file a claim?

Your contract, personnel policy or manual, or ADR program/plan usually will specify the amount of time you have to file a claim. Statutory claims, *i.e.*, claims governed by state and federal laws, contain separate statutes of limitations, based on the nature of the claim you assert.

Do I need an attorney to participate in arbitration?

No. The AAA, however, strongly encourages you to seek the advice of legal counsel, for several reasons. First, arbitration is a final and binding process. Second, workplace disputes, ***particularly those involving statutory claims such as race, age, or national origin discrimination,*** can be difficult to present without the assistance of an attorney. At a minimum, you should consider consulting with an attorney.

The AAA or its employees cannot recommend or provide attorneys to parties in arbitration, nor can any AAA employee offer legal advice. If you do not have an attorney and wish to be represented by an attorney in arbitration, you may want to contact your local bar association for a referral.

Are there rules or procedures that apply in employment arbitration?

For most employment claims, and for all employment claims that arise under employer-promulgated plans, the AAA applies the *Employment Arbitration Rules and Mediation Procedures*. The *Employment Due Process Protocol* ("*Protocol*") is part of these rules, meaning that there are minimum levels of fairness, which must be observed during the arbitration. The AAA's website (**www.adr.org**) will give you immediate access to these Rules and the *Protocol*. You also may obtain a copy of these Rules from your AAA Case Manager.

What does the process cost?

Fees in employment arbitration include a combination of filing fees (AAA forum fees) and arbitrator's fees. If you, the employee, are the filing party, you will pay $300, unless the clause provides the individual pay less.

Your employer is responsible for paying $1,900 and the balance of the individuals' filing fee when the clause provides the individual to pay less. If the employer is the filing party, the employer will pay $1,900 or more, and the employee will pay $300 or less, depending on the clause.

How do I begin arbitration?

First, you, "the claimant," must notify the other party, the "respondent," that you intend to begin an arbitration proceeding. Obtain a copy of the "Demand Form" from the AAA's Website or by contacting your local AAA office. This form must contain the following information:

- A statement explaining what your dispute is about,

- The names and addresses of any other parties involved in this dispute,
- The amount of money, if any, involved in this dispute,
- The remedy sought (what you feel you are entitled to at the end of the proceeding), and
- The hearing location (what city/state you want the hearing to be held in, if it is to be held in person).

Second, you should send two (2) copies of this completed form to the AAA along with two (2) copies of the contract you have with the other party, specifically the part that mentions arbitration.

Third, make sure that you enclose the proper filing fee with the "Demand." The AAA will notify claimant(s) and respondent(s) when these materials are received.

Can my employer initiate arbitration against me?

Yes. Either party may initiate the arbitration. Additionally, if you file for arbitration, the employer might decide to file a counterclaim. By filing a counterclaim, the employer is saying that they are entitled to the remedy or relief against you.

What happens after the claim is filed?

The AAA has four (4) Case Management Centers nationwide, and an International Centre for Dispute Resolution. Although you can file your case with any one of the 30 regional AAA offices, the case will be forwarded to the appropriate Center for administration. Once the AAA Case Management Center receives a Demand for Arbitration with the filing fee, your case will be assigned to an AAA Case Manager who will be your contact for the arbitration of your case. The AAA's Case Managers act as impartial liaisons, send out notices, monitor the arbitrator selection process, schedule hearings, prepare billings and transmit the arbitrator's awards. The AAA offers comprehensive case management to expedite the resolution of your case.

How long does the process take from beginning to end?

Each case is different. Most employment disputes are resolved between 120-180 days. The average length for all arbitration matters through the AAA is about 4.5 months.

When do I present my evidence and what kind of evidence will be allowed?

At the evidentiary hearing, you will be given an opportunity to present your evidence. Evidence in arbitration takes three forms:

Testimonial: Live testimony by a witness on the stand, by affidavit, or by deposition.

Demonstrative: This type of evidence is in the form of photographs, videos, maps, diagrams, models, etc., designed to accentuate key points made through testimony.

Documentary: Written summaries, records and evaluations, all constitute forms of documentary evidence. Documentary evidence also is used to support testimony.

The party who files the Demand for Arbitration usually presents evidence first at the arbitration.

Formal rules of evidence that usually apply in court do not apply generally in employment arbitrations. Be prepared to present any and all evidence that you think is appropriate. However, understand that the arbitrator may accept or reject any evidence. Each party is expected to make a brief and focused presentation so the hearing can be conducted in a timely manner.

Although arbitration is a more relaxed process than litigation, it is a legal proceeding. At times, depending on the complexity of the issues in dispute, arbitration may be more structured.

Does the AAA help me present my claim?

No. The AAA's Case Manager will be your main contact throughout the case. However, neither the Case Manager nor the arbitrator can assist you in the presentation of your claim. As a neutral organization, the AAA cannot help either party in the presentation of its case. The AAA's Case Manager will answer your questions about the procedures and will distribute information to you, but s/he will not provide legal advice or legal assistance.

Who are the arbitrators?

The AAA's arbitrators are independent, impartial decision-makers chosen for their knowledge, case experience, integrity, and dispute resolution skills. Their conduct is guided by the *AAA's Code of Ethics for Arbitrators in Commercial Disputes*, prepared by a joint Committee of the American Arbitration Association and the American Bar Association. All AAA arbitrators are required to attend periodic training programs.

Do I get to select the arbitrator?

You are able to participate fully in the selection of the arbitrator. After the AAA receives the Demand for Arbitration, we will mail to each party a list of names from our Employment Dispute Resolution Roster. You will be able to review each proposed arbitrator's background, and make your selections accordingly. If you and the other side are unable to agree on an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA.

How do I know the arbitrator is neutral (impartial)?

The Rules require an arbitrator to disclose any potentially disqualifying information, *i.e.*, a personal or financial interest in the results of the dispute, or relationship to the parties, their counsel, or witnesses. Parties may jointly or individually challenge an arbitrator's neutrality and request removal. Upon receipt of a joint objection, the arbitrator will be replaced.

In the case of a single party objection, the AAA will determine, after carefully reviewing all parties' contentions, whether the arbitrator should be disqualified.

How do I prepare for the hearing?

You should gather all pertinent documentation and make copies for the arbitrator and the employer. Organize the information logically, following the main points you want to emphasize to the arbitrator. At the hearing, you will be given an opportunity to make a brief opening statement, examine witnesses (if any), introduce evidence and answer questions. Prepare an opening statement. Be prepared to discuss your evidence and answer questions about your case. You should consider the arguments the employer may make and be prepared to respond to them.

May anyone attend the hearings?

No. Generally, only the parties, their counsel, and the witnesses attend and participate in the hearing. The arbitrator has the authority to exclude witnesses, other than a party, from the hearing during the testimony of other witnesses (to safeguard the accuracy of the testimony).

There are times, however, when a party would like a friend or relative to attend, without assuming a formal role in the arbitration. The arbitrator will decide if this attendance is appropriate.

How are the hearings conducted?

Hearings are usually conducted in person. Generally, each party will present their side with the filing party going first. The arbitrator will explain the hearing protocol before the hearing.

What if the employer does not appear at the hearing? What if I do not appear?

The hearing can still proceed even if one party does not appear. The party who is present must present its case to the arbitrator. The appearing party does not win simply because the other party has not appeared and presented evidence.

Can I settle with the employer prior to the arbitration hearing?

Yes, you may. Once you believe the written terms of the settlement are agreeable to both you and the employer, and you have signed any settlement agreement, notify your AAA Case Manager and ask him or her to postpone hearing due to settlement of the dispute. Do not withdraw from your hearing until you have received your written settlement and all parties have signed it. **Important:** The AAA has no authority to enforce any settlement agreement.

How quickly after the hearing will I receive the arbitrator's decision?

Once the arbitrator closes the hearing (s/he determines that all of the information needed to make the decision has been received), the award (decision) will be given in thirty (30) days, unless the parties have extended this deadline.

Is the arbitrator's decision binding?

Yes. This is a very important point to keep in mind: arbitration is a binding process. This means that an arbitrator's decision is as legally binding as a judge's decision.

How quickly after the decision is received does either party have to follow the award?

Please refer to the appropriate state law governing arbitration. A list of state laws can be found on our website under "Resources" and "ADR Law." It's important to note that neither the arbitrator nor the AAA has any authority to make a party comply with the award.

Are there processes other than arbitration available?

Yes. A commonly used alternative to arbitration is mediation. You may use mediation if it is provided for in your ADR program/plan. You also may use mediation if the employer agrees, either before or after you have filed for arbitration. Mediation is different from arbitration in several key respects. The mediator's role is advisory. This means the mediator may offer suggestions for settlement. But the most important difference is that in mediation it is the parties, not the mediator, who decides whether and on what terms a settlement will occur.

Mediation has been shown to produce a high rate of success in reaching agreements. As with arbitration, mediation proceedings are confidential and private.

If you would like to use mediation, but it is not provided for in your ADR program/plan, contact your AAA Case Manager. S/he will contact the other party, explain the mediation process and encourage the party to use the process. The AAA, however, cannot require that the parties mediate.

What does mediation cost?

There is a separate charge for mediation. Please consult with your AAA Case Manager for additional details.

Disclaimer: *The American Arbitration Association (AAA) provides the materials contained in this guide for informational purposes only. Most information presented here is specific to the procedures of AAA, although it may serve as a useful tool for arbitration processes generally.*

Although this guide has been carefully written, the information presented does not constitute legal advice and should not be regarded as a substitute for legal counsel on any subject matter.

The AAA strongly encourages a party or a potential party in arbitration to seek the advice of legal counsel, as employment matters involve legal issues which can be difficult for a person who is not represented by counsel to understand.

The Code of Ethics for Arbitrators in Commercial Disputes

Approved by the American Bar Association House of Delegates on February 9, 2004
Approved by the Executive Committee of the Board of Directors of the AAA

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA. Both the original 1977 Code and the 2003Revision have been approved and recommended by both organizations.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the

time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators – including any party-appointed arbitrators – to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;
(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
(3) that he or she is competent to serve; and
(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.

F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have

prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II. AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) Any known direct or indirect financial or personal interest in the outcome of the arbitration;
(2) Any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
(3) The nature and extent of any prior knowledge they may have of the dispute; and
(4) Any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or
(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or
(2) Withdraw.

CANON III. AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV. AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

CANON V. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI. AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.

C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII. AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established.
(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and
(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII. AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX. ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;
(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and
(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

CANON X. EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations under Canon I*
Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and
(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations under Canon III*
Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

(1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
(2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3).
(3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
(4) Canon X arbitrators may not at any time during the arbitration:

(a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
(b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or
(c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.

(5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;

(6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

(7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV*
Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations under Canon V*
Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI*
Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*
Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*
Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*
The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

Arbitrators Ethics Guidelines

Introduction

A. The purpose of these Ethics Guidelines is to provide basic guidance to JAMS Arbitrators regarding ethical issues that may arise during or related to the Arbitration process. Arbitration is an adjudicative dispute resolution procedure in which a neutral decision maker issues an Award. Parties are often represented by counsel who argue the case before a single Arbitrator or a panel of three Arbitrators, who adjudicate, or judge, the matter based on the evidence presented.

B. Arbitration - either entered into voluntarily after a dispute has occurred, or as agreed to in a pre-dispute contract clause - is generally binding. By entering into the Arbitration process, the Parties have agreed to accept an Arbitrator's decision as final. There are instances when an Arbitrator's decision may be modified or vacated, but they are extremely rare. The Parties in an Arbitration trade the right to full review for a speedier, less expensive and private process in which it is certain there will be an appropriately expeditious resolution.

C. Other sets of ethics guidelines for Arbitrators exist, such as those promulgated by the National Academy of Arbitrators and jointly by the American Arbitration Association and the American Bar Association. An Arbitrator may wish to review these for informational purposes.

D. These Guidelines are national in scope and are necessarily general. They are not intended to supplant applicable state or local law or rules. An Arbitrator should be aware of applicable state statutes or court rules, such as laws concerning disclosure that may apply to the Arbitrations being conducted. In the event that these Guidelines are inconsistent with such statutes or rules, an Arbitrator must comply with the applicable law.

E. In addition, most states have promulgated codes of ethics for judges and other public judicial officers. In some instances, these codes apply to certain activities of private judges, such as court-ordered Arbitrations. Arbitrators should comply with codes that are specifically applicable to them or to their activities. Where the codes do not specifically apply, an Arbitrator may choose to comply voluntarily with the requirements of such codes.

F. The ethical obligations of an Arbitrator begin as soon as the Arbitrator becomes aware of potential selection by the Parties and continue even after the decision in the case has been rendered. JAMS strongly encourages Arbitrators to address ethical issues that may arise in their cases as soon as an issue becomes apparent, and where appropriate to seek advice on how to resolve such issues from the National Arbitration Committee.

G. The Guidelines in Articles I through IX apply to neutral Arbitrators regardless of the method by which they may have been selected. Article X is intended to apply to Party-appointed Arbitrators who are non-neutral.

Many Arbitration agreements provide for the appointment of an Arbitrator by each Party and the appointment of the third Arbitrator by the two Party-appointed Arbitrators. Party-appointed Arbitrators should be presumed to be neutral, unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise.

1. Where the Party-appointed Arbitrator is expected to be non-neutral, some of the Guidelines applicable to neutral Arbitrators do not apply or are altered to suit this process. For example, while non-neutral Arbitrators must disclose any matters that might affect their independence, the opposing Party ordinarily may not disqualify such person from service as an Arbitrator.
2. It is appropriate for the party appointed arbitrators to address the status of their service with the party that

appointed them, with each other and with the neutral arbitrator and to determine whether the Parties would prefer that they act in a neutral capacity.

3. *Note regarding international Arbitrations.* Tripartite Arbitrations in which the Parties each appoint one Arbitrator are common in international disputes; however, all Arbitrators, by whomever appointed, are expected to be independent of the Parties and to be neutral. They are sometimes expected to communicate *ex parte* with the Party that appointed them solely for purposes of the selection of the chairman and not otherwise.

H. These Guidelines do not establish new or additional grounds for judicial review of Arbitration Awards.

Guidelines

I. AN ARBITRATOR SHOULD UPHOLD THE DIGNITY AND INTEGRITY OF THE OFFICE OF THE ARBITRATION PROCESS.

An Arbitrator has a responsibility to the Parties, to other participants in the proceeding, and to the profession. An Arbitrator should seek to discern and refuse to lend approval or consent to any attempt by a Party of its representative to use Arbitration for a purpose other than the fair and efficient resolution of a dispute.

II. AN ARBITRATOR SHOULD BE COMPETENT TO ARBITRATE THE PARTICULAR MATTER.

An Arbitrator should accept an appointment only if the Arbitrator meets the Parties' stated requirements in the agreement to arbitrate regarding professional qualifications. An Arbitrator should prepare before the Arbitration by reviewing any statements or documents submitted by the Parties. An Arbitrator should refuse to serve or should withdraw from the Arbitration if the Arbitrator becomes physically or mentally unable to meet the reasonable expectations of the Parties.

III. AN ARBITRATOR SHOULD INFORM ALL PARTIES OF THE ROLE OF THE ARBITRATOR AND THE RULES OF THE ARBITRATION PROCESS.

A. An Arbitrator should ensure that all Parties understand the Arbitration process, the Arbitrator's role in that process, and the relationship of the Parties to the Arbitrator.

B. An Arbitrator may encourage the Parties to mediate their dispute but should not suggest that the Arbitrator serve as the mediator. In the event that, prior to or during the Arbitration, all Parties request an Arbitrator to participate in discussions of settlement or to combine the Arbitration with another dispute resolution process, the Arbitrator should explain how the Arbitrator's role and relationship to the Parties may be altered, including the impact such a shift may have on the willingness of the Parties to disclose certain information to the Arbitrator serving in the settlement-related role. Nothing in these Guidelines is intended to prevent an Arbitrator from acting as a neutral in another dispute resolution process in the same case, if requested to do so by all Parties and if an appropriate written waiver is obtained. The Parties should, however, be given the opportunity to select another neutral to conduct any such process.

IV. AN ARBITRATOR SHOULD MAINTAIN CONFIDENTIALITY APPROPRIATE TO THE PROCESS.

A. Unless otherwise agreed by the Parties, or required by applicable rules or law, an Arbitrator should keep confidential all matters relating to the Arbitration proceedings and decisions.

B. An Arbitrator should not discuss a case with persons not involved directly in the

Arbitration unless the identity of the Parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.

C. An Arbitrator may discuss a case with another member of the Arbitration panel hearing that case, whether or not all panel members are present.

D. An Arbitrator should not use confidential information acquired during the Arbitration proceeding to gain personal advantage or advantage of others, or to affect adversely the interest of another. An Arbitrator should not inform anyone of the decision in advance of giving it to all Parties. Where there is more than one Arbitrator, an Arbitrator should not disclose to anyone the deliberations of the Arbitrators.

E. An Arbitrator should not participate in post-Award proceedings, except (1) if requested to make a correction to or clarification of an Award, (2) if required by law or (3) if requested by all Parties to participate in a subsequent dispute resolution procedure in the same case.

V. AN ARBITRATOR SHOULD ENSURE THAT HE OR SHE HAS NO KNOWN CONFLICT OF INTEREST REGARDING THE CASE, AND SHOULD ENDEAVOR TO AVOID ANY APPEARANCE OF A CONFLICT OF INTEREST.

A. An Arbitrator should promptly disclose, or cause to be disclosed all matters required by applicable law and any actual or potential conflict of interest or relationship or other information, of which the Arbitrator is aware, that reasonably could lead a Party to question the Arbitrator's impartiality.

B. An Arbitrator may establish social or professional relationships with lawyers and members of other professions. There should be no attempt to be secretive about such relationships but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

C. An Arbitrator should not proceed with the process unless all Parties have acknowledged and waived any actual or potential conflict of interest. If the conflict of interest casts serious doubt on the integrity of the process, an Arbitrator should withdraw, notwithstanding receipt of a full waiver.

D. An Arbitrator's disclosure obligations continue throughout the course of the Arbitration and require the Arbitrator to disclose, at any stage of the Arbitration, any such interest or relationship that may arise, or that is recalled or discovered. Disclosure should be made to all Parties, and the Arbitrator should accept such work only where the Arbitrator believes it can be undertaken without an actual or apparent conflict of interest. Where more than one Arbitrator is appointed, each should inform the others of the interests and relationships that have been disclosed.

E. An Arbitrator should avoid conflicts of interest in recommending the services of other professionals. If an Arbitrator is unable to make a personal recommendation without

creating a potential or actual conflict of interest, the Arbitrator should so advise the Parties and refer them to a professional service, provider or association.

F. After an Award or decision is rendered in an Arbitration, an Arbitrator should refrain from any conduct involving a Party, insurer or counsel to a Party to the Arbitration that would cast reasonable doubt on the integrity of the Arbitration process, absent disclosure to and consent by all the Parties to the Arbitration. This does not preclude an Arbitrator from serving as an Arbitrator or in another neutral capacity with a Party, insurer or counsel involved in the prior Arbitration, provided that appropriate disclosures are made about the prior Arbitration to the Parties to the new matter.

G. Other than agreed fee and expense reimbursement, an Arbitrator should not accept a gift or item of value from a Party, insurer or counsel to a pending Arbitration. Unless a period of time has elapsed sufficient to negate any appearance of a conflict of interest, an Arbitrator should not accept a gift or item of value from a Party to a completed Arbitration, except that this provision does not preclude an Arbitrator from engaging in normal, social interaction with a Party, insurer or counsel to an Arbitration once the Arbitration is completed.

H. Where relevant state or local rule or statute is more specific than these Guidelines as to Arbitrator disclosure, it should be followed.

VI. AN ARBITRATOR SHOULD ENDEAVOR TO PROVIDE AN EVENHANDED AND UNBIASED PROCESS AND TO TREAT ALL PARTIES WITH RESPECT AT ALL STAGES OF THE PROCEEDINGS.

A. An Arbitrator should remain impartial throughout the course of the Arbitration. Impartiality means freedom from favoritism either by word or action. The Arbitrator should be aware of and avoid the potential for bias based on the Parties' backgrounds, personal attributes or conduct during the Arbitration, or based on the Arbitrator's pre-existing knowledge of or opinion about the merits of the dispute being arbitrated. An Arbitrator should not permit any social or professional relationship with a Party, insurer or counsel to a Party to an Arbitration to affect his or her decision-making. If an Arbitrator becomes incapable of maintaining impartiality, the Arbitrator should withdraw.

B. An Arbitrator should perform duties diligently and conclude the case as promptly as the circumstances reasonably permit. An Arbitrator should be courteous to the Parties, to their representatives and to the witnesses, and should encourage similar conduct by all participants in the proceedings. An Arbitrator should make all reasonable efforts to prevent the Parties, their representatives, or other participants from engaging in delaying tactics, harassment of Parties or other participants, or other abuse or disruption of the Arbitration process.

C. Unless otherwise provided in an agreement of the Parties, (1) an Arbitrator should not discuss a case with any Party in the absence of every other Party, except that if a Party fails to appear at a hearing after having been given due notice, the Arbitrator may discuss

the case with any Party who is present; and (2) whenever an Arbitrator communicates in writing with one Party, the Arbitrator should, at the same time, send a copy of the communication to every other Party. Whenever an Arbitrator receives a written communication concerning the case from one Party that has not already been sent to each Party, the Arbitrator should do so.

D. When there is more than one Arbitrator, the Arbitrators should afford each other full opportunity to participate in all aspects of the Arbitration proceedings.

VII. AN ARBITRATOR SHOULD WITHDRAW UNDER CERTAIN CIRCUMSTANCES.

A. An Arbitrator should withdraw from the process if the Arbitration is being used to further criminal conduct, or for any of the reasons set forth above - insufficient knowledge of relevant procedural or substantive issues, a conflict of interest that has not been or cannot be waived, the Arbitrator's inability to maintain impartiality, or the Arbitrator's physical or mental disability. In addition, an Arbitrator should be aware of the potential need to withdraw from the case if procedural or substantive unfairness appears to have irrevocably undermined the integrity of the Arbitration process.

B. Except where an Arbitrator is obligated to withdraw or where all Parties request withdrawal, an Arbitrator should continue to serve in the matter.

VIII. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. An Arbitrator should, after careful deliberation and exercising independent judgment, promptly or otherwise within the time period agreed to by the Parties or by JAMS Rules, decide all issues submitted for determination and issue an Award. An Arbitrator's Award should not be influenced by fear or criticism or by any interest in potential future case referrals by any of the Parties or counsel, nor should an Arbitrator issue an Award that reflects a compromise position in order to achieve such acceptability. An Arbitrator should not delegate the duty to decide to any other person.

B. If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator should comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she may inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

IX. AN ARBITRATOR SHOULD UPHOLD THE DIGNITY AND INTEGRITY OF THE ARBITRATION PROCESS IN MATTERS RELATING TO MARKETING AND COMPENSATION.

An Arbitrator should avoid marketing that is misleading or that compromises impartiality. An Arbitrator should ensure that any advertising or other marketing to the public conducted on the Arbitrator's behalf is truthful. An Arbitrator may discuss issues relating to compensation with the Parties but should not engage in such discussions if

they create an appearance of coercion or other impropriety and should not engage in *ex parte* communications regarding compensation.

X. ETHICAL GUIDELINES APPLICABLE TO NON-NEUTRAL ARBITRATORS.

These Guidelines are applicable to non-neutral Arbitrators, except as follows:

Guideline III: A non-neutral Arbitrator should ensure that all Parties and other Arbitrators are aware of his or her non-neutral status.

Guideline V: A non-neutral Arbitrator is obligated to make disclosures of any actual or potential conflicts of interest, although a non-neutral Arbitrator is not obligated to withdraw if requested to do so only by the party who did not appoint him or her.

Guideline VI:

1. A non-neutral Arbitrator may be predisposed toward the Party who appointed him or her but in all other respects is obligated to act in good faith and with integrity and fairness.
2. A non-neutral Arbitrator may engage in *ex parte* communication with the Party that appointed him or her, but should disclose to the Parties and the other Arbitrators the fact that such communications are occurring and should honor any agreement reached with the Parties and the other Arbitrators regarding the timing and nature of such communications.

Guideline IX: The compensation arrangements between a non-neutral Arbitrator and the Party that appointed him or her usually is treated as confidential but may be disclosed in connection with any fee application in the Arbitration proceeding.

For more information, please call your local JAMS office at 1-800-352-5267.

Mandatory Arbitration and the Federal Arbitration Act

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Summary

Arbitration is a method of legal dispute resolution in which a neutral, private third party, rather than a judge or jury, renders a decision on a particular matter. Under a growing number of consumer and employment agreements, companies have come to require arbitration to resolve disputes. While arbitration is often viewed as an expeditious and economical alternative to litigation, consumer advocates and others contend that mandatory arbitration agreements create one-sided arrangements that deny consumers and employees advantages afforded by a judicial proceeding.

The Federal Arbitration Act (FAA) was enacted in 1925 to ensure the validity and enforcement of arbitration agreements in any "maritime transaction or ... contract evidencing a transaction involving commerce[.]" The U.S. Supreme Court (Court) has recognized the FAA as evidencing "a national policy favoring arbitration." The application of the FAA, however, particularly in light of various state law requirements and the use of different types of arbitration agreements, has raised numerous legal questions and been the subject of several cases before the Court.

The question of whether the FAA preempts a state law or judicial rule is a subject of frequent litigation. In these cases, the Court has routinely held that the FAA supersedes state requirements that restrain the enforceability of mandatory arbitration agreements. This report examines the FAA and reviews the Court's decisions involving the statute's preemption of state law requirements. The report also explores the Court's decisions involving mandatory arbitration agreements that prohibit a consumer or employee from maintaining a class or collective action. In its October 2017 term, the Court will consider three consolidated cases that challenge such agreements on the grounds that they violate the right to engage in "other concerted activities" under the National Labor Relations Act (NLRA).

Finally, concern over a perceived lack of "meaningful choice" to decide whether to submit a claim to arbitration has prompted regulatory activity, as well as legislation that would amend the FAA to render certain types of pre-dispute arbitration agreements unenforceable. The report discusses some recent examples of federal regulatory action that aim to restrict the use of mandatory arbitration in the consumer arena, and reviews bills like the Arbitration Fairness Act of 2017 (H.R. 1374/S. 537), which would prohibit the enforcement of an arbitration agreement that requires arbitration for an employment, consumer, antitrust, or civil rights dispute if the agreement was executed prior to the dispute's occurrence.

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Introduction

Under a growing number of consumer and employment agreements, companies are requiring disputes to be resolved through arbitration, a method of dispute resolution involving a neutral, private third party, rather than a judicial proceeding. In 2015, for example, the Consumer Financial Protection Bureau found that tens of millions of consumers use consumer financial products that are subject to arbitration clauses.[1] In nonunion workplaces, it is estimated that at least a quarter of all employees are now subject to mandatory arbitration agreements.[2] While arbitration is often viewed as a faster and less expensive alternative to litigation,[3] consumer advocates and others maintain that mandatory arbitration agreements create one-sided arrangements that deny consumers and employees advantages afforded by a judicial proceeding, such as the availability of a jury trial.[4]

The Federal Arbitration Act (FAA or the Act) was enacted in 1925 to ensure the validity and enforcement of arbitration agreements in any "maritime transaction or ... contract evidencing a transaction involving commerce[.]"[5] The U.S. Supreme Court (Court) has recognized the FAA as evidencing "a national policy favoring arbitration."[6] The application of the FAA, however, particularly in light of various state law requirements and the use of different types of arbitration agreements, has raised numerous legal questions and been the subject of several cases before the Court. Concern over a perceived lack of "meaningful choice" to decide whether to submit a claim to arbitration has also spurred recent federal regulatory action, as well as legislation that would amend the FAA to render pre-dispute arbitration agreements unenforceable.[7]

This report examines the FAA and reviews the Court's decisions involving the statute's preemption of state law requirements. The report also explores the Court's decisions involving mandatory arbitration agreements that prohibit a consumer or employee from maintaining a class or collective action. In its October 2017 term, the Court will consider three consolidated cases that challenge such agreements on the grounds that they violate the right to engage in "other concerted activities" under the National Labor Relations Act (NLRA).[8]

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[1] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 9 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[2] KATHERINE V.W. STONE AND ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 15 (2015), http://www.epi.org/files/2015/arbitration-epidemic.pdf.

[3] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (discussing the "simplicity, informality, and expedition of arbitration."); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011) ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

[4] Jessica Silver-Greenburg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, at A1; STONE AND COLVIN, *supra* note 2 at 26.

[5] 9 U.S.C. § 2.

[6] Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

[7] *See, e.g.*, Arbitration Fairness Act of 2017, S. 537, 115th Cong. (2017); Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017).

[8] Murphy Oil USA, Inc. v. Nat'l Labor Relations Bd., 808 F.3d 1013, 1015 (5th Cir. 2015), *cert. granted*, 85 U.S.L.W. 3341 (U.S. Jan. 13, 2017) (No. 16-307); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1150 (7th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-285); Morris v. Ernst & Young LLP, 834 F.3d 975, 979 (9th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3344 (U.S. Jan. 13, 2017) (No. 16-300).

The Federal Arbitration Act

Section 2 of the FAA provides:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[9]

By enacting Section 2, Congress sought generally to promote the enforcement of arbitration agreements.[10] Historically, American courts viewed arbitration with judicial hostility.[11] It is believed that this hostility flowed from a similar enmity displayed by English courts.[12] Arbitration infringed on the livelihood of English judges who were paid fees based on the number of cases they decided.[13] English courts were also generally unwilling to surrender their jurisdiction over various disputes.[14]

The hostility toward arbitration subsided as industrialization led to an increased number of business disputes.[15] In 1924, the Court upheld a New York law that compelled arbitration in a dispute involving a maritime contract.[16] The Court's decision in *Red Cross Line v. Atlantic Fruit Company* is believed to have opened the door for federal legislation that recognized the validity of arbitration agreements.[17]

President Calvin Coolidge signed the United States Arbitration Act (commonly referred to as the Federal Arbitration Act) on February 12, 1925.[18] The enactment of the new law "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[19] While Congress's primary motivation for drafting the FAA reflected its interest in protecting the enforcement of arbitration agreements as agreed to by the contracting parties, it also understood the potential benefits that would be provided by the law's enactment:

> It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be

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[9] 9 U.S.C. § 2.

[10] *See, e.g.*, H.R. REP. NO. 96, 68th Cong., 1st Sess., 1 (1924) (noting that the FAA was designed to place arbitration agreements "upon the same footing as other contracts").

[11] *Id.* at 2.

[12] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) ("[The Federal Arbitration Act's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts[.]"); *See also* Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499 (1995).

[13] WIGNER, *supra* note 12 at 1502.

[14] H.R. REP. NO. 96, *supra* note 10 at 1-2.

[15] WIGNER, *supra* note 12 at 1502.

[16] Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924).

[17] WIGNER, *supra* note 12 at 1503.

[18] Pub. L. No. 68-401, 43 Stat. 883 (1925).

[19] Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

> largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.[20]

Although Section 2 of the FAA requires the enforcement of arbitration agreements in maritime transactions and contracts "evidencing a transaction involving commerce," the precise scope of this latter group of contracts has not always been certain. Congress provided a definition for the term "commerce" in Section 1 of the FAA, but it did not identify the extent to which a contract must "evidenc[e] a transaction involving commerce" before the FAA would apply.[21]

Prior to 1995, there was a split among courts interpreting Section 2. Some courts concluded that the FAA applied only to those contracts where the parties "contemplated" an interstate commerce connection.[22] In *Burke County Public Schools Board of Education v. Shaver Partnership*, for example, a North Carolina court stated that where performance of the contract "necessarily involves, so that the parties to the agreement must have contemplated, substantial interstate activity the contract evidences a transaction involving commerce within the meaning of the Federal Arbitration Act."[23]

Other courts held that the Section 2 phrase "involving commerce" reached to the limits of Congress's power under the Commerce Clause.[24] In *Snyder v. Smith*, for example, the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) maintained that the courts should take into account Congress's broad power to regulate under the Commerce Clause when deciding which contracts involve commerce.[25] Because Congress may reach activities "affecting" interstate commerce under its Commerce Clause authority, the Seventh Circuit reasoned that it was logical to conclude that any contract affecting interstate commerce falls under Section 2 of the FAA.[26]

In 1995, the Supreme Court determined that a broad interpretation of "involving commerce" is appropriate. In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, the Court held in a 7-2 opinion authored by Justice Breyer that the phrase "involving commerce" signaled the full exercise of Congress's power under the Commerce Clause.[27] The Court concluded that the FAA's legislative history "indicates an expansive congressional intent."[28] For example, the House Report that accompanied the FAA stated that the Act's "'control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.'"[29] In addition, remarks in the *Congressional Record* indicated that the FAA "'affects contracts relating to interstate subjects and contracts in admiralty.'"[30] The Court maintained that

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[20] H.R. REP. NO. 96, *supra* note 10 at 2.

[21] *See* 9 U.S.C. § 1 ("'commerce' ... means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation ... ").

[22] *See, e.g.*, Burke Cty. Pub. Schs. Bd. of Educ. v. Shaver P'ship, 279 S.E.2d 816 (N.C. 1981); R.J. Palmer Constr. Co. v. Wichita Band Instrument Co., 642 P.2d 127 (Kan. 1982); Lacheney v. Profitkey Int'l, Inc., 818 F.Supp. 922 (E.D. Va. 1993).

[23] *Burke*, 279 S.E.2d at 822.

[24] *See, e.g.*, Foster v. Turley, 808 F.2d 38 (10th Cir. 1986); Snyder v. Smith, 736 F.2d 409 (7th Cir. 1984).

[25] *Snyder*, 736 F.2d at 418.

[26] *Id.*

[27] Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 273-74 (1995).

[28] *Id.* at 274.

[29] *Id.* (citing H.R. REP. NO. 96, *supra* note 10 at 1).

[30] *Id.* (citing 65 CONG. REC. 1931 (1924) (remarks of Rep. Graham)).

the word "involve" should be read as the functional equivalent of the word "affect."[31] Because the phrase "affecting commerce" normally signals Congress's intent to exercise its Commerce Clause powers to the fullest extent, the Court reasoned that the use of the phrase "involving commerce" should be given a similar reading.[32]

After concluding that the phrase "involving commerce" should be interpreted broadly, the *Dobson* Court further determined that the FAA applies to all contracts that involve commerce and does not require the contemplation of an interstate commerce connection by the parties.[33] The Court found that a "contemplation of the parties" requirement was inconsistent with the FAA's basic purpose of helping parties avoid litigation.[34] Such a requirement invited litigation about what was or was not contemplated by the parties.[35] Any congressional recognition of an expedited dispute resolution system at the time the FAA was drafted would be undermined by this additional litigation.[36]

In 2001, the Court confirmed that the FAA also covers employment agreements that require arbitration to resolve work-related disputes. In *Circuit City Stores, Inc. v. Adams*, the Court held in a 5-4 opinion authored by Justice Kennedy that an employment application that included a mandatory arbitration provision was not excluded from the FAA's coverage pursuant to the statute's exemption clause.[37] Section 1 of the FAA provides that it will not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[38]

The Court concluded that the Section 1 exemption clause should be given a narrow construction, and interpreted it to apply only to contracts with seamen, railroad employees, and other transportation employees.[39] According to the Court, a reading of the phrase "any other class of workers engaged in foreign or interstate commerce" to exclude all employment contracts from the FAA's coverage would undermine the statute's specific enumeration of the "seamen" and "railroad employees" categories.[40] The Court observed:

> Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it; there would be no need for Congress to use the phrases "seamen" and "railroad employees" if those same classes of workers were subsumed within the meaning of the "engaged in ... commerce" residual clause.[41]

The Court also noted that the FAA's exclusion of contracts involving seamen and rail employees was reasonable given the adoption of federal legislation, such as the Shipping Commissioners Act of 1872 and the Transportation Act of 1920, that provided for the arbitration of their disputes.[42] In

[31] *Id.* at 273-74.

[32] *Id.*

[33] *Id.* at 278.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).

[38] 9 U.S.C. § 1.

[39] *Circuit City Stores*, 532 U.S. at 119.

[40] *Id.* at 114.

[41] *Id.*

[42] *Id.* at 121.

light of these laws, the Court opined that the exclusion would allow "established or developing statutory dispute resolution schemes" to remain undisturbed.[43]

Preemption and the FAA

Background

Historically, states have played an active role in the regulation of arbitration agreements, and all fifty states currently maintain statutes that operate alongside the FAA and govern the validity of arbitration agreements and awards.[44] However, state legislatures and state courts have also sought to place various restrictions on the enforcement of mandatory arbitration clauses and proceedings, particularly in situations where there may be unequal bargaining power between the contracting parties.[45] These restrictions have included state requirements that mandate a judicial forum for certain kinds of legal disputes, as well as those that impose special conditions or procedural safeguards on the arbitration process.[46]

As the Supreme Court has noted, Section 2 of the FAA "limits the grounds for denying enforcement of 'written provision[s] in ... contract[s]' providing for arbitration," and because of these limits, courts commonly find that the FAA preempts state laws or judicial rules that interfere with these contracts.[47] Nevertheless, some state legislatures and state courts have attempted to invalidate certain mandatory arbitration agreements, commonly in instances where there is a perception that requiring the parties to settle their disputes through arbitration would be unfair, contrary to public policy, or would somehow not protect the interests of vulnerable individuals.[48] The question of whether the FAA preempts a state law or judicial rule is a subject of recurring litigation that has come before the Court more than a dozen times.[49] In these cases, the Court has routinely held that the FAA supersedes state requirements that restrain the enforceability of mandatory arbitration agreements.

The preemption doctrine originates from the Supremacy Clause of the Constitution, which establishes that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[50] In general terms, federal preemption occurs when a validly

[43] *Id.*

[44] *See* Kristin M. Blankley, *Impact Preemption, A New Theory of Federal Arbitration Preemption*, 67 FLA. L. REV. 711, 728 (2016).

[45] *See generally* Brian Farkus, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act*, 22 HARV. NEGOTIATION L. REV. 33, 41-43 (2016).

[46] *See id.* at 42.

[47] Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1199 (2017).

[48] *See generally* Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145 (2015).

[49] *See, e.g.*, Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Preston v. Ferrer, 552 U.S. 346 (2008); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, (1995); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, (1996); Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995); Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468 (1989); Perry v. Thomas, 482 U.S. 483 (1987); Southland Corp. v. Keating, 465 U.S. 1 (1984).

[50] U.S. CONST., ART. VI, cl. 2. For a general discussion of the Supremacy Clause and federal preemption, *see* CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION (2012), http://www.crs.gov/conan/details.aspx?mode=topic&doc=Article06.xml&t=1|2|1&c=2.

enacted federal law supersedes an inconsistent state law.[51] As a result, where federal and state laws are in conflict, the state law is generally supplanted, leaving it void and without effect.[52] Courts frequently recognize that in analyzing the preemptive effect of federal law, the "purpose of Congress is the ultimate touch-stone."[53]

There are two general categories of preemption: express preemption and implied preemption.[54] With respect to the first category, a federal statute may be deemed to displace existing state law through express language in a congressional enactment, often called an express preemption clause.[55] Additionally, the Court has recognized certain implied forms of preemption, under which state law must give way to federal law if, for example, implementation of state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[56]

The FAA does not contain an express preemption clause. [57] However, the Court has held, pursuant to implied preemption principles, that the FAA supersedes state laws that "undermine the goals and policies of [the Act]." [58] As the Court has noted, the FAA "was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate,'" and "[t]he overarching purpose of [the FAA] ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[59]

Additionally, a key factor in the Court's FAA preemption analysis has been a state's treatment of arbitration clauses compared to other contractual provisions. The Court has repeatedly indicated that Section 2 of the FAA compels courts to place arbitration agreements "on equal footing with all other contracts."[60] Accordingly, state requirements that "single out" arbitration clauses for

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[51] Federal preemption may also apply to state regulations and common law. *See id.*

[52] *See* Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (finding state laws that conflict with federal law are "without effect."); Wickard v. Filburn, 317 U.S. 111, 124 (1942) ("[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress."). *See also generally* Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466, 2473 (2013) ("Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.").

[53] *See, e.g.,* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996).

[54] *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 97 (1992) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)) ("Pre-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'").

[55] *See, e.g.*, Chamber of Commerce of United States of America v. Whiting, 563 U.S. 582, 592 (2011).

[56] Arizona v. United States, 567 U.S. 387, 399 (2012) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). This is commonly referred to as "obstacle preemption." Implied preemption may also be found if it is "impossible for a private party to comply with both state and federal requirements" (so-called "impossibility preemption"). *See, e.g., Bartlett*, 133 S. Ct. at 2473 (quoting English v. General Elec. Co., 496 U.S. 72, 79 (1990)). The Supreme Court has also recognized implied "field preemption" in instances where a "scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.... " Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). With respect to the FAA and field preemption, the Court has stated that the Act does not "reflect a congressional intent to occupy the entire field of arbitration." Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 477 (1989).

[57] *See Volt Info. Scis.*, 489 U.S. at 477.

[58] *Id.*

[59] *Id.* at 478 (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-220 (1985)); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011). *Cf. Volt Info. Scis.*, 489 U.S. at 477 ("While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." (citations omitted)).

[60] *See, e.g.,* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

hostile treatment or do not apply to contracts generally have been held to be preempted by the FAA.[61]

FAA Preemption and the Supreme Court

The Supreme Court has addressed the relationship between the FAA and state law in a variety of different contexts. However, certain common principles articulated in these cases may arguably demonstrate the broad parameters of when the FAA preempts a particular state requirement. Among these principles, the Court has repeatedly held that the FAA will displace state laws or judicial rules that prohibit the arbitration of a particular kind of claim. In one of the first of its FAA preemption cases, *Southland Corporation v. Keating*, the Court held that the Act superseded a state provision that effectively compelled resolution of a dispute exclusively through the courts.[62] In *Keating*, several franchisees of 7-Eleven convenience stores filed a class action lawsuit in California state court against the corporate owner and franchisor, alleging, among other things, violations of a state statute governing franchise investment.[63] The corporation sought to compel arbitration of these claims pursuant to an arbitration clause in the franchise agreement.[64] On appeal, the California Supreme Court held that (1) the state statute compelled judicial review of the claims because the statute voided provisions "purporting to bind a [franchisee] ... to waive compliance with any provision of [state] law"; and (2) the FAA did not supplant this state provision.[65]

In a 7-2 opinion written by Chief Justice Burger, the Court reversed the lower court, concluding in relevant part that the FAA applied in state courts and preempted the state statute's prohibition on the arbitration of claims.[66] The Court stated that "in enacting §2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims" that parties choose to resolve through arbitration.[67] Prior to *Keating*, it was unclear whether the FAA applied in state courts, where a large proportion of contractual disputes between private parties are heard.[68] In clarifying the reach of the FAA, the Court focused on the language in Section 2 and its application to contracts "involving commerce" as evidence that Congress did not intend to limit the Act's reach to enforcement of arbitration clauses solely to federal courts.[69] The Court further reasoned that adopting the state court's decision would promote forum shopping, and that Congress did not intend for enforcement of an arbitration clause to vary depending on whether the case arose in federal or state court. [70] Finally, the Court explained that in passing the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[71] In subsequent decisions, the

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[61] *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[62] Southland Corp. v. Keating, 465 U.S. 1, 17 (1984).

[63] *Id.* at 4-5.

[64] *Id.* at 4.

[65] *Id.* at 5.

[66] *See* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 400 (2004).

[67] *Southland Corp.*, 465 U.S. at 10.

[68] *See id.* at 15.

[69] *Id.*

[70] *Id. See also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S 265, 272 (1995) ("In Southland Corp. v. Keating ... this Court decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases.").

[71] *Southland Corp.*, 465 U.S. at 16.

Court has reaffirmed the idea that when a state law or judicial interpretation bars mandatory arbitration of a specific type of dispute, the FAA preempts the state requirement.[72]

Following *Keating*, the Court has determined that Section 2 of the FAA also preempts state requirements that prescribe special conditions on the enforcement of mandatory arbitration agreements or the arbitration process.[73] Under the Court's current construction of the FAA, these types of state requirements conflict with Section 2, which prevents states from singling out arbitration provisions for "suspect status."[74]

In *Doctor's Associates, Inc. v. Casarotto*, the Court evaluated a Montana state law that rendered arbitration clauses unenforceable if the agreement failed to state on the first page, in underlined and capital letters, that the agreement was subject to arbitration.[75] At issue in *Casarotto* was an agreement between a franchisor of Subway sandwich shops and a franchisee.[76] The agreement called for mandatory arbitration of disputes arising from the agreement, but lacked this state-required notice concerning arbitration.[77] In an 8-1 opinion authored by Justice Ginsburg, the Court held Montana's law preempted, as it placed arbitration agreements in "a class apart" from other contracts and "singularly limit[ed] their validity."[78] Because the state law conditioned enforcement of an arbitration agreement on compliance with a notice requirement that was inapplicable to contracts generally, the Court concluded that the FAA overrode the state requirement.[79]

In a more recent case, *Preston v. Ferrer*, the Court held that the FAA preempted a state law that initially referred certain state law claims to a state administrative agency before parties could arbitrate questions arising out of a contract.[80] This case involved a dispute between Alex Ferrer, a television personality, and Arnold Preston, an entertainment industry attorney, and an agreement that contained a mandatory arbitration clause.[81] Preston sought to recover fees allegedly due under the contract and moved to compel arbitration.[82] In response, Ferrer petitioned the California Labor Commissioner to determine whether the contract was invalid and unenforceable under California law, claiming that Preston acted without the proper license required for talent agents.[83] The state law at issue conferred "exclusive original jurisdiction" in the state's Labor Commissioner.[84]

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[72] *See, e.g.*, Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012) ("West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA."); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011) ("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.").

[73] *See generally* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 394 (2004).

[74] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).

[75] *Casarotto*, 517 U.S. at 683.

[76] *Id.*

[77] *Id.* at 684.

[78] *Id.* at 688.

[79] *Id.* at 687.

[80] Preston v. Ferrer, 552 U.S. 346, 349-350 (2008).

[81] *Id.* at 350.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 351.

The Court ruled, in an 8-1 decision written by Justice Ginsburg, that the FAA preempted the state law. In its opinion, the Court relied on an earlier FAA case, *Buckeye Check Cashing, Inc. v. Cardegna*, in which the Court determined "challenges to the validity of a contract providing for arbitration ordinarily 'should ... be considered by an arbitrator, not a court.'"[85] The Court stated that "*Buckeye* largely, if not entirely resolves the dispute" in the case, and that granting primary jurisdiction over the dispute to an administrative agency conflicted with the FAA.[86] The Court also found the state law preempted because it "impose[d] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally."[87] Ferrer had argued that the California law can be reconciled with the FAA because it "merely postpones arbitration until the Labor Commissioner has exercised her primary jurisdiction."[88] However, the Court rejected this argument, concluding that requiring the Labor Commissioner to first hear the dispute would "hinder the speedy resolution of the controversy" and frustrate a primary objective of arbitration.[89]

The Supreme Court has also addressed the preemption of state law in relation to the FAA's "saving clause." Under the saving clause in Section 2 of the FAA, an arbitration agreement may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract."[90] In other words, pursuant to the FAA's saving clause, arbitration agreements may be rendered unenforceable based on factors that would invalidate the contract as a whole.[91] Courts have relied on the FAA's saving clause to deny the enforcement of an arbitration agreement, sometimes in cases where it is found that enforcement would be unconscionable pursuant to state law (i.e., fundamentally unfair or oppressive to one of the bargaining parties).[92] However, the Supreme Court has recently held that the saving clause does not "preserve state-law rules that stand as an obstacle to the accomplishment of FAA's objectives."[93]

In *AT&T Mobility LLC v. Concepcion*, the Court examined an agreement between two consumers and a telephone company for the sale and servicing of cellular phones.[94] After the consumers were charged sales tax for the phones that had been advertised as free, the consumers filed a class action lawsuit against the company.[95] In response, the company sought to compel individual arbitration pursuant to the agreement.[96] The consumers maintained that the arbitration agreement was unconscionable and therefore invalid because it did not allow for classwide arbitration.[97] The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) agreed with the consumers, based on a

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[85] *Id.* at 353-54 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006)).

[86] *Id.* at 354.

[87] *Id.* at 356.

[88] *Id.* at 354.

[89] *Id.* at 358.

[90] 9 U.S.C. § 2.

[91] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) ("[The FAA's] saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.").

[92] *See generally* Jerett Yan, *A Lunatic's Guide to Suing for $30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551 (2011).

[93] *Concepcion*, 563 U.S. at 343.

[94] *Id.* at 336.

[95] *Id.* at 337.

[96] *Id.*

[97] *Id.*

rule established by an earlier state court decision that found class arbitration waivers to be unconscionable when they involve certain types of contractual disputes.[98] The appeals court maintained that the state court's rule did not conflict with the FAA because it reflected an unconscionability analysis that is generally applicable to contracts in California, and not just contracts containing an arbitration clause.[99]

In a 5-4 decision penned by Justice Scalia, the Supreme Court reversed the decision of the Ninth Circuit.[100] While the Court noted that the FAA's saving clause allows arbitration agreements to be invalidated by "generally applicable contract defenses" such as unconscionability, the Court generally reasoned that the clause could not be used as a mechanism for imposing restrictions on arbitration that interfere with the goals of the FAA.[101] In this case, the Court found that the saving clause did not immunize a state rule that required the availability of classwide arbitration, a process that interferes with the "fundamental attributes of arbitration" and creates a scheme that is inconsistent with the FAA.[102] In comparing class arbitration with individual arbitration, the Court observed that the former makes the process slower and more costly, requires procedural formality, and increases risks to the company.[103] The Court further concluded that California's state rule was preempted because it hindered the FAA's objectives of promoting an informal and streamlined dispute resolution process.[104]

In its most recent FAA preemption ruling, the Supreme Court not only reaffirmed its prior stance on FAA preemption, but also found that state law governing contract formation may also be subject to preemption under the FAA. On May 15, 2017, the Court handed down its ruling in *Kindred Nursing Centers Limited Partnership v. Clark*, upholding the validity of arbitration agreements entered into by the legal representatives of former nursing home residents.[105] In a 7-1 decision authored by Justice Kagan, the Court concluded that application of a Kentucky state rule that compelled an individual to explicitly waive a right to trial when executing a power of attorney agreement violated the FAA, as such a requirement "singles out arbitration agreements for disfavored treatment."[106]

In *Kindred*, the estates of former nursing home residents sued the company that operated the nursing facility, alleging that the residents received improper care that led to their deaths.[107] The company moved to dismiss the litigation, claiming that the arbitration agreements signed by the representatives of the residents, pursuant to power-of-attorney documents, prevented the cases from being heard in court.[108] The Kentucky Supreme Court held that the arbitration agreements were invalid based on provisions of the Kentucky Constitution, which generally proclaim the right to trial by jury as "sacred" and "inviolate."[109] Pursuant to these rights, the state court

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[98] *Id.* at 338.

[99] *Id.*

[100] *Id.* at 352.

[101] *Id.* at 343.

[102] *Id.* at 344.

[103] *Id.* at 348-50.

[104] *Id.* at 344.

[105] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1425 (2017).

[106] *Id.* Justice Neil Gorsuch had not yet taken a seat on the Court when oral arguments were heard in *Kindred*, and he did not take part in the Court's consideration or decision of the lawsuit.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 1426 (citations and internal quotations omitted).

determined that an individual's representative can enter into a valid binding arbitration agreement and deprive the individual of access to the courts, but only when the individual expressly consents to the arbitration agreement being entered into on his or her behalf.[110] Because the powers of attorney at issue in the case lacked this requisite authorization, the Kentucky Supreme Court concluded that these representatives were not permitted to waive the residents' state constitutional rights.[111]

The U.S. Supreme Court reversed and vacated the judgment of the state court.[112] In its opinion, the Court held that by requiring an individual to make an express statement to surrender the individual's right to a trial, Kentucky's clear-statement rule "fails to put arbitration agreements on an equal plane with other contracts," in violation of the FAA.[113] The estates of the residents argued that the FAA was inapplicable in this case, as the Kentucky state rule did not concern enforcement of existing arbitration agreements, but rather the initial formation of these agreements, something that is not covered by the federal act.[114] However, the Court disagreed, noting that the language of the FAA addresses not only "enforce[ment]" of arbitration agreements, but also their "valid[ity]"—that is, what is needed to enter into them.[115] Thus, the Court contended, "[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made."[116]

Based on the Supreme Court's FAA jurisprudence, states appear restricted in their ability to constrain the use of arbitration agreements. While the Court has found that states may regulate arbitration agreements under laws governing the validity, revocability, and enforceability of contracts generally, state requirements that expressly target these agreements and that disfavor or interfere with arbitration are generally preempted by the federal act.[117] Additionally, although the FAA's preemptive scope is broad, the Court has recognized that courts have the power to invalidate certain arbitration agreements under the Act's saving clause.[118] However, after *Concepcion*, a topic of continuing debate is when the invalidation of an arbitration agreement is allowable, and when this invalidation will be found to impermissibly impede the objectives of the FAA, particularly in situations outside of the class action context.[119]

Class Arbitration Waivers and the FAA

During the late 1990s, major companies began to restrict the availability of classwide arbitration in their consumer and employment-related mandatory arbitration agreements.[120] In 1999, for

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[110] *Id.* at 1426.

[111] *Id.*

[112] *Id.* at 1429.

[113] *Id.* at 1426-27.

[114] *Id.* at 1428-29.

[115] *Id.* at 1428.

[116] *Id.*

[117] *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 685 (1996).

[118] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011).

[119] *See generally* E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOTIATION L. REV. 1, 9 (2015).

[120] STONE AND COLVIN, *supra* note 2 at 4.

example, ten major banks that issue credit cards reportedly formed a group to promote the use of class arbitration waivers.[121] The increased use of such waivers has been criticized by some who contend that they have undermined challenges to practices such as predatory lending and wage theft.[122] Others emphasize, however, that class arbitration waivers do not prohibit individual actions, and that employment disputes, in particular, are generally individualized and otherwise not appropriate for class or collective action.[123]

The Court has considered the enforcement of arbitration agreements that include class or collective action waivers in some of its most recent cases. As noted, in *Concepcion*, the Court concluded that an arbitration agreement that allowed only individual arbitration to resolve disputes was enforceable and not covered by the FAA's saving clause.[124] According to the Court, the FAA's objectives of promoting an informal and expeditious dispute resolution system would be undermined if a California state court's rule were applied.[125] Application of the rule would have permitted classwide arbitration, a process believed to be slower and more expensive.[126]

Following its decision in *Concepcion*, the Court considered another case involving a class arbitration waiver in a consumer agreement. In *American Express Company v. Italian Colors Restaurant*, a group of merchants that accepted the American Express card challenged a class arbitration waiver on the ground that it contravened the policies of federal antitrust laws.[127] The merchants argued that the credit card company used its monopoly power to force them to accept its cards at rates 30 percent higher than the fees charged for competing credit cards.[128] The U.S. Court of Appeals for the Second Circuit (Second Circuit) declined to enforce the class arbitration waiver, citing the prohibitive costs that would be incurred by the merchants if they were compelled to pursue individual actions.[129]

On appeal, the Supreme Court noted that the enforcement of an arbitration agreement pursuant to the FAA may be overridden by a "contrary congressional command" against arbitration.[130] Here, however, because the antitrust laws do not express an intention to preclude a waiver of class action procedures, the Court concluded in a 5-3 opinion authored by Justice Scalia that the class arbitration waiver was enforceable.[131] The Court also maintained that the cost of pursuing individual arbitration should not be viewed as preventing the effective vindication of the merchants' rights under the antitrust laws.[132] The Court explained: "[T]he fact that it is not worth

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[121] *Id.* ("Indeed, in 1999, the 10 major banks that issue credit cards—including American Express, Citibank, First USA, Capital One, Chase, and Discover—formed a group called 'the Arbitration Coalition' to promote the use of arbitration clauses that bar class actions.").

[122] GREENBERG AND GEBELOFF, *supra* note 4.

[123] *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Respondents in No. 16-307 at 4, Epic Sys. Corp. v. Lewis, No. 16-285 (U.S. *petition for cert. granted* Jan. 13, 2017), Ernst & Young LLP v. Morris, No. 16-300 (U.S. *petition for cert. granted* Jan 13, 2017), Nat'l Labor Relations Bd. v. Murphy Oil USA, Inc., No. 16-307 (U.S. *petition for cert. granted* Jan. 13, 2017).

[124] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348-50 (2011).

[125] *Id.*

[126] *Id.*

[127] Am. Express Co. v. Italian Colors Rest., 133 S.Ct. 2304, 2306 (2013).

[128] *Id.* at 2308.

[129] In re Am. Express Merchs.' Litig., 554 F.3d 300 (2nd Cir. 2009).

[130] *Italian Colors*, 133 S.Ct. at 2309.

[131] *Id.*

[132] *Id.* at 2310.

the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[133]

In January 2017, the Court agreed to review three employment-related cases that involve class or collective action waivers.[134] Unlike the class arbitration waivers at issue in *Concepcion* and *Italian Colors*, the waivers in these three cases prohibit a class or collective action in both arbitral and judicial forums.[135] The cases—*National Labor Relations Board v. Murphy Oil USA, Inc.*; *Epic Systems Corporation v. Lewis*; and *Ernst & Young LLP v. Morris*—involve employees who contend that the waivers violate their right under the NLRA to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]"[136] This right, established in Section 7 of the NLRA, is enforced by Section 8 of the statute, which states that it is an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7.]"[137]

In *Murphy Oil*, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) upheld a gas station operator's use of a class or collective action waiver. The court concluded that the NLRA does not express a contrary congressional command against arbitration that should preclude the enforcement of the waiver.[138] In *Epic Systems* and *Ernst & Young*, however, the Seventh Circuit and the Ninth Circuit respectively held that the waivers contravene the NLRA, and may not be enforced pursuant to the FAA.

In *Epic Systems*, the Seventh Circuit determined that the waiver was unlawful under the NLRA after first recognizing that the concerted activities contemplated by section 7 include the ability to maintain a class or collective action.[139] Citing the NLRA's history and purpose, the court observed: "Section 7 should be read broadly to include resort to representative, joint, collective, or class legal remedies."[140] Because the waiver restricts these Section 7 rights and thus would be considered an unfair labor practice under Section 8, the court determined that it was unlawful.[141]

Finding the waiver to be unlawful, the Seventh Circuit further maintained that the FAA's saving clause should render it unenforceable.[142] The court explained:

> Illegality is a standard contract defense contemplated by the FAA's saving clause ... If the NLRA does not render an arbitration provision sufficiently illegal to trigger the saving clause, the saving clause does not mean what it says.[143]

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[133] *Id.* at 2311 (emphasis in original and citation omitted).

[134] Murphy Oil USA v. Nat'l Labor Relations Bd., 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 85 U.S.L.W. 3341 (U.S. Jan. 13, 2017) (No. 16-307); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-285); Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3344 (U.S. Jan. 13, 2017) (No. 16-300).

[135] *See, e.g.*, *Murphy Oil*, 808 F.3d at 1015 ("The Arbitration Agreement further requires employees to waive the right to pursue class or collective claims in an arbitral or judicial forum.").

[136] 29 U.S.C. § 157.

[137] 29 U.S.C. § 158(a)(1).

[138] *Murphy Oil*, 808 F.3d at 1016-18.

[139] *Epic Sys.*, 823 F.3d at 1153.

[140] *Id.*

[141] *Id.* at 1156.

[142] *Id.* at 1157.

[143] *Id.* at 1159 (citation omitted).

Unlike the Fifth Circuit, the Seventh Circuit declined to find the waiver enforceable because the NLRA does not include a contrary congressional command against arbitration. Rather, the Seventh Circuit contended that the NLRA and the FAA should be construed to give effect to both statutes.[144] Here, the court maintained that the statutes "work hand in glove" given the waiver's illegality and the operation of the FAA's saving clause.[145]

Like the Seventh Circuit, the Ninth Circuit also concluded that a concerted action waiver included in an accounting firm's arbitration agreement violated the NLRA and was unenforceable. In *Ernst & Young*, however, the Ninth Circuit emphasized that Section 7 provides a non-waivable substantive right to collectively pursue legal claims.[146] The court noted that "when an arbitration contract professes the waiver of a substantive federal right, the FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield."[147] While the Ninth Circuit did recognize the waiver as a violation of Sections 7 and 8, it seems that the court might have found the waiver to be unenforceable simply because "substantive rights cannot be waived in arbitration agreements."[148]

The consolidated cases provide the Court with an opportunity to not only resolve the split among the appellate courts, but also address how the FAA should be construed when an arbitration agreement attempts to eliminate a right provided by another federal statute. In past cases, the Court has concluded that an arbitration agreement can restrict how a right will be enforced. In *Gilmer v. Interstate/Johnson Lane Corporation*, for example, the Court maintained that a claim alleging a violation of the Age Discrimination in Employment Act could be subject to arbitration in lieu of litigation.[149] Unlike the agreement at issue in *Gilmer*, however, the agreements in the consolidated cases would eliminate both a judicial and arbitral forum for concerted activity, a right provided by the NLRA.

Moreover, how the Court interprets the application of the saving clause could be particularly notable. Epic Systems and Murphy Oil argue that the saving clause does not apply for various reasons, including the contention that it "has no application to other federal statutes like the NLRA."[150] As discussed, however, this position is at odds with the decisions of the Seventh and Ninth Circuits.

Recent Federal Regulatory and Legislative Action

Federal Agency Action to Restrict Mandatory Arbitration

Given the Court's FAA jurisprudence and the seemingly limited ability of states to curb the use of mandatory arbitration agreements, some federal agencies have taken recent action to regulate the use of arbitration agreements under certain circumstances. For example, on July 19, 2017, the

[144] *Id.* at 1158.

[145] *Id.* at 1157.

[146] Morris v. Ernst & Young LLP, 834 F.3d 975, 985-86 (9th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3344 (U.S. Jan. 13, 2017) (No. 16-300).

[147] *Id.* at 986.

[148] *Id.* at 985.

[149] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1990).

[150] Brief for Petitioner Epic Sys. Corp. and Respondent Murphy Oil USA, Inc. at 8-9, Epic Sys. Corp. v. Lewis, No. 16-285 (U.S. *petition for cert. granted* Jan. 13, 2017), Nat'l Labor Relations Bd. v. Murphy Oil USA, Inc., No. 16-307 (U.S. *petition for cert. granted* Jan. 13, 2017).

Consumer Financial Protection Bureau (CFPB) issued a final rule that will restrict the use of mandatory pre-dispute arbitration clauses in agreements for certain consumer financial products and services.[151] This rule was issued pursuant to Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorized the CFPB to conduct a study of the use of arbitration agreements between consumers and financial institutions and subsequently issue regulations restricting or prohibiting the use of arbitration agreements upon a finding that such a prohibition or restriction "is in the public interest and for the protection of consumers."[152] The CFPB final rule circumscribes the use of mandatory arbitration agreements in two main ways. First, the final rule restricts covered financial service providers from using a pre-dispute arbitration agreement to block consumers from initiating or joining class action lawsuits.[153] Second, the rule requires providers that use these arbitration agreements to include language reflecting the limitation on class action waivers and to submit specified information on their use of arbitration to the CFPB.[154] The CFPB final rule takes effect on September 18, 2017, and applies only to mandatory arbitration agreements entered into on or after March 19, 2018.[155] Some Members of Congress have expressed opposition to the rule, claiming that it could detrimentally impact consumers and hamper their ability to seek expedited resolution of their legal disputes.[156] Legislation has been introduced that would overturn the final rule under the Congressional Review Act, including H.J.Res 111, a joint resolution passed by the House on July 25, 2017.[157]

Additionally, in 2016, the Centers for Medicare and Medicaid Services (CMS), a part of the Department of Health and Human Services, issued a comprehensive final rule governing the participation of nursing homes and other long-term care facilities in Medicare and Medicaid.[158] One requirement of the new rule that received considerable attention was a prohibition on a covered facility entering into a binding arbitration agreement with a resident (or the resident's representative) prior to a dispute arising between the parties.[159] While some praised this ban as a way to better protect the health and safety of long-term care residents, others criticized this restriction and asserted that CMS lacks the authority to hinder the use of arbitration in this manner.[160] Shortly after the final rule was issued, a number of plaintiffs filed a lawsuit against CMS, claiming that the agency lacked the authority to limit arbitration in light of the FAA.[161] The

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[151] 82 Fed. Reg. 33,210 (July 19, 2017).

[152] Pub. L. No. 111–203, § 1028, 24 Stat. 1376 (2010) (codified at 12 U.S.C. § 5518). *See also* 82 Fed. Reg. at 33,210 ("[The CFPB] final rule is based on the Bureau's findings—which are consistent with the Study—that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief.") *See also* CRS Legal Sidebar WSLG1574, *CFPB Issues Proposed Rule that Would Restrict Mandatory Pre-Dispute Arbitration Clauses*, by David H. Carpenter.

[153] *See* 82 Fed. Reg. at 33,358-33,387 (to be codified at 12 C.F.R pt. 1040).

[154] *Id.*

[155] *Id.* at 33,210.

[156] *See, e.g.*, Press Release, U.S. Senate Committee on Banking, Housing, and Urban Affairs, Senators File Resolution Disapproving of CFPB Arbitration Rule (July 20, 2017).

[157] H.J.Res 111, 115th Cong. (2017). For more information on the Congressional Review Act, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

[158] 81 Fed. Reg. 68,688 (Oct. 4, 2016).

[159] *Id.* at 68,790.

[160] *See, e.g.*, Press Release, American Ass'n for Justice, CMS Restores Nursing Home Residents' Rights, Prohibiting Pre-Dispute Forced Arbitration Contracts (Sept. 28, 2016); Press Release, American Health Care Ass'n, AHCA Statement on CMS Final Rule Requirements of Participation (Sept. 29, 2016).

[161] Am. Health Care Ass'n v. Burwell, 217 F.Supp.3d 921, 925 (N.D. Miss. 2016).

U.S. District Court for the Northern District of Mississippi issued a preliminary injunction in *American Health Care Association v. Burwell* to temporarily prevent the agency from implementing the arbitration requirements while the case was pending.[162]

However, in June 2017, CMS withdrew its appeal of the district court decision, and the agency subsequently issued a proposed rule that would revise these arbitration restrictions.[163] The proposed rule would remove the prohibition on pre-dispute binding arbitration agreements, but also includes certain measures to promote transparency in the arbitration process.[164] Among the new provisions, the proposed rule would require a facility to ensure that the binding arbitration agreement is in "plain language" and in "plain writing" if it is part of the facility admission contract.[165] As noted in the preamble to the final rule, CMS believes that the revised approach "is consistent with the elimination of unnecessary and excessive costs to providers while enabling residents to make informed choices about important aspects of his or her healthcare."[166]

Legislation in the 115th Congress

In light of the Supreme Court's FAA decisions, the use of mandatory arbitration agreements by private-sector companies is believed to have grown enormously.[167] While the efforts of federal agencies like the CFPB will likely deter the use of such agreements, the CFPB's rule, in particular, would apply only to a specific category of agreements—that is, those involving certain consumer financial products and services. Some maintain that the only way to reverse the growing use of mandatory arbitration agreements generally is to amend the FAA.[168]

During the 115th Congress, several bills have been introduced that would amend the FAA and generally limit the use of mandatory arbitration agreements under specified circumstances. Examples include the following:

- **Arbitration Fairness Act of 2017 (H.R. 1374/S. 537).** This legislation would add a new chapter to the FAA and generally forbid mandatory arbitration agreements for the resolution of antitrust, civil rights, employment, or consumer disputes if an agreement was entered into before such a dispute arises.[169] Under the bills, courts would be responsible for determining whether a particular arbitration agreement is subject to the ban.[170]
- **Restoring Statutory Rights and Interests of the States Act of 2017 (H.R. 1396/S. 550).** In an effort to curb the use of pre-dispute arbitration agreements, these bills would amend Section 2 of the FAA to provide that the Act's requirements on the enforceability of arbitration agreements would not apply to specific claims brought by individuals or certain small businesses that arise from a violation of federal or state statutes, the U.S. Constitution, or a state constitution, unless a written arbitration agreement is entered into by both parties

[162] *Id.*

[163] 82 Fed. Reg. 26,649 (June 8, 2017).

[164] *Id.* at 26,650.

[165] *Id.* at 26,651.

[166] *Id.*

[167] STONE AND COLVIN, *supra* note 2 at 14.

[168] *Id.* at 27.

[169] H.R. 1374, 115th Cong. § 3 (2017); S. 537, 115th Cong. § 3 (2017).

[170] *Id.*

after the claim has arisen and applies only to the existing claim.[171] The legislation would also amend the saving clause of the FAA to specify that it pertains to federal and state statutes and findings of a court that an agreement is unconscionable, invalid based on a lack of "meeting of the minds," or otherwise unenforceable based on contract law or public policy.[172] Such changes would appear to limit the preemptive scope of the FAA under the Court's current construction of the Act, and potentially make it easier for state courts to invalidate mandatory arbitration agreements. A determination as to whether these provisions apply to a particular arbitration agreement would be required to be made by a court instead of an arbitrator.[173]

- **Safety Over Arbitration Act of 2017 (S. 542).** This bill would allow arbitration to resolve a dispute "alleging facts relevant to a hazard to public health or safety" only if all parties consent to arbitration in writing after the dispute arises.[174] In instances when arbitration is elected, the arbitrator must provide a written explanation of the basis for any award or other outcome.[175]
- **Court Legal Access and Student Support (CLASS) Act of 2017 (H.R. 2301/S. 553).** Legislation has also been introduced that would address the availability of arbitration in college enrollment disputes. Pursuant to the proposed CLASS Act, provisions of the FAA promoting the enforcement of arbitration agreements would not apply to enrollment agreements between students and institutions of higher education.[176]

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[171] H.R. 1396, 115th Cong. § 3 (2017); S. 550, 115th Cong. § 3 (2017).

[172] *Id.*

[173] *Id.*

[174] S. 542, 115th Cong. § 2 (2017).

[175] *Id.*

[176] H.R. 2301, 115th Cong. § 2 (2017); S. 553, 115th Cong. § 2 (2017).

United States Court of Appeals

For the Eighth Circuit

No. 20-1799

Northport Health Services of Arkansas, LLC, doing business as Springdale Health and Rehabilitation Center; NWA Nursing Center, LLC, doing business as The Maples; Ashland Place Health and Rehabilitation, LLC; Aspire Physical Recovery Center at Cahaba River, LLC; Aspire Physical Recovery Center at Hoover, LLC; Aspire Physical Recovery Center of West Alabama, LLC; Athens Health and Rehabilitation, LLC; Civic Center Health and Rehabilitation, LLC; Columbiana Health and Rehabilitation, LLC; Cordova Health and Rehabilitation, LLC; Crossville Health and Rehabilitation, LLC; Florala Health and Rehabilitation, LLC; Georgiana Health and Rehabilitation, LLC; Gulf Coast Health and Rehabilitation, LLC; Hunter Creek Health and Rehabilitation, LLC; Huntsville Health and Rehabilitation, LLC; Jacksonville Health and Rehabilitation, LLC; Legacy Health and Rehabilitation of Pleasant Grove, LLC; Lineville Health and Rehabilitation, LLC; Luverne Health and Rehabilitation, LLC; Moundville Health and Rehabilitation, LLC; Northport Health Services of Arkansas, LLC, doing business as Covington Court Health and Rehabilitation Center, doing business as Fayetteville Health and Rehabilitation Center, doing business as Springdale Health and Rehabilitation Center, doing business as Legacy Health and Rehabilitation Center, doing business as Paris Health and Rehabilitation Center; Northport Health Services of Florida, LLC, doing business as Crystal River Health and Rehabilitation Center, doing business as Ocala River Health and Rehabilitation Center, doing business as Daytona Beach Health and Rehabilitation Center, doing business as St. Augustine Health and Rehabilitation Center, doing business as West Melbourne Health and Rehabilitation Center; Northport Health Services of Missouri, LLC, doing business as Joplin Health and Rehabilitation Center, doing business as Webb City Health and Rehabilitation Center, doing business as Carthage Health and Rehabilitation Center, doing business as Warsaw Health and Rehabilitation Center, doing business as Pleasant Hill Health and Rehabilitation Center; Northway Health & Rehabilitation, LLC; Oak Knoll Health and Rehabilitation, LLC; Opp Health and Rehabilitation, LLC; Ozark Health and Rehabilitation, LLC; Palm Gardens Health and Rehabilitation, LLC; Park Manor Health and Rehabilitation, LLC; Prattville Health and Rehabilitation, LLC; South

Haven Health and Rehabilitation, LLC; South Health and Rehabilitation, LLC; Sumter Health and Rehabilitation, LLC; Tallassee Health and Rehabilitation, LLC; Valley View Health and Rehabilitation, LLC; Wetumpka Health and Rehabilitation, LLC; AFNC, Inc., doing business as Eaglecrest Nursing and Rehab; Beebe Retirement Center, Inc.; BNNC, Inc., doing business as Alcoa Pines Health and Rehabilitation; BVNC, Inc., doing business as Alcoa Pines Health and Rehabilitation; CNNC, Inc., doing business as Corning Therapy and Living Center; FPNC, Inc., doing business as Twin Lakes Therapy and Living; GVNC, Inc., doing business as Gassville Therapy and Living; HBNC, Inc., doing business as Southridge Village Nursing and Rehab; HLNC, Inc., doing business as Heritage Living Center; HSNC, Inc., doing business as Village Springs Health and Rehabilitation; JBNC, Inc., doing business as Ridgecrest Health and Rehabilitation; Jonesboro Care and Rehabilitation Center, LLC, doing business as St. Elizabeths Place; JRNRC OPS, Inc., doing business as James River Nursing and Rehabilitation; Linco Health, Inc., doing business as Gardner Nursing and Rehabilitation; MHCNC, Inc., doing business as Care Manor Nursing and Rehab; MLBNC, Inc., doing business as Pioneer Therapy and Living; MMNC, Inc., doing business as The Lakes at Maumelle Health and Rehabilitation; MSNRC OPS, Inc., doing business as Magnolia Square Nursing and Rehab; Nashville Nursing & Rehab, Inc.; Northwest Health and Rehab, Inc., doing business as North Hills Life Care and Rehab; OCNC, Inc., doing business as Silver Oaks Health and Rehabilitation; OR OPS, Inc., doing business as Oak Ridge Health and Rehabilitation; PM OPS, Inc., doing business as Dierks Health and Rehab; RTNC, Inc., doing business as Rector Nursing and Rehab; Salco NC, Inc., doing business as Evergreen Living Center at Stagecoach; Salco NC 2, Inc., doing business as Amberwood Health and Rehabilitation; SCNC, Inc., doing business as Spring Creek Health & Rehab; Senior Living Management Group, LLC, doing business as Birch Pointe Health and Rehabilitation; SLNC, Inc., doing business as Southfork River Therapy and Living; SRCNC, Inc., doing business as The Crossing at Riverside Health and Rehabilitation; Timberlane Care and Rehabilitation Center, LLC, doing business as Timberlane Health & Rehabilitation; TXKNC, Inc., doing business as Bailey Creek Health & Rehab; WCNC, Inc., doing business as Katherines Place at Wedington; Westwood Health and Rehab, Inc.; Windcrest Health and Rehab, Inc.; WRNC, Inc., doing business as Chapel Woods Health and Rehabilitation; Apple Creek Health and Rehab, LLC; Ashton Place Health and Rehab, LLC; Atkins Care Center, Inc.; Belvedere Nursing and Rehabilitation Center, LLC; Bradford House Nursing and Rehab,

LLC; Briarwood Nursing and Rehabilitation Center, Inc.; Cabot Health and Rehab, LLC; Chapel Ridge Nursing Center, LLC; Colonel Glenn Health and Rehab, LLC; Dardanelle Nursing and Rehabilitation Center, Inc.; Nursing and Rehabilitation Center at Good Shepherd, LLC; Greenbrier Care Center, Inc.; Greystone Nursing and Rehab, LLC; Heather Manor Care Center, Inc.; Hickory Heights Health and Rehab, LLC; Innisfree Health and Rehab, LLC; Jamestown Nursing and Rehab, LLC; Johnson County Health and Rehab, LLC; Country Club Gardens, LLC; Lakewood Health and Rehab, LLC; Legacy Heights Nursing and Rehab, LLC; Lonoke Health and Rehab Center, LLC; Oak Manor Nursing and Rehabilitation Center, Inc.; Perry County Care Center, Inc.; Quapaw Care and Rehabilitation Center, LLC; Robinson Nursing & Rehabilitation Center, LLC; Russellville Car Center, Inc.; Salem Place Nursing and Rehabilitation Center, Inc.; Sherwood Nursing and Rehabilitation Center, Inc.; Shiloh Nursing and Rehab, LLC; Stella Manor Care Center, Inc.; Superior Health & Rehab, LLC; Eufaula Care Center, Inc.; Cherokee County Nursing Center, Inc.; Parks Edge Care Center, Inc.; Hendrix Health Care Center, Inc., doing business as Hendrix Health & Rehabilitation; Glen Haven Health and Rehabilitation, LLC

Plaintiffs - Appellants

v.

U.S. Department of Health and Human Services; Xavier Becerra,[1] in his official capacity as Secretary of the U.S. Department of Health & Human Services; Centers for Medicare & Medicaid Services; Chiquita Brooks-LaSure,[2] in her official capacity as the Administrator of the Centers for Medicare & Medicaid Services

Defendants - Appellees

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[1]Xavier Becerra is automatically substituted pursuant to Federal Rule of Appellate Procedure 43(c)(2).

[2]Chiquita Brooks-LaSure is automatically substituted pursuant to Federal Rule of Appellate Procedure 43(c)(2).

Public Citizen

Amicus on Behalf of Appellee(s)

Appeal from United States District Court
for the Western District of Arkansas - Fayetteville

Submitted: January 15, 2021
Filed: October 1, 2021

Before SMITH, Chief Judge, KELLY and ERICKSON, Circuit Judges.

KELLY, Circuit Judge.

Northport Health Services of Arkansas, LLC, and other similarly situated long-term care (LTC) facilities (collectively, Northport) appeal the decision of the district court[3] granting summary judgment in favor of the U.S. Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS, and collectively, the government). Northport argues that a regulation promulgated by CMS through notice and comment rulemaking is unlawful and should be set aside for violating the Administrative Procedure Act (APA), 5 U.S.C. § 706, the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, and the Regulatory Flexibility Act (RFA), 5 U.S.C. § 601 *et seq.* Having jurisdiction under 28 U.S.C. § 1291, we affirm.

[3]The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

I. Background

A. Factual and Regulatory Background

The federal government subsidizes eligible individuals' health care through two large programs: Medicare and Medicaid. Medicare, the second largest federal program, spends approximately $800 billion annually "to provide health insurance to nearly 60 million aged or disabled Americans." Azar v. Allina Health Servs., 139 S. Ct. 1804, 1808 (2019); see NHE Fact Sheet, Ctrs. for Medicare & Medicaid Servs., https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet (last modified Dec. 16, 2020). "Medicaid is a cooperative federal-state program through which the Federal Government provides [approximately $600 billion in] financial assistance to States so that they may furnish medical care to needy individuals." Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990); see NHE Fact Sheet, supra. The Secretary of HHS administers both programs through CMS, a sub-agency of HHS. To provide services to Medicare- and Medicaid-covered individuals, medical providers must enter into provider agreements that establish treatment standards and set reimbursement rates for available services. See 42 U.S.C. §§ 1395cc, 1396a.

Medicare and Medicaid provide coverage for long-term residents of nursing homes, commonly referred to as LTC facilities. Participating LTC facilities must comply with the requirements set forth in 42 U.S.C. § 1395i-3 (Medicare) and 42 U.S.C. § 1396r (Medicaid), as well as the regulations promulgated thereunder, see 42 C.F.R. §§ 483.1–.95. The plaintiffs in this matter are "dually-certified" LTC facilities, meaning they provide long-term care under both the Medicare and Medicaid programs.

In 2015, CMS initiated notice and comment rulemaking to comprehensively revise the requirements for LTC facilities to participate in the Medicare and Medicaid

programs. See Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42,168, 42,168–69 (proposed July 16, 2015). The regulatory reforms were intended to "improve the quality of life, care, and services in LTC facilities, optimize resident safety, reflect current professional standards, and improve the flow of the regulations" in light of "evidence-based research . . . [that] enhanced [CMS's] knowledge about resident safety, health outcomes, individual choice, and quality assurance and performance improvement." Id. at 42,169. In that vein, CMS noted the potential benefits of alternative dispute resolution, including arbitration, but also expressed its concern that LTC facilities' "superior bargaining power could result in a resident feeling coerced into signing the agreement," that residents might be waiving the right to judicial relief without full understanding, and that the prevalence of pre-dispute arbitration agreements "could be detrimental to residents' health and safety." Id. at 42,211. CMS therefore proposed certain limitations on LTC facilities' use of arbitration agreements, including requirements that the facilities explain such agreements to residents in a form, manner, and language that they understand and that they not treat arbitration agreements as a "condition of admission, readmission, or the continuation of [one's] residence at the facility." Id. In addition, reflecting a more general concern regarding the use of such agreements by LTC facilities, CMS stated it was considering and soliciting comments on "whether binding arbitration agreements should be prohibited" in the case of nursing home residents. Id.

On October 4, 2016, after an extended comment period, CMS published the final version of the rule (Original Rule) in the Federal Register. See Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688 (Oct. 4, 2016). In a shift from the proposed rule, the final rule prohibited LTC facilities from entering into pre-dispute, binding arbitration agreements with residents or their representatives. See id. at 68,690. CMS clarified further that, "[a]fter a dispute arises, the resident and the LTC facility may voluntarily enter into a binding arbitration agreement if both parties agree and comply with the relevant requirements" of the final rule. Id. at 68,800.

Several weeks later, before the Original Rule was to take effect on November 28, 2016, see id. at 68,688, a group of Mississippi nursing homes sued to preliminarily and permanently enjoin enforcement of the rule's arbitration provision. See Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921, 926 (N.D. Miss. 2016). Similar to this case, the nursing homes claimed that the rule's blanket prohibition of LTC facilities' use of pre-dispute arbitration agreements violated the APA, the FAA, and the RFA. See id. at 929–42. Finding that the nursing homes were likely to prevail, the district court granted a nationwide preliminary injunction of the challenged provision of the Original Rule. See id. at 946.

Rather than appeal the district court's decision, CMS initiated another round of notice and comment rulemaking several months later to revise the enjoined portion of the Original Rule. CMS proposed removing the requirement that precluded LTC facilities from entering into pre-dispute, binding arbitration agreements, reasoning that, "[u]pon reconsideration, [it] believe[d] that arbitration agreements are, in fact, advantageous to both providers and beneficiaries because they allow for the expeditious resolution of claims without the costs and expense of litigation." Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. 26,649, 26,650–51 (proposed June 8, 2017). CMS nevertheless acknowledged some concerns about the use of arbitration agreements in LTC facilities and proposed strengthening some requirements "to ensure the transparency of arbitration agreements in LTC facilities" and to strike the "best policy balance." Id. at 26,651.

After the comments period concluded, CMS published the final version of the rule (Revised Rule) in the Federal Register, to go into effect on September 16, 2019. See Revision of Requirements for Long-Term Care Facilities: Arbitration Agree-

ments, 84 Fed. Reg. 34,718, 34,718 (July 18, 2019) (codified at 42 C.F.R. § 483.70(n)). It provided:

> (n) *Binding arbitration agreements.* If a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with all of the requirements in this section.
>
> > (1) The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.
> >
> > (2) The facility must ensure that:
> >
> > > (i) The agreement is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands;
> > >
> > > (ii) The resident or his or her representative acknowledges that he or she understands the agreement;
> > >
> > > (iii) The agreement provides for the selection of a neutral arbitrator agreed upon by both parties; and
> > >
> > > (iv) The agreement provides for the selection of a venue that is convenient to both parties.
> >
> > (3) The agreement must explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it.

> (4) The agreement must explicitly state that neither the resident nor his or her representative is required to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility.
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> (5) The agreement may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including but not limited to, federal and state surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman, in accordance with § 483.10(k).
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> (6) When the facility and a resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for 5 years after the resolution of that dispute on and be available for inspection upon request by CMS or its designee.

Id. at 34,735–36 (quoting proposed 42 C.F.R. § 483.70(n)).

B. Procedural History

On September 4, 2019, Northport filed this lawsuit challenging multiple aspects of the Revised Rule: (i) the requirement that a binding arbitration agreement not be made a condition for the admission to, or the continuation of care in, an LTC facility, 42 C.F.R. § 843.70(n)(1); (ii) the requirement that residents be granted a right to rescind a binding arbitration agreement within 30 days of signing, id. § 843.70(n)(3); (iii) the requirement that any arbitration agreement (a) be explained to the resident so he or she understands it and (b) explicitly state that signing it is not a condition of admission to the LTC facility, id. § 843.70(n)(2)(i)–(ii), (4); and (iv) the requirement that the LTC facility retain copies of the signed arbitration agreement and any final arbitration decisions for five years, id. § 843.70(n)(6). Northport moved to preliminarily enjoin the enforcement of the Revised Rule or, in the alternative, to

stay enforcement pending judicial review. While that motion was pending, the parties agreed to stay enforcement of the Revised Rule until the district court ruled on the merits of the case, and they cross-moved for summary judgment based on the administrative record.

On April 7, 2020, the district court denied Northport's motion for summary judgment and granted the government's motion for summary judgment, upholding the Revised Rule. The court reasoned that the rule (i) did not violate the FAA, 9 U.S.C. § 2; (ii) was a permissible exercise of HHS's statutory authority under the Medicare and Medicaid statutes; (iii) was not "arbitrary and capricious" under the APA, 5 U.S.C. § 706(2)(A); and (iv) was promulgated in compliance with the RFA, 5 U.S.C. § 605(b). Northport now appeals, and we have granted a stay of the Revised Rule's enforcement pending resolution of this appeal.

II. Discussion

Northport revives its four challenges to the Revised Rule on appeal. "We review de novo a district court's decision on whether an agency action violates the APA." Simmons v. Smith, 888 F.3d 994, 998 (8th Cir. 2018) (quoting Friends of the Norbeck v. U.S. Forest Serv., 661 F.3d 969, 975 (8th Cir. 2011)); see also 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."). We may set aside agency action under the APA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C)–(D).

A. Conflict with the Federal Arbitration Act

Northport first argues that the Revised Rule violates the FAA and is therefore "not in accordance with law," id. § 706(2)(A), because it subjects arbitration agreements to "disfavored treatment." Enacted in 1925 "in response to widespread judicial hostility to arbitration agreements," AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011), the FAA provides that the terms of a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As described by the Supreme Court, this provision "establishes an equal-treatment principle," requiring "courts to place arbitration agreements 'on equal footing with all other contracts.'" Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1424, 1426 (2017) (quoting DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 48 (2015)).

Northport argues that the Revised Rule contravenes the equal-treatment principle because it "singles out" arbitration agreements, including by regulating LTC facilities' ability to enter into them with residents. For example, Northport reasons that prohibiting LTC facilities from requiring residents to sign arbitration agreements as a condition for admission, 53 C.F.R. § 483.70(n)(1), "restricts the use of arbitration agreements" and violates the FAA. We disagree. Such a construction of the FAA ignores the statute's plain language and interpreting precedent and would significantly expand the scope of the FAA to manufacture a conflict with the Revised Rule where none exists. Simply put, the Revised Rule does not come up against the FAA because it does not limit or frustrate the enforceability of valid arbitration agreements.

As noted above, the "savings clause" of the FAA "permits arbitration agreements to be declared *unenforceable* 'upon such grounds as exist at law or in equity for the revocation of any contract.'" Concepcion, 563 U.S. at 339 (emphasis added) (quoting 9 U.S.C. § 2). That is, an agreement to arbitrate a dispute may "be *invalidated* by 'generally applicable contract defenses, such as fraud, duress, or

unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Id. (emphasis added) (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)). Thus, in AT&T Mobility LLC v. Concepcion, the Supreme Court held that a California rule that treated class-action waivers in arbitration agreements as per se unconscionable was preempted by the FAA. See id. at 340, 352. Although unconscionability typically is a "generally applicable contract defense," the Court reasoned that California was applying the doctrine discriminately to arbitration agreements by finding class-action waivers particularly unconscionable when included therein. See id. at 341–44, 346–48. And under the FAA, California courts could not avoid *enforcing* arbitration agreements, including their class-action waivers, "according to their terms." Id. at 344 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

In our reading, the Supreme Court has never applied the FAA to prohibit a federal agency from generally regulating the use of arbitration agreements as CMS does here. Rather, it has construed the FAA simply to limit the circumstances in which arbitration agreements, once entered into, can be rendered invalid or unenforceable. So, for example, in Kindred Nursing Centers Ltd. Partnership v. Clark, the Court held that the FAA preempted a Kentucky rule that would have rendered invalid (and thereby unenforceable) arbitration agreements entered into by a principal's legal representative if the governing power of attorney did not specifically state that the representative was entitled to enter into arbitration agreements on the principal's behalf. See 137 S. Ct. at 1425–27; see also id. at 1428 ("A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made."). Likewise, in Preston v. Ferrer, the Court held that the FAA preempted a California rule that required exhaustion of state administrative remedies before arbitration, despite the fact that the parties had "agree[d] to arbitrate all questions arising under [the] contract." 552 U.S. 346, 359 (2008). Because

requiring parties to initially refer their disputes to a state administrative body would frustrate the benefits of utilizing arbitration in the first instance, see id. at 357–58 ("A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results." (cleaned up)), the rule effectively rendered valid arbitration agreements unenforceable and violated the FAA. See id. at 359. And in Epic Systems Corp. v. Lewis, the Supreme Court considered whether the National Labor Relations Act (NLRA) rendered certain agreements requiring individualized (as opposed to classwide) arbitration *unenforceable.* See 138 S. Ct. 1612, 1620 (2018); see also id. at 1622 (discussing the contract *defenses* that are preempted by the FAA: "defenses that target arbitration by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration" (cleaned up)). Assuming the NLRA rendered class and collective action waivers in arbitration agreements illegal, the Court concluded that such a rule would violate the FAA because it would operate as a defense applicable to arbitration agreements only. See id. at 1622–23.

The Revised Rule, in comparison to the rules challenged in the above cases, does not invalidate or render unenforceable any arbitration agreement. See 84 Fed. Reg. at 34,718 ("This final rule does not purport to regulate the enforcement of any arbitration agreement . . . ."); id. at 34,729 ("CMS does not have the power to annul valid contracts."); see also id. at 34,732 ("This rule in no way would prohibit two willing and informed parties from entering voluntarily into an arbitration agreement."). Instead, it establishes the conditions for receipt of federal funding through the Medicare and Medicaid programs. See id. at 34,733 (noting that LTC facilities may enter into arbitration agreements "so long as they comply with the requirements" finalized in the Revised Rule). So, for example, if an LTC facility entered into an arbitration agreement with a resident without complying with the Revised Rule by requiring the resident to sign as a condition of admission to the facility, see 42 C.F.R. § 483.70(n)(1), the arbitration agreement would nonetheless be enforceable, absent a showing of "generally applicable contract defenses, such as fraud, duress, or unconscionability," Concepcion, 563 U.S. at 339; see 9 U.S.C. § 2. CMS would

simply enforce the regulation through a combination of administrative remedies, including denial of payment and civil monetary penalties. See 42 C.F.R. § 488.406; 84 Fed. Reg. at 34,733.

In summary, Northport expansively argues that the FAA established "a liberal federal policy favoring arbitration agreements," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983), that is frustrated by the Revised Rule's regulation of nursing homes' use of arbitration agreements.[4] However, "courts do not apply federal policies; they apply federal statutes, and the FAA speaks only to the validity, irrevocability and enforceability of arbitration agreements." Cal. Ass'n of Priv. Postsecondary Schs. v. DeVos, 436 F. Supp. 3d 333, 344 (D.D.C. 2020), vacated as moot, No. 20-5080, 2020 WL 9171125 (D.C. Cir. Oct. 14, 2020). Because the Revised Rule does not, in words or effect, render arbitration agreements entered into in violation thereof invalid or unenforceable, it does not conflict with the FAA.[5]

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[4]Northport largely ignores the extent to which the Revised Rule *favors* arbitration as "an appropriate forum to resolve disputes." 84 Fed. Reg. at 34,729; see also id. at 34,732 ("We acknowledge the[] advantages and disadvantages to arbitration and believe that the requirements in this final rule provide the transparency and opportunity for the resident and his or her representative to evaluate those advantages and disadvantages and make a choice that is best for them. This rule in no way would prohibit two willing and informed parties from entering voluntarily into an arbitration agreement.").

[5]Because we find no conflict between the FAA and the Revised Rule, we need not address Northport's argument that Congress has not evinced a "clear and manifest" intention to empower CMS to promulgate rules overriding the FAA. See Epic Sys., 138 S. Ct. at 1624 ("A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." (cleaned up)). Such an intention is unnecessary where there is "no conflict at all." Id. at 1625. Nor do we address Northport's argument that the Revised Rule engages in "economic dragooning," leaving LTC facilities "no real option but to acquiesce" to its regulations of arbitration agreements. Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S.

B. HHS's Statutory Authority Under the Medicare and Medicaid Statutes

Next, Northport argues that the Revised Rule should be set aside because it exceeds HHS's statutory authority under the Medicare and Medicaid statutes to promulgate regulations (i.e., that it is ultra vires). See 5 U.S.C. § 706(2)(C); see also U.S. ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1257 (8th Cir. 1998) ("An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these regulations aside."). We review such a claim using the familiar Chevron framework. See Iowa League of Cities v. E.P.A., 711 F.3d 844, 876 (8th Cir. 2013). "Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable." King v. Burwell, 576 U.S. 473, 485 (2015) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)). The two-step Chevron framework "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." Id. (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

519, 582 (2012) (plurality opinion). For one, a plurality of the Supreme Court used that language to describe the federal government's limited constitutional authority under the Spending Clause to regulate the states, see id. at 575–85, not a federal agency's ability to regulate LTC facilities' use of federal funding, as in this case. Indeed, it is irrelevant for the purposes of the FAA whether LTC facilities—private businesses that voluntarily participate in the Medicare and Medicaid programs, see Minn. Ass'n of Health Care Facilities, Inc. v. Minn. Dep't of Pub. Health, 742 F.2d 442, 446 (8th Cir. 1984); Livingston Care Ctr., Inc. v. United States, 934 F.2d 719, 720–21 (6th Cir. 1991)—must comply with the Revised Rule as the price of admission to obtain federal funding. The Revised Rule's regulations do not affect the validity or enforceability of LTC facilities' arbitration agreements, and they therefore do not conflict with the FAA.

The government relied on three sections of the Medicare and Medicaid statutes as the bases for its statutory authority to promulgate the Revised Rule. See 84 Fed. Reg. at 34,718, 34,725.

> It is the duty and responsibility of the Secretary to assure that requirements which govern the provision of care in [participating LTC facilities], and the enforcement of such requirements, are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys.
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> 42 U.S.C. §§ 1395i-3(f)(1), 1396r(f)(1).
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> A [participating LTC facility] must meet such other requirements relating to the health, safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary.
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> Id. § 1395i-3(d)(4)(B); cf. id. § 1396r(d)(4)(B).
>
> A [participating LTC facility] must protect and promote the rights of each resident, including . . . [a]ny other right established by the Secretary.
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> Id. §§ 1395i-3(c)(1)(A)(xi), 1396r(c)(1)(A)(xi).[6]

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[6]Northport argues that the government "disclaimed reliance" on this last pair of provisions because it was not cited in the section titled "Statutory Authority" of the Revised Rule. See 84 Fed. Reg. at 34,718; see also Michigan v. E.P.A., 576 U.S. 743, 758 (2015) (noting "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action"). However, the Revised Rule did cite these provisions as statutory authorities for promulgating the Original Rule, which was "designed to accomplish the same goals" as the Revised Rule, 84 Fed. Reg. at 34,725; see also 82 Fed. Reg. at 26,651 (claiming statutory authority to issue the Revised Rule under these three provisions), and we consider all three statutory bases proffered by the government, see Union Pac. R.R. Co. v. Surface Transp. Bd., 863 F.3d 816, 824 (8th Cir. 2017).

To determine whether a statute is ambiguous, we start with its plain language. See Ark. AFL-CIO v. F.C.C., 11 F.3d 1430, 1440 (8th Cir. 1993) (en banc). "If congressional intent is clearly discernable, the agency must act in accordance with that intent and the court need not defer to the agency's interpretation of its mandate." Id. Thus, we must determine whether Congress intended HHS to have the authority to regulate LTC facilities' use of arbitration agreements. See Friends of the Boundary Waters Wilderness v. Bosworth, 437 F.3d 815, 823 (8th Cir. 2006).

Looking to the above statutory provisions, we conclude that the Medicare and Medicaid statutes are ambiguous as to whether HHS has the authority to regulate the use of arbitration agreements. The statutes are broadly worded to give HHS significant leeway in deciding how best to safeguard LTC residents' health and safety and protect their dignity and rights. For example, the statutes delegate authority to the Secretary to promulgate regulations ensuring the "provision of care" at LTC facilities is adequate to "protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys." 42 U.S.C. §§ 1395i-3(f)(1), 1396r(f)(1). More capaciously, the statutes confer authority to the Secretary to promulgate regulations "relating to the health, safety, and well-being of residents" as deemed "necessary." Id. § 1395i-3(d)(4)(B); cf. id. § 1396r(d)(4)(B). And most expansively, the Secretary is empowered to "protect and promote" the rights of residents he or she may deem important. Id. §§ 1395i-3(c)(1)(A)(xi), 1396r(c)(1)(A)(xi).

We disagree with Northport's arguments that the statutes are sufficiently unambiguous to conclude that Congress did not intend for HHS to have the authority to regulate the use of arbitration agreements. First, Northport contends that arbitration is not "meaningful[ly] connect[ed]" to residents' "healthy, safety, and well-being," e.g., id. § 1395i-3(d)(4)(B), and falls outside HHS's wheelhouse—the "provision of care," id. §§ 1395i-3(f)(1), 1396r(f)(1). In effect, Northport implies that although HHS is empowered to regulate the terms of residents' medical, palliative,

or residential care, HHS does not have the authority to regulate the administrative side of LTC facilities. Looking to the "text and context" of the statute, Union Pac. R.R. Co., 863 F.3d at 825, we reject such a narrow reading of HHS's authority. In addition to conferring the general responsibility to promulgate regulations governing the "provision of care . . . adequate to protect the health, safety, welfare, and rights of residents," 42 U.S.C. §§ 1395i-3(f)(1), 1396r(f)(1), Congress gave HHS the power to develop standards for the qualification of LTC facility administrators, id. §§ 1395i-3(f)(4), 1396r(f)(4), to establish criteria for the administration of LTC facilities, id. §§ 1395i-3(f)(5), 1396r(f)(5), and to specify data to be collected by LTC facilities, id. §§ 1395i-3(f)(6), 1396r(f)(6). These provisions, though not themselves the statutory bases of the Revised Rule, demonstrate that HHS is not restricted to regulating only matters concerning residents' standard of medical care.

Next, relying on the interpretive canon that expressing some items of a group excludes the omitted items, see N.L.R.B. v. SW General, Inc., 137 S. Ct. 929, 940 (2017) (defining *expressio unius est exclusio alterius*), Northport argues that Congress did not intend HHS to regulate LTC facilities' ability to condition residents' admission on signing arbitration agreements. In Northport's view, by enacting express provisions governing LTC facilities' admissions practices without mentioning arbitration agreements, see 42 U.S.C. §§ 1395i-3(c)(5), 1396r(c)(5), Congress intentionally withheld authority from HHS to promulgate regulations on that issue. "But that canon [is] a feeble helper in an administrative setting," Child.'s Hosp. Ass'n of Tex. v. Azar, 933 F.3d 764, 770–71 (D.C. Cir. 2019) (cleaned up), particularly when, as here, Northport points to no evidence suggesting that "Congress considered the unnamed possibility and meant to say no to it," Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003). Moreover, Northport's argument would suggest that HHS lacks the authority to regulate admissions practices beyond that specified in the pertinent statutory provisions, a claim undermined by other HHS regulations that do just that. See, e.g., 42 C.F.R. § 483.15(a)(2)(iii), (6).

Finally, Northport infers from the fact that HHS had not tried to promulgate regulations governing the use of arbitration agreements until 2016, when it published the Original Rule, that HHS had implicitly recognized it lacked the statutory authority to do so. Northport points to no authority suggesting that an agency's inaction defines the boundaries of that agency's statutory authority. Indeed, we do not draw comparable inferences from *legislative* inaction. See Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." (cleaned up)). But more directly, whether or not an agency has previously attempted to exercise statutory authority it may or may not have does not answer the question before us—whether the statute is ambiguous, thereby implicitly leaving a gap in the statute to be filled. See Iowa League of Cities, 711 F.3d at 877.

Having determined that the Medicare and Medicaid statutes are ambiguous, we look to whether the agency's interpretation "is based on a permissible construction of the statute[s]." Andrade-Zamora v. Lynch, 814 F.3d 945, 951 (8th Cir. 2016) (quoting City of Arlington v. F.C.C., 569 U.S. 290, 296 (2013)); see Ark. AFL-CIO, 11 F.3d at 1441 (noting "the agency's construction of [a] statute must be reasonable"). An agency's reasonable interpretation of a statute is entitled to "substantial deference." Bosworth, 437 F.3d at 821. In conducting our analysis, we need not identify the interpretation we would have taken had the question been presented to us initially in a judicial proceeding, as "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Simmons, 888 F.3d at 998 (quoting Chevron, 467 U.S. at 844); see also Unity Healthcare v. Azar, 918 F.3d 571, 578 (8th Cir. 2019) ("[T]he question before us is not whether an agency interpretation represents the best interpretation of the statute, but whether it represents a reasonable one." (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744–45 (1996))). Rather, we will uphold the agency's interpretation "so long as we can reasonably conclude that the grants of authority in

the statutory provisions cited by the government contemplate the issuance." Iowa League of Cities, 711 F.3d at 877 (cleaned up).

Reviewing the provisions of the Revised Rule, we conclude that they are reasonable interpretations of the Medicare and Medicaid statutes. As noted by CMS, the Revised Rule reflects the agency's belief that "arbitration has both advantages and disadvantages" and permits LTC facilities "to ask their residents to sign arbitration agreements so long as they comply with the [Revised Rule's] requirements." 84 Fed. Reg. at 34,732–33. Generally, these requirements ensure that residents who enter into arbitration agreements with LTC facilities do so knowingly and voluntarily, without the specter that the facility will deny care should they refuse. For example, LTC facilities may not require a resident to sign an arbitration agreement either as a condition of admission or as a requirement to continue receiving care. See 42 C.F.R. § 483.70(n)(1); see also id. § 483.70(n)(4). LTC facilities must explain the function of the arbitration agreement before a resident signs it, and they must afford residents the right to rescind the agreement within 30 days of signing it. See id. § 483.70(n)(2)(i), (3). And to assist CMS in monitoring the efficacy of arbitration in resolving disputes between residents and LTC facilities, the Revised Rule requires LTC facilities to keep for five years the applicable arbitration agreement and the arbitrator's final decision if ever a dispute is resolved. See id. § 483.70(n)(6).

In our view, it is reasonable for CMS to conclude that regulating the use of arbitration agreements in LTC facilities furthers the health, safety, and well-being of residents, particularly during the critical stage when a resident is first admitted to a facility. See 42 U.S.C. § 1395i-3(d)(4)(B), (f)(1); id. § 1396r(d)(4)(B), (f)(1). We can appreciate how conditioning care on entering into a binding arbitration agreement may frustrate residents' access to treatment or jeopardize their health and well-being. See 84 Fed. Reg. at 34,726 (noting that the Revised Rule "holds the [LTC] facility accountable by ensuring that [it] cannot coerce or apply unreasonable pressure on a resident . . . by implying the resident would not receive the care he or she needs

without signing the agreement"); see also id. at 32,727 (noting that "residents are frequently admitted during a time of stress and often after a decline in their health or directly from the hospital . . . mak[ing] it extremely difficult for LTC residents . . . to make an informed decision about arbitration"). Likewise, we think the Revised Rule is a reasonable exercise of CMS's authority to protect residents' rights. See 42 U.S.C. §§ 1395i-3(c)(1)(A)(xi), 1396r(c)(1)(A)(xi).

In summary, the Revised Rule "represents a reasonable accommodation of manifestly competing interests and is entitled to deference." Chevron, 467 U.S. at 865. We affirm the district court's conclusion that it is not ultra vires.

C. Northport's Challenge to the Rule as Arbitrary and Capricious

Next, Northport argues that the Revised Rule should be set aside because it is "arbitrary, capricious, [and] an abuse of discretion." See 5 U.S.C. § 706(2)(A). When promulgating a rule, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Id.; see also F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in the judgment) ("The question in each case is whether the agency's reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its

authority."). Our scope of review is narrow, and we are "not to substitute [our] judgment for that of the agency." State Farm, 463 U.S. at 43. Although "[w]e may not supply a reasoned basis for the agency's action that the agency itself has not given," id. (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)), we will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," id. (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

Northport raises two arguments as to why the Revised Rule is arbitrary and capricious. First, it suggests that the rule was "based on sheer speculation" because CMS relied principally on anecdotal evidence rather than quantitative social science evidence to support the rule. See, e.g., 84 Fed. Reg. at 34,722, 34,726 (noting that CMS believed the Revised Rule was "the best way to strike a balance" between "a great deal of anecdotal evidence and reportage" critical of LTC facilities' use of arbitration agreements and the "lack of statistical data" showing "that arbitration agreements necessarily have a negative effect on quality of care"). But "[t]he APA imposes no general obligation on agencies to produce empirical evidence," Stilwell v. Office of Thrift Supervision, 569 F.3d 514, 519 (D.C. Cir. 2009), and CMS was entitled to justify the rule using the available anecdotal evidence so long as it provided a rational, reasoned explanation for doing so. See id.; see also Sacora v. Thomas, 628 F.3d 1059, 1069 (9th Cir. 2010) (noting that although "[i]t may have been preferable for the [agency] to support its conclusions with empirical research," "it was reasonable for the [agency] to rely on its experience, even without having quantified it in the form of a study").

Having reviewed the regulatory record of both the Original Rule and the Revised Rule, we are satisfied that the evidence CMS relied upon is sufficient to support the Revised Rule. See 84 Fed. Reg. at 34,722 (noting that CMS relied on the evidence and comments gathered during the Original Rule's rulemaking process to justify the Revised Rule). For example, CMS took into consideration commenters'

stated beliefs that arbitration agreements in some instances permitted LTC facilities "to avoid responsibility for providing poor or substandard care to their residents," jeopardizing residents' health and safety. 81 Fed. Reg. at 68,793; see also id. (noting that some commenters "had personally witnessed resident neglect and attributed it to facilities believing that they were immune to any legal consequences for their mistreatment because of the likelihood that they would prevail in binding arbitration"). Furthermore, CMS conducted a review of academic literature and court opinions, which "provided evidence that pre-dispute arbitration agreements were detrimental to the health and safety of LTC facility residents." Id. (noting various evidence-based critiques of LTC facilities' use of arbitration agreements, including "the unequal bargaining power between the resident and the LTC facilities; inadequate explanations of the arbitration agreement; the inappropriateness of presenting the agreement upon admission, an extremely stressful time for the residents and their families; negative incentives on staffing and care as a result of not having the threat of a substantial jury verdict for sub-standard care; and the unfairness of the arbitration process for the resident"). Although these observations were not supported by statistical data that quantified their aggregate effect, they were sufficient to justify CMS "implement[ing] a regulation that accommodates arbitration while also protecting LTC facility residents from unfairly coerced agreements." 84 Fed. Reg. at 34,726. Likewise, it was not arbitrary or capricious for CMS to have adopted a rule recognizing the importance of amassing data going forward to continue monitoring the propriety of the rule, see id. at 34,723 ("[T]he requirement to retain copies of the arbitration agreement and the arbitrator's final decision will allow us to learn how arbitration is being used by LTC facilities and how this is affecting the residents."), as agencies are empowered to "adopt prophylactic rules to prevent potential problems before they arise," see Stilwell, 569 F.3d at 519.

Second, Northport argues that CMS did not adequately explain the rule's alleged departure from the agency's historical support for the use of arbitration agreements by LTC facilities. Northport relies on two documents that supposedly

reflect HHS and CMS's prior policy toward arbitration agreements: a January 2003 memorandum from Steven Pelovitz, the former Director of the Survey and Certification Group of CMS, Dist. Ct. Dkt. 25-5 at 2–3 (the Pelovitz Memo), and a July 2008 letter from Michael Leavitt, the former Secretary of HHS, to the House Judiciary Committee, Dist. Ct. Dkt. 24-25 at 691–93 (the Leavitt Letter). In the Pelovitz Memo, CMS set forth its policy regarding LTC facilities that conditioned residents' admission to or ability to remain in an LTC facility on their signing of a pre-dispute, binding arbitration agreement. Noting that the agency's "primary focus should be on the quality of care actually received by nursing home residents that may be compromised by such agreements," CMS declared that it would enforce existing federal regulations to prevent LTC facilities from discharging, transferring, or retaliating against current residents who refused to enter into binding arbitration agreements. Dist. Ct. Dkt. 25-2 at 2–3. And in the Leavitt Letter, HHS articulated its general support for pre-dispute arbitration agreements as "an excellent way for patients and providers to control costs, resolve disputes, and speed resolution of conflicts." Dist. Ct. Dkt. 24-25 at 691. The agency noted its opposition to legislation that would "deprive patients and providers of the opportunity to agree voluntarily to resolve their disputes through arbitration," id., and suggested along similar lines as the Pelovitz Memo that existing regulations "provide[d] ample safeguards to ensure that nursing home residents are protected from harm," id. at 692.

To the extent the Revised Rule departs from these prior policies,[7] we find that CMS has provided a sufficiently reasonable explanation for doing so. When an agency reverses its prior policy, "it need not demonstrate . . . that the reasons for the

[7]Although Northport argues that the Revised Rule departs from CMS's historical position on arbitration agreements by being *more* restrictive of the use of arbitration agreements, the Revised Rule is in fact *less* restrictive than CMS's immediately preceding policy: the Original Rule's per se ban on pre-dispute, binding arbitration agreements. See 84 Fed. Reg. at 34,719, 34,722 (noting that the "overwhelming majority of commenters" opposed the Revised Rule because it "revers[ed] course" on the Original Rule).

new policy are *better* than the reasons for the old one." Fox Television, 556 U.S. at 515. "[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." Id. At the outset, we note that the Revised Rule is generally in harmony with the Pelovitz Memo and the Leavitt Letter. Indeed, the rule appreciates the advantages of arbitration and expressly permits LTC facilities and their residents to enter into arbitration agreements transparently and voluntarily. See 84 Fed. Reg. at 34,722. But even if the Revised Rule changed direction slightly by deciding that existing federal and state regulations are insufficient to protect residents' quality of care vis-á-vis arbitration agreements, CMS has provided a rational justification for that change. As noted above, CMS relied on evidence suggesting that LTC facilities' use of arbitration agreements had a larger impact on residents' health and safety than had previously been realized. CMS noted comments "rais[ing] a number of concerns that convinced us that [existing federal and state] protections are limited and do not protect the unique needs of Medicare and Medicaid beneficiaries." Id. at 34,720 (noting that "state laws differ . . . offer[ing] varying levels of protection" and that residents may not be financially capable of challenging unconscionable arbitration agreements in court, requiring CMS to step in to further safeguard residents). Relatedly, CMS determined that the five-year recordkeeping requirement was necessary to "evaluate quality of care complaints . . . and assess the overall impact of these agreements on the safety and quality of care provided in LTC facilities." Id. at 34,730.

Finally, Northport argues that the change of policy was arbitrary and capricious because it did not consider LTC facilities' "substantial reliance interests" on CMS's historical arbitration agreement policy. See Fox Television, 556 U.S. at 515 (noting that an agency may need to provide greater explanation "when its prior policy has engendered serious reliance interests that must be taken into account"). Specifically, it argues that LTC facilities have "built their economic and pricing models in reliance on the prior policy" and that the Revised Rule will require LTC facilities to

henceforth allocate more money to cover their dispute resolution costs. To begin, we echo the district court's reasonable skepticism of Northport's claimed reliance interests. Under the Revised Rule, existing arbitration agreements will continue to be enforceable, and LTC facilities can still enter into arbitration agreements with their residents and obtain federal funding so long as they comport with the rule's requirements. Therefore, the availability of arbitration and any associated cost savings are largely unaffected by the Revised Rule, and LTC facilities can continue to rely on historical economic models. But even setting that aside, we find that CMS reasonably explained the departure from CMS's prior policy in spite of those reliance interests. See Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (noting that an agency need only provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy" (quoting Fox Television, 556 U.S. at 515–16)). As noted above, the Revised Rule continues to recognize the advantage of permitting LTC facilities to rely on arbitration as a fast and economic means to resolve disputes with residents. See 84 Fed. Reg. at 34,722. But CMS also explained that the cost-efficiency and expediency of arbitration had to be counter-balanced by the need to protect residents by ensuring that they enter into arbitration agreements voluntarily and in a transparent way. See id.

We conclude that the Revised Rule reflects CMS's reasoned judgment in light of competing considerations, see State Farm, 463 U.S. at 43, and we affirm the district court's conclusion that the Revised Rule is not arbitrary or capricious.

D. Compliance with the Regulatory Flexibility Act

Finally, Northport argues that the promulgation of the Revised Rule violated the RFA. Enacted in 1980 as a "response to the complaints of small business about the burdens of federal regulation," see Paul R. Verkuil, A Critical Guide to the Regulatory Flexibility Act, 1982 Duke L.J. 213, 226 (1982), the RFA requires an

agency undergoing informal rulemaking to prepare and publish a regulatory flexibility analysis that details, among other things, the rule's "significant economic impact on small entities" and the steps the agency has taken to minimize that impact. See 5 U.S.C. § 604; see also id. § 601(6) (defining "small entities" to include small businesses, certain non-profit organizations, and small governmental jurisdictions). However, an agency may forego the regulatory flexibility analysis "if the head of the agency certifies that the rule will not, if promulgated, have a significant impact on a substantial number of small entities." Id. § 605(b). And central to this appeal, the certification must be published in the Federal Register "along with a statement providing the factual basis for such certification." Id. In reviewing a party's claim that an agency violated the "[p]urely procedural" requirements of the RFA, Nat'l Tel. Coop. Ass'n v. F.C.C., 563 F.3d 536, 540 (D.C. Cir. 2009), we consider whether the agency made a "reasonable, good-faith effort to carry out the RFA's mandate." Zero Zone, Inc. v. U.S. Dep't of Energy, 832 F.3d 654, 683 (7th Cir. 2016) (cleaned up) (quoting U.S. Cellular Corp. v. F.C.C., 254 F.3d 78, 88 (D.C. Cir. 2001)); see Alenco Commcn's, Inc. v. F.C.C., 201 F.3d 608, 625 (5th Cir. 2000)); Associated Fisheries of Maine, Inc. v. Daley, 127 F.3d 104, 114 (1st Cir. 1997); see also 5 U.S.C. § 611(a)(1) (permitting judicial review of a claim that an agency failed to comply with the requirements of, among other provisions of the RFA, 5 U.S.C. § 605(b)).

The parties agree that the Secretary of HHS certified that the Revised Rule would not have a significant economic impact on a substantial number of small entities. See 84 Fed. Reg. at 34,734. But Northport argues that CMS failed to provide the requisite factual basis for that certification. At first blush, it appears that Northport is correct; CMS seemingly did not provide any evidence or reasoning to support the certification, let alone make a "reasonable, good-faith effort" to do so. In publishing the final Revised Rule, CMS provided the following, cursory explanation of its decision to certify:

> The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small

> businesses, nonprofit organizations, and small government jurisdictions. Most hospitals and most other providers and suppliers [subject to the Revised Rule] are small entities, either by nonprofit status or by having revenues of less than $7.5 million to $38.5 million in any 1 year. . . . We are not preparing an analysis for the RFA because we have determined, and the Secretary certifies, that this final rule will not have a significant economic impact on a substantial number of small entities.

Id. Considered alone, this paragraph falls short of other certifications that have passed muster. See, e.g., Carpenter, Chartered v. Sec'y of Veterans Affs., 343 F.3d 1347, 1356–57 (Fed. Cir. 2003) (upholding § 605(b) certification that clarified that the rule would not affect small businesses because it "would affect only the processing of claims by VA" (cleaned up)); Sw. Penn. Growth All. v. Browner, 121 F.3d 106, 123 (3d Cir. 1997) (upholding § 605(b) certification that explained that the rule "d[id] not affect any existing requirements applicable to small entities nor d[id] it impose new requirements").

In response, CMS argues that the required factual basis was provided in the prefatory statement to the agency's RFA certification. See 84 Fed. Reg. at 34,733–34. There, the agency noted that the Revised Rule "will increase transparency in LTC facilities that cho[o]se to use arbitration while, at the same time, allowing facilities to use arbitral forums as a means of resolving disputes." Id. at 34,734. It also explained the Revised Rule's "Overall Impact," noting that it will "ensure[] that no resident will be required to sign a pre-dispute, binding arbitration agreement as a condition for receiving the care he or she needs." Id. We struggle to see how these statements provide a factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Although they might describe the Revised Rule's intended effects, these statements do not even purport to consider which entities the rule will affect or to what degree.

CMS also argues that the required factual basis for the RFA certification was provided earlier in the rulemaking process. In the Original Rule, which covered

significantly more than LTC facilities' use of arbitration agreements, CMS estimated that the rule in its entirety would impact less than one percent of LTC facilities' annual revenues, an insignificant economic impact. See 81 Fed. Reg. at 68,846. Similarly, in the notice of proposed rulemaking of the Revised Rule, CMS noted that one of its proposals (ultimately amended for the final rule) would not impose significant costs or burdens on LTC facilities because it required what was already a standard business practice. See 82 Fed. Reg. at 26,652 ("We are proposing that LTC facilities post a notice regarding the use of arbitration agreements in an area that is visible to residents and visitors. . . . We believe that notices concerning facility practices are periodically developed, reviewed, and updated as a standard business practice. We also believe that facilities that are already using arbitration agreements post some type of notice. Thus, there is no burden associated with the posting of this notice.").

Yet CMS has not provided any convincing authority to suggest that an agency may satisfy its requirements under § 605(b) by relying on factual bases sprinkled throughout the Federal Register. Indeed, the plain language of the statute suggests that the certification and corresponding factual basis should be supplied by the agency in tandem. See 5 U.S.C. § 605(b) ("If the head of the agency makes a certification . . . , the agency shall publish such certification in the Federal Register . . . *along with* a statement providing the factual basis for such certification." (emphasis added)). And the cases cited by CMS do not establish that we may consider the "entire administrative record," expansively defined to include the record of a precedent rule, to determine that CMS satisfied its procedural obligations under the RFA.

For example, CMS relies upon Michigan v. Thomas to argue that we must analyze Northport's RFA claim in "the context of [CMS's] overall rulemaking analysis." 805 F.2d 176, 188 (6th Cir. 1986). But in Thomas, the Environmental Protection Agency (EPA) expressly cited in its challenged rule a previous notice that

categorically certified that rules of that type (i.e., approvals of State Implementation Plans) would not affect small entities because they stood only to approve state regulations already in place. Id. at 187–88; see also Council for Urological Interests v. Burwell, 790 F.3d 212, 227 (D.C. Cir. 2015) (upholding certification as sufficient where HHS expressly incorporated the rule's preamble into its RFA analysis). Similarly, CMS relies upon Carpenter, Chartered v. Secretary of Veterans Affairs to argue we must assess compliance with the RFA "in view of the record as a whole," including the administrative record of the Original Rule. 343 F.3d at 1357. But there, the Federal Circuit found that the Department of Veterans Affairs (DVA) satisfied § 605(b) because it expressly noted, when certifying that a regulatory flexibility analysis was unwarranted, that the rule would "affect only the processing of claims." See id. at 1356 (quoting 67 Fed. Reg. at 36,104). Moreover, the court looked to the record as a whole *not* to find whether the DVA provided a factual basis at all but rather to assess whether the DVA's certification was reasonable in light of the factual basis it provided. See id. at 1357. California Farm Bureau Federation v. U.S. E.P.A. is similarly not on point. 72 F. App'x 540 (9th Cir. 2003). There, although the court mentioned in passing that the EPA's certification "was supported by [the] EPA's earlier impact analysis," it more importantly noted that the EPA provided a factual basis along with its certification that the rule would not have a significant economic impact on a substantial number of small entities. Id. at 541 (noting that the "EPA reasoned that few agricultural operations that qualify as a small business for purposes of the Act will also qualify as a major source of pollution," the subject of the challenged regulation).

Thus, looking to the Revised Rule and the certification provided therein, we conclude that CMS failed to comply with the procedural requirements of the RFA. However, we conclude that such an error is harmless. See Env't Def. Ctr. v. U.S. E.P.A., 344 F.3d 832, 879 (9th Cir. 2003); cf. Nat'l Mining Ass'n v. Mine Safety & Health Admin., 512 F.3d 696, 701 (D.C. Cir. 2008) (finding that the agency did not need to certify under § 605(b) that an alternative method of compliance did not create

a significant economic burden on small businesses because the agency had already determined that the *primary* method of compliance did not). "Failure to comply with the RFA may be, but does not have to be, grounds for overturning a rule." Cement Kiln Recycling Coalition v. E.P.A., 255 F.3d 855, 868 (D.C. Cir. 2001) (cleaned up). In granting relief for a violation of the RFA, we may take corrective actions, including "remanding the rule to the agency" to conduct a regulatory flexibility analysis under § 604(a) or to properly certify that such an analysis is unwarranted under § 605(b). 5 U.S.C. § 611(a)(4)(A). But such a remedy is unnecessary because, as a factual matter, the Revised Rule unquestionably has less of an economic impact than the Original Rule had.

Recall that the Original Rule entirely prohibited LTC facilities from entering into pre-dispute, binding arbitration agreements with residents. See 81 Fed. Reg. at 68,690. In promulgating the Original Rule and pursuant to the RFA, CMS certified that the entire rule—encompassing not only the arbitration prohibition but also regulations impacting, among other things, resident rights, nursing services, food and nutrition services, and infection control—would not result in a significant economic impact to LTC facilities, costing them less than one percent of their annual revenue. See 81 Fed. Reg. at 68,846; see also id. at 68,844 tbl.5 (breaking out by category the estimated costs to LTC facilities attributable to the Original Rule's regulations). In contrast, the Revised Rule *permits* LTC facilities to enter into arbitration agreements with residents so long as they meet the rule's other requirements, allowing facilities to reduce their overall costs by using arbitration as a means of dispute resolution. See 84 Fed. Reg. at 34,733–34. Accordingly, the Revised Rule *lessens* whatever financial burden was placed on LTC facilities by the Original Rule, an obvious factual basis for CMS's certification that the rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. § 605(b).

Therefore, although CMS failed to provide a factual basis in support of its § 605(b) certification in the Revised Rule, we conclude that failing to do so was harmless error.

III. Conclusion

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of HHS and CMS.
