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Parties' Defenses to Binding Arbitration Agreements in the Health Care Field & the Operation of the McCarran-Ferguson Act Comment.

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PARTIES' DEFENSES TO BINDING ARBITRATION AGREEMENTS IN THE HEALTH CARE FIELD & THE OPERATION OF THE MCCARRAN-FERGUSON ACT

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I. Introduction

For nearly a century, courts and legislatures have used arbitration as a means to resolve disputes between parties quickly, efficiently, and

cheaply.[1] "Arbitration is a process that allows parties voluntarily to refer their disputes to an impartial third person, an arbitrator, selected by them to determine the parties' rights and liabilities."[2] Initially, arbitration was encouraged for use primarily in commercial contexts between big businesses and those with equal bargaining power.[3] However, due to the federal policy favoring arbitration,[4] the use of predispute arbitration agreements has increased dramatically, and arbitration clauses can now be found in many noncommercial consumer contracts, including those in the health care industry.[5]

Ultimately, the strong federal policy favoring arbitration originated with Congress's passing of the Federal Arbitration Act (FAA).[6] In 1925, Congress enacted the FAA in an attempt to ease judicial hostility towards

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1. *See, e.g.*, Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 400-01 (1998) (indicating that arbitration has been referred to as the preferred method of dispute resolution between two parties of equal bargaining power because of the belief that it is "more efficient than litigation, less costly[,] and a better process for parties with continuing business relationships").

2. Charles Davant IV, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 524 (2001).

3. *See* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 400-01 (1998) (asserting that "[w]hen the FAA was enacted, arbitration was occurring primarily in the commercial context between business persons of equal bargaining power").

4. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (expressing that questions regarding the enforceability of an arbitration agreement must be considered "with a healthy regard for the federal policy favoring arbitration"); *see also* Commercial Union Ins. Co. v. Gilbane Bldg. Co., 992 F.2d 386, 388 (1st Cir. 1993) (noting the "strong federal policy favoring arbitration agreements").

5. *See* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 401-02 (1998) (proclaiming that "[i]t is the Supreme Court's expansive interpretation of the FAA that has fueled the widespread use of predispute arbitration clauses" in a number of noncommercial consumer contracts and, furthermore, finding predispute arbitration clauses evident in a range of contracts from employment contracts and investment contracts to health care contracts); *see also* Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L.J. 45, 89 (2000) (stating that "in light of future direction for medical malpractice in the new millennium, arbitration may play a stronger role as more corporate entities become involved in the malpractice process").

6. 9 U.S.C. §§ 1-16 (2000 & Supp. II 2001-2003) (declaring that "an agreement in writing to submit to arbitration an existing controversy arising out of" a written contract involving interstate commerce or maritime transactions is valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract"); *see also* Perry v. Thomas, 482 U.S. 483, 489 (1987) (reiterating that when Congress enacted section 2 of the FAA, it established a national policy favoring arbitration); *Moses H. Cone Mem'l Hosp,* 460 U.S. at 24 (affirming that "[s]ection 2 [of the FAA] is a congressional declaration

arbitration agreements and to make predispute arbitration agreements enforceable.[7] Under the FAA, an agreement to arbitrate is enforceable if it is written, involves interstate commerce, and can withstand scrutiny under traditional state contract law defenses.[8] Generally, the FAA applies to all agreements involving interstate commerce, and the term commerce is broadly construed.[9] Therefore, based upon the broad interpretation of the FAA and the operation of the Supremacy Clause,[10] the FAA applies in state court proceedings to preempt conflicting state law.[11]

Under Texas law, chapter 74 of the Texas Civil Practice and Remedies Code contains a mandatory notice provision for arbitration agreements

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of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

7. *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89 (2000) (restating that Congress's purpose in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts" (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991))); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (asserting that the "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so"); Charles Davant IV, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 525-26 (2001) (declaring that by enacting the FAA in 1925, Congress sought to remedy the unenforceability of predispute arbitration agreements).

8. *See* Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984) (declaring that "[w]e discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract'" (quoting Federal Arbitration Act, 9 U.S.C. § 2 (2000))); *see also In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005) (indicating that the factors used in determining whether the FAA preempts state law "are whether[:] (1) the agreement is in writing[;] (2) it involves interstate commerce[;] (3) it can withstand scrutiny under traditional contract defenses[;] and (4) state law affects the enforceability of the agreement").

9. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 275 (1995) (asserting that a broad interpretation of interstate commerce "is consistent with the Act's basic purpose," to place arbitration clauses on equal footing with other contract provisions); *Perry*, 482 U.S. at 490 (stating that the FAA "embodies Congress'[s] intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause"); *Keating*, 465 U.S. at 11 (indicating that the FAA is subject to a "broad principle of enforceability"); *In re Nexion Health*, 173 S.W.3d at 69 (concluding that because "commerce" is to be construed broadly, evidence of Medicare payments to the nursing home is sufficient to show interstate commerce).

10. *See* U.S. CONST. art. VI, cl. 2 (stating that "the laws of the United States . . . shall be the supreme law of the land").

11. *Keating*, 465 U.S. at 14, 16; *accord* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 440-41 (1998).

which is required to bind health care liability claims to arbitration.[12] Section 74.451 mandates written notice from health care providers indicating that an agreement to arbitrate is void and unenforceable without an attorney's signature.[13] However, due to the Supremacy Clause, state and federal courts have asserted that the FAA preempts this state law requirement which favors plaintiffs and precludes binding arbitration of agreements lacking an attorney signature.[14] Despite the inevitable preemption of state law, opponents and patients continue to seek new ways to avoid binding arbitration.[15]

Primarily, opponents have sought protection against binding arbitration from the language of the FAA itself, which allows predispute arbitration agreements to be invalidated by the application of general state contract law principles.[16] Opponents of binding arbitration in the health care field have attempted to render agreements unenforceable by label-

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12. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.451 (Vernon 2005) (indicating that no physician or health care provider shall "require a patient . . . to execute an agreement to arbitrate a health care liability claim unless the form of the agreement delivered to the patient contains a written notice in 10-point boldface type clearly and conspicuously stating" that the agreement is null and void without an attorney's signature).

13. *Id.*

14. *See, e.g., In re Nexion Health*, 173 S.W.3d at 69 (asserting that because the state law notice provision, requiring an attorney's signature in personal injury cases, conflicts with federal arbitration law, federal law controls and preempts state law); *see also* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 398 (2004) (emphasizing that according to *Keating*, section 2 of the FAA applies in state courts and operates to preempt conflicting state law).

15. *See* Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 971 (2004) (noting that opponents of binding arbitration often attempt to invalidate arbitration agreements as being unconscionable adhesion contracts); *see also* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 403 (1998) (asserting that judges and plaintiffs are hostile to arbitration, and that unless the arbitration agreement is mutually desired, "[j]udges and state legislatures will continue to look for ways to protect parties from arbitration and predispute arbitration clauses, and the arbitration process will be further undermined").

16. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2000) (declaring that arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) (expressing that "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract'" (quoting Federal Arbitration Act, 9 U.S.C. § 2 (2000))); *Keating*, 465 U.S. at 16 n.11 (stating that "a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement").

ing them as unconscionable,[17] non-binding on a non-signatory,[18] or invalid due to lack of intent.[19] However, due to the federal pro-arbitration policy, conflicting interpretation of state law contract defenses, and health care providers' ability to contract around plaintiffs' defenses, these means have become increasingly limited in their success.[20]

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17. *See* Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 981 (2004) (proclaiming that patients in health care contracts generally make one of five arguments when attacking arbitration clauses on the basis of unconscionability: (1) the patient was coerced to sign the arbitration agreement seeing as there was "no meaningful choice because the service at the heart of the contract was public or essential;" (2) the arbitration clause is non-mutual, binding to one party but not to the other; (3) the arbitration process is too costly for the individual to participate; (4) lack of an independent or neutral arbitrator; or (5) the arbitration clause is unreasonable because it reduces the individuals rights to things like remedies); *see also* David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 142 (1998) (noting that "arbitration agreements relating to health care undergo careful scrutiny from the courts, and are typically attacked by patients on the grounds that the agreement is a contract of 'adhesion' and is unconscionable").

18. *See In re* Kepka, 178 S.W.3d 279, 294 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (upholding plaintiff's claim that she was not bound by the arbitration agreement as a non-signatory because she "did not sign the arbitration agreement in her individual capacity," and because plaintiff brought the wrongful death claim "in her individual capacity for damages personal to her").

19. *See* Keymer v. Mgmt. Recruiters Int'l, Inc., 169 F.3d 501, 504 (8th Cir. 1999) (stating that "the FAA's pro-arbitration policy does not operate [without] regard to the intent of the contracting parties, for arbitration is a matter of consent, not coercion"). In *Keymer*, the court interpreted the agreement to arbitrate in accordance with the parties' intentions, and based upon an exclusionary clause, concluded that plaintiff never "agreed to arbitrate his age discrimination claims." *Id.* at 505-06; *see also* AT&T Techs. Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) (declaring that arbitration is merely "a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960))).

20. *See* Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157, 162-64 (2d Cir. 1998) (finding the provision requiring arbitration in a distant location not to be unconscionable); U.S. Fid. & Guar. Co. v. W. Point Constr. Co., 837 F.2d 1507, 1508 (11th Cir. 1998) (declaring that the parties intended to arbitrate claims); Young v. Jim Walter Homes, Inc., 110 F. Supp. 2d 1344, 1347-51 (M.D. Ala. 2000) (asserting that because the plaintiffs did not meet their burden of proving that the arbitration agreement was unconscionable, the arbitration agreement was valid and enforceable); Pridgen v. Green Tree Fin. Servicing Corp., 88 F. Supp. 2d 655, 658-59 (S.D. Miss. 2000) (rejecting plaintiff's claim that the arbitration clause was substantively unconscionable solely because it was one-sided and lacked mutuality of obligation); Sanchez v. Sirmons, 467 N.Y.S.2d 757, 759 (App. Div. 1983) (concluding that the arbitration agreement was not a contract of adhesion because it was not offered to plaintiff on a take it or leave it basis, and plaintiff could have sought care elsewhere due to the lack of emergency in treatment); Buraczynski v. Erying, 919 S.W.2d 314, 321 (Tenn. 1996) (compelling arbitration between a physician and a patient, notwithstand-

In addition to state contract law principles, plaintiffs have recently discovered another method to avoid binding arbitration of health care liability claims. In a recent Houston [1st District] Court of Appeals decision, *In re Kepka*,[21] the court granted state law immunity from FAA preemption through the application of the McCarran-Ferguson Act.[22] The McCarran-Ferguson Act,[23] a federal law passed for the purposes of restoring state supremacy in the area of insurance,[24] applies to prevent federal preemption of conflicting state law where the state law is enacted for the purpose of regulating insurance.[25] In *Kepka*, the court held that the state law notice provision, required under the Medical Liability and Insurance Improvement Act of Texas (Texas Act),[26] was enforceable and immune from FAA preemption due to reverse preemption of the FAA by the McCarran-Ferguson Act.[27] The *Kepka* Court indicated that since the Texas Act, containing the arbitration provision, was passed "for the purpose of regulating the business of insurance," state law controlled.[28] Although article 4590i, section 15.01 of the Texas Act has been re-codified,[29] this "business of insurance" exception could potentially apply to plaintiffs

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ing that the arbitration agreement was contained in an adhesion contract presented to the plaintiff on a take it or leave it basis, because the contract had numerous procedural safeguards in place, rendering the agreement as fair between the parties).

21. 178 S.W.3d 279 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

22. *Id.* at 289 (discussing that since article 4590i of the Medical Liability and Insurance Improvement Act of Texas was passed "for the purpose of regulating the business of insurance[,]" state law controlled and the McCarran-Ferguson Act prevented the FAA from preempting conflicting state law); *see also* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000) (declaring that the states have the sole authority to tax and regulate the business of insurance).

23. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000).

24. *See* U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 499-500 (1993) (stating that Congress "enacted the McCarran-Ferguson Act within a year of the [Supreme Court's] decision in *South-Eastern Underwriters*" to restore state supremacy to the area of insurance regulation).

25. *See* Munich Am. Reinsurance Co. v. Crawford, 141 F.3d 585, 590 (5th Cir. 1998) (stating that "[b]y its terms, the Act permits a state law to reverse [preempt] a federal statute only if: (1) the federal statute does not specifically relate to the 'business of insurance'[;] (2) the state law was enacted for the 'purpose of regulating the business of insurance'[;] and (3) the federal statute operates to 'invalidate, impair, or supersede' the state law").

26. Medical Liability and Insurance Improvement Act, 65th Leg., R.S., ch. 817, § 15.01, 1977 Tex. Gen. Laws 2039, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

27. *Kepka*, 178 S.W.3d at 292-93.

28. *Id.*

29. Medical Liability and Insurance Improvement Act, 65th Leg., R.S., ch. 817, § 15.01, 1977 Tex. Gen. Laws 2039 (repealed 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 74.451 (Vernon 2005)).

under the current statute and serve as a means to defeat binding arbitration.[30]

Regardless of the avoidance method, opponents to binding arbitration in the health care field assert that the national policy favoring arbitration has swept too far.[31] Many argue that the application of binding arbitration in the health care industry runs contrary to the original goals asserted by the FAA drafters.[32] Opponents advocate that when formulating the FAA, the drafters did not intend for binding arbitration to affect those in non-commercial contexts with unequal bargaining power.[33] Despite these contentions, proponents argue that the advantages of binding arbitration agreements greatly outweigh the disadvantages and justify their application in the heath care field, especially in light of the escalating costs of medical liability insurance.[34]

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30. *See* Jennifer Nicole Taylor, Recent Development, Erickson v. Aetna Health Plans of California, Inc.: *When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. ST. U. L. REV. 257, 282 (2000-2001) (urging plaintiffs to challenge the application of the FAA by way of the McCarran-Ferguson Act).

31. *See* Charles Davant IV, Note, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 559 (2001) (advocating that "[w]hen Congress enacted the Federal Arbitration Act in 1925, the Act was understood to be a procedural statute that supplemented—not supplanted—state contract law"). "During the last thirty years, the Supreme Court has recast the Act as a national regulatory statute that leaves little role for state law." *Id.*

32. *See* Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 547 (2005) (proclaiming that the drafters' original aim in enacting the FAA was to make binding and enforceable arbitration agreements that "were freely and knowingly entered into between parties of equal bargaining power[,]" but also stating that "[t]his rather straight-forward aim has been distorted to permit arbitration to displace court proceedings without knowledge or consent of the weaker party"); *see also* Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 969-70 (2004) (noting that "[c]ritics often say that when patients forgo their right to sue, the health care industry strips them of a valuable right at a time when they might be at their most vulnerable").

33. *See* Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 547 (2005) (emphasizing that the FAA drafters' original aim was to make arbitration agreements that "were freely and knowingly entered into between parties of equal bargaining power to be enforced by courts, just like other contracts").

34. *See* Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L.J. 45, 90 (2000) (asserting that "[w]hile arbitration is no panacea for the now chronic ills of the medical malpractice system, it has shown to be [an] effective and efficient tool when used to resolve medical malpractice claims"); David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 136 (1998) (reporting that "the continuing increase in the number of medical malpractice suits in recent years, combined with the time and expense associated with prolonged court adjudication, has led both patients and health care providers to search for an effective method for resolving these disputes"). "Increases in the price of

This Comment examines the avenues used by plaintiffs to preclude binding arbitration and the application of the FAA pertaining to health care liability claims. Furthermore, this Comment intends to point out the inconsistencies in how courts apply plaintiffs' defenses to FAA preemption. Part II provides a basic background of the FAA, the Texas arbitration notice provision, and their interplay. Part III analyzes the application of plaintiffs' defenses to FAA preemption, general state contract law principles, and the McCarran-Ferguson Act, while pointing out inconsistencies and deficiencies in their treatment. Finally, Part IV addresses the advantages and disadvantages of arbitration in the medical field in an attempt to discern whether arbitration is worth fighting for, and to promote judicial awareness of much needed reform.

II. BACKGROUND

A. *Applicable Law Governing Arbitration Agreements*

1. The Federal Arbitration Act

Congress enacted the Federal Arbitration Act (FAA) in 1925 to make written predispute arbitration provisions in maritime transactions and contracts involving interstate commerce enforceable.[35] Based on the idea that arbitration would be faster, cheaper, and more efficient than litigation, Congress, through the FAA, sought to cure judicial hostility towards arbitration.[36] Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving [interstate] 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,

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health care, contributed to by the cost of court adjudication and large jury verdicts in medical malpractice actions, have resulted in a focus on arbitrating medical malpractice disputes as part of the solution to the 'health care crisis.'" *Id.*; *see also* Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 994 (2004) (stating that arbitration may be beneficial for all parties in the health care industry in the long run, but advising health care providers to "take steps to safeguard due process as well as to educate patients and consumers about the benefits of arbitration over litigation").

35. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2000) (declaring that a written provision to arbitrate, in maritime transactions or contracts involving interstate commerce, shall be valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract").

36. *See* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 399-401 (1998) (advocating that, at the time of the FAA's enactment, arbitration was "believed to be more efficient than litigation, less costly and a better process for parties with continuing business relationships").

> or an agreement in writing to submit to arbitration an existing controversy arising out of such 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.[37]

The Supreme Court has declared that Congress's purpose in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."[38] Congress sought to achieve two goals under the FAA: (1) to cure disparity in the treatment of arbitration agreements and (2) to promote arbitration between two commercial parties with equal bargaining power.[39]

Subsequently, the Supreme Court has interpreted the FAA as a body of substantive law enacted pursuant to Congress's Commerce Clause power,[40] enforceable in both state and federal courts.[41] In *Southland Corp. v. Keating*,[42] the Supreme Court noted that by enacting section 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 which the contracting parties agreed to resolve by arbitration."[43] Furthermore, the Supreme Court has declared that section 2 of the FAA "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable 'upon such grounds as exist at law or in equity

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37. Federal Arbitration Act, 9 U.S.C. § 2 (2000).

38. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89 (2000) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

39. *See* Keymer v. Mgmt. Recruiters Int'l, Inc., 169 F.3d 501, 504 (8th Cir. 1999) (indicating that Congress's purpose in enacting the FAA "was to reverse judicial hostility to arbitration agreements and to place arbitration agreements on equal footing with other contracts").

40. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (holding that the FAA was enacted under Congress's broad Commerce Clause power); *see also* U.S. CONST. art. I, § 8, cl. 3 (declaring that Congress has the power to regulate commerce).

41. *See* Southland Corp. v. Keating, 465 U.S. 1, 11-12 (1984) (asserting that the FAA is a body of substantive law, enacted pursuant to the Commerce Clause, that is enforceable in both state and federal courts); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (expressing that the effect of section 2 of the FAA was "to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act"); Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 338 (1996) (indicating that "[t]he Supreme Court held that the purpose of the FAA was to create a body of federal substantive law that governs in both state and federal courts").

42. 465 U.S. 1 (1984).

43. *Keating*, 465 U.S. at 10 (stating the purpose and effects of Congress's passing of the FAA).

for the revocation of any contract.'"[44] Thus, through endorsement of the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[45]

2. Texas Civil Practice and Remedies Code Section 74.451

Chapter 74 of the Texas Civil Practice and Remedies Code regulates procedural and substantive issues regarding the litigation of medical malpractice claims.[46] Passed in 2003 as a response to the enormous rise in medical malpractice claims,[47] chapter 74 contains a mandatory notice provision for arbitration agreements involving health care liability claims.[48] Section 74.451 of the code states:

> 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 an attorney.[49]

Initially contained in article 4590i, section 15.01 of the Texas Act,[50] this mandatory notice provision now appears in section 74.451 of the Texas Civil Practice and Remedies Code.[51]

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44. Perry v. Thomas, 482 U.S. 483, 489 (1987).

45. *Keating*, 465 U.S. at 16.

46. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001-.507 (Vernon 2005 & Vernon Supp. 2006) (imposing time limits for expert reports, discovery limitations, and qualifications for expert witnesses, to be used in suits against physicians and health care providers).

47. *See Tex. H.B. 4, Senate Special Comm. on Prompt Pay of Health Care Providers, Interim Report to the 78th Leg.*, 78th Leg., R.S. 2.22 (Nov. 2002), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 1, ex. 1 (2003) (discussing the issues arising from the large increase in medical malpractice claims, and posing potential solutions towards the resolution of those problems).

48. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.451 (Vernon 2005) (declaring that arbitration agreements in the health care field must contain an attorney's signature in order to be valid and enforceable).

49. *Id.*

50. *See* Act of May 31, 1993, 73rd Leg., R.S., ch. 625, § 15.01, 1993 Tex. Gen. Laws 2347, 2349-50, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 (identifying the legislation that led to the current mandatory notice provision in Texas).

51. *See* Act of May 31, 1993, 73rd Leg., R.S., ch. 625, § 15.01, 1993 Tex. Gen. Laws 2347, 2349-50 (repealed 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN.

B. *Preemption: Which Law Controls, the FAA or Chapter 74?*

1. History and Requirements for FAA Preemption

The FAA governs arbitration disputes and preempts conflicting state law in nearly every situation.[52] Following the Supreme Court's decisions in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[53] and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[54] the Supreme Court in *Southland Corp. v. Keating* concluded that the FAA applies in state courts and operates to preempt conflicting state law.[55] Accordingly, the Supreme Court's broad interpretation of the FAA has caused state arbitration law to yield to federal supremacy.[56] The factors which determine whether the FAA overrides state law "are whether (1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses, and (4) state law

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§ 74.451 (Vernon 2005)) (emphasizing the location of the current mandatory notice statute in Texas).

52. *See* Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 536-37 (2005) (advocating that the Supreme Court has greatly expanded the scope of the FAA five ways: (1) by announcing "a federal policy favoring arbitration and requiring that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'"; (2) by holding "that the FAA's coverage extends to the full extent of Congress'[s] power under the [C]ommerce [C]lause"; (3) by indicating "that the FAA applies to actions brought in state court"; (4) by finding "that even statutory rights . . . are arbitrable"; and (5) by declaring that the FAA preempts "state laws protective of weaker parties subject to pre-dispute arbitration clauses in adhesion contracts" (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983))).

53. 388 U.S. 395 (1967).

54. 460 U.S. 1 (1983).

55. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (concluding that the FAA applies to state court proceedings and operates to preempt conflicting state law); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24 (outlining that "[t]he effect of [section 2 of the FAA] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act"); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (acknowledging that the FAA was enacted under Congress's broad Commerce Clause power); *see also* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 399 (2004) (advocating that "[t]he Supreme Court first held that the FAA applies in state court and preempts conflicting state laws in *Southland Corp. v. Keating*"); Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 440 (1998) (indicating that the FAA's supremacy and preemption over state law was not evident until the Supreme Court's decision in *Southland Corp. v. Keating*).

56. *See* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 460 (1998) (noting that "[t]he Court's expansive reading of the FAA and its willingness to interpret it in a manner to give effect to the broad purposes the Court attributed to it made the FAA's application in state court proceedings an almost foregone conclusion").

affects the enforceability of the agreement."[57] Typically, the FAA applies to all agreements involving interstate commerce, and the term commerce is broadly construed.[58] The Supreme Court has declared that a broad interpretation of interstate commerce under the FAA "embodies Congress'[s] intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause."[59] Additionally, there exists a strong federal policy favoring arbitration and any doubts regarding the scope of arbitration agreements are "resolved in favor of arbitration."[60]

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57. *In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005); *see also* Federal Arbitration Act, 9 U.S.C. § 2 (2000) (declaring that arbitration agreements are valid and enforceable if they are written and involve either interstate commerce or a maritime transaction, "save upon such grounds as exist at law or in equity for the revocation of any contract"); *Keating*, 465 U.S. at 10-11 (announcing that there are "only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract'" (quoting Federal Arbitration Act, 9 U.S.C. § 2 (2000))).

58. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24-26 (1991) (discussing the broad interpretation of commerce under the Commerce Clause); *see also Keating*, 465 U.S. at 11 (expressing that the FAA is subject to a "broad principle of enforceability"). *See generally In re Nexion Health*, 173 S.W.3d at 69 (finding that because Medicare reimbursed the nursing home for expenses incurred by plaintiff, the arbitration agreement involved interstate commerce).

59. Perry v. Thomas, 482 U.S. 483, 490 (1987); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 275 (1995) (proclaiming that a broad interpretation of interstate commerce is "consistent with the Act's basic purpose," to place arbitration clauses on equal footing with other contract provisions).

60. *E.g., Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (stating that any doubts regarding the scope of issues concerning arbitration should be resolved favoring arbitration); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) (commenting that "it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act"); *Keating*, 465 U.S. at 2 (stating that "[i]n enacting [section] 2 of the federal Act, 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 the contracting parties agreed to resolve by arbitration"); Fazio v. Lehman Bros., 340 F.3d 386, 392 (6th Cir. 2003) (noting that "[i]t is a well-established rule that any doubts regarding arbitrability should be resolved in favor of arbitration"); Commercial Union Ins. Co. v. Gilbane Bldg. Co., 992 F.2d 386, 388 (1st Cir. 1993) (recognizing the "the strong federal policy favoring arbitration agreements"); Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Health Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 976 (2004) (indicating that "[c]ourts have consistently acknowledged that Congress created a strong federal policy that favors arbitration agreements through the language of the FAA"); David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 137-38 (1998) (advocating that "most courts now inter-

2. Preemption Today

Following Congress's enactment of the FAA and the Supreme Court's subsequent determination that the FAA preempts conflicting state law, the Supreme Court has nonetheless continued "to expand the scope and reach of the Federal Arbitration Act."[61] Therefore, in regards to health care liability claims in Texas, federal law likely controls.[62] Despite arguments that "[t]he Court's continued willingness to find that the FAA preempts state arbitration law is strikingly contrary to the deference the Court has otherwise shown to state sovereignty in other areas of law," federal and state courts continue to broaden the scope of the FAA.[63] Nevertheless, opponents of binding arbitration have discovered ways to preclude binding arbitration under the FAA by relying on general state contract law defenses[64] and the operation of the federal McCarran-Ferguson Act.[65]

C. *Plaintiffs' Defenses to FAA Preemption*

1. The McCarran-Ferguson Act

Congress enacted the McCarran-Ferguson Act in 1945 as a response to the Supreme Court's holding in *United States v. South-Eastern Underwriters Ass'n.*[66] Prior to *South-Eastern Underwriters*, it was assumed that dis-

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pret arbitration agreements similarly to other contracts, with any doubts resolved in favor of arbitration").

61. Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 398 (1998).

62. *See* David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 160-61 (1998) (asserting that "given the broad language of the FAA, and the strong federal policy favoring arbitration, . . . [medical arbitration agreements] will most likely be found to affect interstate commerce[,]" and that "these provisions will likely fall under the purview of federal law (the FAA), and may be enforced in a state or federal court").

63. Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 400 (1998).

64. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (emphasizing that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [section 2 of the FAA]").

65. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000).

66. 322 U.S. 533, 581-83 (1944) (declaring that under the Commerce Clause, Congress has the power to regulate insurance); *see also* U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 500 (1993) (stating that Congress "enacted the McCarran-Ferguson Act within a year of the decision in *South-Eastern Underwriters*"); Sec. & Exch. Comm'n v. Nat'l Sec., Inc., 393 U.S. 453, 459 (1969) (asserting that the McCarran-Ferguson Act was passed as an attempt

tributing a policy of insurance was not a dealing of commerce subject to federal regulation.[67] Thus, control and regulation over the insurance industry was thought to be held exclusively by the states, not subject to federal restraint.[68] However, state supremacy over the insurance industry was inevitably challenged due to the Court's mounting interpretation of the bounds of the Commerce Clause.[69] Consequently, in *South-Eastern Underwriters*, the Supreme Court concluded "that an insurance company that conducted a substantial part of its business across state lines was engaged in interstate commerce and thereby was subject to the antitrust laws."[70] Many perceived the holding of *South-Eastern Underwriters* as a threat on the state's authority "to tax and regulate the insurance industry."[71] Within a year of the *South-Eastern Underwriters* decision, Con-

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to remedy the perceived threat on state supremacy in the area of insurance, arising after the Supreme Court's decision in *South-Eastern Underwriters*); Risk Managers Int'l, Inc. v. State, 858 S.W.2d 567, 573 (Tex. App.—Austin 1993, writ denied) (noting that Congress enacted the McCarran-Ferguson Act in 1945); Jennifer Nicole Taylor, Recent Development, Erickson v. Aetna Health Plans of California, Inc.: *When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. ST. U. L. REV. 257, 271 (2000-2001) (indicating that "[t]he McCarran-Ferguson Act grew out of tension between Congress and the United States Supreme Court over the Court's 1944 ruling in *United States v. South-Eastern Underwriters [Ass'n]*"). *See generally* McCarran-Ferguson Act, 15 U.S.C. § 1011 (2000) (declaring that the states have the sole power to regulate and tax the "business of insurance").

67. *Nat'l Sec.*, 393 U.S. at 458.

68. *Id.*; *see also Fabe*, 508 U.S. at 499 (indicating that before the decision in *South-Eastern Underwriters*, "the [s]tates enjoyed a virtually exclusive domain over the insurance industry" (quoting St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 539 (1978))).

69. *See Fabe*, 508 U.S. at 499 (asserting that due to "[t]he emergence of an interconnected and interdependent national economy," the limits of the Commerce Clause were ultimately broadened). *See generally* United States v. Simpson, 252 U.S. 465, 466-67 (1920) (indicating that the private transportation of whiskey across state lines constitutes interstate commerce); Lottery Case, 188 U.S. 321, 329-30 (1903) (declaring that the movement of lottery tickets across state borders was within the bounds of the Commerce Clause); Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1, 9-10 (1877) (finding the transmission of electrical telegraph communications across state boarders to be within the limits of the Commerce Clause).

70. *Fabe*, 508 U.S. at 499; *see also Nat'l Sec.*, 393 U.S. at 458 (indicating that the Court in *South-Eastern Underwriters* "held that insurance transactions were subject to federal regulation under the Commerce Clause").

71. *Fabe*, 508 U.S. at 499-500; *see also* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 218 n.18 (1979) (asserting that "[t]he power of the [s]tates to regulate and tax the insurance companies was threatened after [*South-Eastern Underwriters*], because of its holding that insurance companies are in interstate commerce"); *Nat'l Sec.*, 393 U.S. at 459 (asserting that the decision in *South-Eastern Underwriters* "threatened the continued supremacy of the [s]tates" in the area of insurance regulation).

gress enacted the McCarran-Ferguson Act to quell these fears and to restore state supremacy to the area of insurance regulation.[72]

The purpose of the McCarran-Ferguson Act is clearly set forth on its face.[73] Section 1011 of the Act provides:

> Congress hereby declares that the continued regulation and taxation by the several [s]tates of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several [s]tates.[74]

It is evident through the enactment of the McCarran-Ferguson Act that Congress sought to restore state supremacy to the area of insurance regulation and taxation.[75] Congress strove to achieve this purpose in two ways: first, by "removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation," and second, by "declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects."[76] Accordingly, the Supreme Court has construed the McCarran-Ferguson Act as one which eliminates Commerce Clause restrictions on the states ability to tax and regulate the business of insurance.[77]

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72. *Fabe*, 508 U.S. at 500; *see also Nat'l Sec.*, 393 U.S. at 458 (advocating that "Congress reacted quickly" to the decision in *South-Eastern Underwriters*). "Even before the opinion [in *South-Eastern Underwriters*] was announced, the House had passed a bill exempting the insurance industry from the antitrust laws." *Nat'l Sec.*, 393 U.S. at 458. Although the Senate eventually quashed the bill, "[t]he McCarran-Ferguson Act was the product of this concern." *Id.* "The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *Id.* at 459.

73. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000) (declaring that the states shall have the sole power to regulate and tax the insurance industry); *see also Nat'l Sec.*, 393 U.S. at 458 (asserting that the purpose of the McCarran-Ferguson Act is "stated quite clearly in its first section"); Risk Managers Int'l, Inc. v. State, 858 S.W.2d 567, 573 (Tex. App.—Austin 1993, writ denied) (reiterating the purpose of the McCarran-Ferguson Act as stated within its text).

74. McCarran-Ferguson Act, 15 U.S.C. § 1011 (2000).

75. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30 (1946).

76. *Id.*

77. W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 653 (1981); *see also* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 218 n.18 (1979) (emphasizing that "[t]he *primary* purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies," and further, asserting that "[t]he McCarran-Ferguson Act operates to assure that the [s]tates are free to regulate insurance companies without fear of Commerce Clause attack"); State Bd. of Ins. v. Todd Shipyards

In normal circumstances, federal law preempts inconsistent state law by operation of the Supremacy Clause.[78] However, in "cases involving state regulation of the insurance industry," the McCarran-Ferguson Act operates to reverse-preempt federal law, which attempts to encroach on the state's authority to regulate the business of insurance.[79] When determining whether the McCarran-Ferguson Act and reverse preemption apply, a court should look to the language of the Act itself.[80] From its text, the McCarran-Ferguson Act proclaims that "[n]o Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any [s]tate for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance."[81] Based on its terms, "[t]he Fifth Circuit has [applied] a three-part test for McCarran-Ferguson reverse preemption."[82] State law is said to reverse-preempt conflicting federal law by operation of the McCarran-Ferguson Act "only if: (1) the federal statute does not specifically relate to the 'business of insurance'[;] (2) the state law was enacted for the 'purpose of regulating the business of insurance'[;] and (3) the federal statute operates to 'invalidate, impair, or supersede' the state law."[83]

Though the requirements for reverse preemption are clearly set forth on the face of the McCarran-Ferguson Act, "courts have ruled inconsistently on its application" and have attained "differing conclusions over whether the McCarran-Ferguson Act precludes Federal Arbitration Act preemption."[84] Some have expressed that the problem of inconsistent

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Corp., 370 U.S. 451, 452 (1962) (declaring that "by force of the McCarran-Ferguson Act, we upheld the continued taxation and regulation by the [s]tates of interstate insurance transactions"); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 319 (1955) (affirming that "the McCarran Act[ ] was designed to assure that existing state power to regulate insurance would continue"); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946) (asserting that "[o]bviously Congress'[s] purpose [in enacting the McCarran-Ferguson Act] was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance"); Munich Am. Reinsurance Co. v. Crawford, 141 F.3d 585, 590 (5th Cir. 1998) (indicating that Congress specifically enacted the McCarran-Ferguson Act to reassign to the states "broad and primary responsibility for regulating the insurance industry").

78. *Munich Am. Reinsurance Co.*, 141 F.3d at 590; *see also* U.S. CONST. art. VI, cl. 2 (mandating that federal law is the supreme law and therefore trumps conflicting state law).

79. *Munich Am. Reinsurance Co.*, 141 F.3d at 590.

80. *Group Life & Health Ins. Co.*, 440 U.S. at 210.

81. McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (2000).

82. Bodine v. Webb, 992 S.W.2d 672, 677 (Tex. App.—Austin 1999, pet. denied).

83. *Munich Am. Reinsurance Co.*, 141 F.3d at 590.

84. Jennifer Nicole Taylor, Recent Development, Erickson v. Aetna Health Plans of California, Inc.: *When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. ST. U. L. REV. 257, 270-72 (2000-2001). "The federal circuit courts appear to align on different sides of the Federal Arbitration Act

application stems "partly in the meaning of the term 'business of insurance' in section 1012(b) of the McCarran-Ferguson Act."[85] The interpretation of this key phrase will determine whether plaintiffs in health care contracts are successful in reverse-preempting federal law and are thereby relieved from binding arbitration.

However, even if the Texas notice provision is not found to be within the business of insurance, reverse preemption by the McCarran-Ferguson Act is not a plaintiff's only means of avoiding binding arbitration. Plaintiffs in health care contracts may still attempt to invalidate binding arbitration agreements by using generally applicable state law contract principles.

2. State Law Contract Principles

Although the Supreme Court has held that the FAA preempts conflicting state law,[86] states can continue to utilize general contract law principles to preclude binding arbitration.[87] The Supreme Court has declared that "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles."[88] Furthermore, section 2 of the FAA sanctions states for invalidating binding arbitration clauses "save upon such grounds as exist at law or in equity for the revocation of any con-

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and McCarran-Ferguson Act conflict." *Id.* at 272-73; *see also* Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes with the McCarran-Ferguson Act—1941-1993*, 43 CATH. U. L. REV. 399, 417-21 (1994) (noting that the intercircuit courts conflict when determining whether insurance corporations are engaged in the business of insurance, and urging the Supreme Court to resolve the issue once and for all).

85. Jennifer Nicole Taylor, Recent Development, Erickson v. Aetna Health Plans of California, Inc.*: When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. ST. U. L. REV. 257, 273 (2000-2001). *See generally* U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 498-99 (1993) (granting certiorari "to resolve the conflict among the [c]ourts of [a]ppeals on the question [of] whether a state statute governing the priority of claims against an insolvent insurer is a 'law enacted . . . for the purpose of regulating the business of insurance,' within the meaning of [section] 2(b) of the McCarran-Ferguson Act").

86. Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984).

87. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2000) (declaring that arbitration agreements are valid and binding "save upon such grounds as exist at law or in equity for the revocation of any contract"); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) (indicating that "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles"); Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 979 (2004) (asserting that state contract law is first applied when determining whether the arbitration clause was appropriately obtained).

88. *Allied-Bruce Terminix Cos.*, 513 U.S. at 281.

tract."[89] Therefore, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [section 2 of the FAA]."[90] However, the Supreme Court has declared that state laws used to quash binding arbitration must not single out arbitration provisions for special treatment; the laws themselves must be neutral.[91]

"Before a court is justified in granting a motion to compel arbitration [under the FAA], it must engage in a two-step process governed by state rather than federal law."[92] The court must first determine whether the arbitration agreement itself is valid, and if so, the court must determine whether the disputed issue is contained within the scope of the arbitration clause.[93] State law governs the initial question of whether there is a valid and binding arbitration agreement,[94] and the strong presumptions in

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89. Federal Arbitration Act, 9 U.S.C. § 2 (2000); *see also* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 473 (1998) (discussing that section 2 of the Federal Arbitration Act "contemplates a role for state general contract law").

90. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); *see also* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 473 (1998) (emphasizing that "[s]tate contract law defenses are indeed applicable to arbitration agreements").

91. *See Doctor's Assocs.*, 517 U.S. at 687 (warning that "[c]ourts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions"); Perry v. Thomas, 482 U.S. 483, 492-93 n.9 (1987) (declaring that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally"); Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 473 (1998) (advocating that "[t]he FAA requires that the state law, whether statutory or judge-made, be neutral").

92. Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 979 (2004); *see also* Cap Gemini Ernst & Young, L.L.C. v. Nackel, 346 F.3d 360, 365 (2d Cir. 2003) (indicating that "prior to compelling arbitration, the district court must first determine two threshold issues that are governed by state rather than federal law").

93. *Cap Gemini Ernst & Young*, 346 F.3d at 364-65; *see also In re* C & H News Co., 133 S.W.3d 642, 645 (Tex. App.—Corpus Christi 2003, pet. denied) (noting that "[a] party seeking to compel arbitration must establish the existence of an arbitration agreement and show that the claims raised fall within the scope of that agreement"); Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Longoria, 783 S.W.2d 229, 230 (Tex. App.—Corpus Christi 1989, no writ) (asserting that before a court can compel a motion to arbitrate, the court must determine two questions: "whether the parties agreed to arbitrate, and [if so,] the scope of the [arbitration] agreement").

94. *See* Stone v. Doerge, 328 F.3d 343, 345 (7th Cir. 2003) (declaring that "[n]othing in the Federal Arbitration Act overrides the normal rules of contractual interpretation"). "Arbitration depends on agreement, and nothing beats normal rules of contract law to determine what the parties' agreement entails." *Id.* (citations omitted).

favor of arbitration do not affect this initial resolution of whether a valid agreement to arbitrate exists.[95]

Even though the federal government, through section 2 of the FAA, granted state courts the leeway to apply general contract law principles in order to invalidate arbitration agreements, many courts have refused to apply these valid contract law defenses.[96] The courts' failure to apply these valid state law principles is contrary to the purpose of the FAA and operates to withhold the placing of arbitration agreements "on the same footing as other contracts."[97] As a result, arbitration agreements have become "more enforceable than other contract provisions," because while states can limit the enforceability of certain contractual provisions, such as requiring an implied warranty of merchantability to be conspicu-

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95. *See, e.g.*, Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069, 1073-74 n.5 (5th Cir. 2002) (asserting that the "federal policy favoring arbitration does not extend to a determination of who is bound" by the arbitration agreement); J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003) (restating that the "presumption [in favor of arbitration] arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists"); *In re* Kepka, 178 S.W.3d 279, 295 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (declaring that the Texas Supreme Court "has held that the presumptions and strong policy favoring arbitration have no application until after the movant has shown the existence of a valid arbitration agreement").

96. *See* Charles Davant IV, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 523 (2001) (arguing that "courts have not observed controlling state contract law" and instead continue to create and apply federal contract law when determining the initial question of whether the parties agreed to arbitration). "Parties are being forced to arbitrate disputes they never intended to arbitrate." *Id.* at 559. *See generally* Keystone Shipping Co. v. New England Power Co., 109 F.3d 46, 50-53 (1st Cir. 1997) (finding plaintiff bound to arbitration relying solely on federal case law, ignoring state contract law principles); Commercial Union Ins. Co. v. Gilbane Bldg. Co., 992 F.2d 386, 388 (1st Cir. 1993) (urging that the strong federal policy in favor of arbitration "applies 'whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability'" (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983))); U.S. Fid. & Guar. Co. v. W. Point Constr. Co., 837 F.2d 1507, 1508 (11th Cir. 1988) (declaring that the parties intended to arbitrate their claims, and stating that "[o]ur conclusion is supported by the strong policy favoring arbitration expressed by Congress in the Federal Arbitration Act").

97. Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 539 (2005). Advocating as the premise throughout her article "that the Supreme Court's interpretation of the FAA does not place arbitration on the same footing as other contracts." *Id.* Furthermore, stating that "[t]he Supreme Court and the lower courts appear to have imperfectly sorted out Congress'[s] desire" to place arbitration on equal footing with other contracts, which has lead to "the removal of large numbers of disputes from our system of justice into private forums, without the consent, agreement, or knowledge of the participants." *Id.* at 547.

ous, states are prohibited from putting the same limits on arbitration agreements.[98]

III. Analysis: The Application of Plaintiffs' Defenses to FAA Preemption

A. *The McCarran-Ferguson Act*

1. Interpretation of the Phrase "Business of Insurance"

In order to determine whether section 74.451 of the Texas Civil Practice and Remedies Code survives federal law preemption by the operation of the McCarran-Ferguson Act, one must establish whether the elements of the McCarran-Ferguson Act have been satisfied. From its text, state law is said to reverse-preempt conflicting federal law by operation of the McCarran-Ferguson Act "only if: (1) the federal statute does not specifically relate to the 'business of insurance'[;] (2) the state law was enacted for the 'purpose of regulating the business of insurance'[;] and (3) the federal statute operates to 'invalidate, impair, or supersede' the state law."[99]

In regard to the FAA, courts applying the first prong of the McCarran-Ferguson test have consistently held that the FAA "does not specifically relate to the business of insurance."[100] Furthermore, under the third prong, it is clear that section 75.451 of the Texas Civil Practice and Remedies Code conflicts with the FAA.[101] Under the FAA, arbitration agree-

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98. Margaret L. Moses, *Privatized "Justice,"* 36 Loy. U. Chi. L.J. 535, 540-41 (2005).

99. Munich Am. Reinsurance Co. v. Crawford, 141 F.3d 585, 590 (5th Cir. 1999).

100. *See, e.g., id.* (asserting that "[t]here is no question that the FAA does not relate specifically to the business of insurance"); Davister Corp. v. United Republic Life Ins. Co., 152 F.3d 1277, 1279 n.1 (10th Cir. 1998) (holding that "[p]art (1) of the test is not an issue in this case because the Federal Arbitration Act does not specifically relate to the business of insurance"); Jennifer Nicole Taylor, Recent Development, Erickson v. Aetna Health Plans of California, Inc.: *When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. St. U. L. Rev. 257, 275 (2000-2001) (declaring that "the Federal Arbitration Act satisfies the first part of the McCarran-Ferguson test because the Federal Arbitration Act does not specifically relate to the business of insurance"). Furthermore, Taylor explained that because "the Federal Arbitration Act is a general application statute, the McCarran-Ferguson Act precludes Federal Arbitration Act preemption because section 1012(b) of the McCarran-Ferguson Act only allows preemption of an act of Congress when that act specifically relates to the business of insurance." *Id.*

101. *Compare* Federal Arbitration Act, 9 U.S.C. § 2 (2000) (declaring that a written arbitration agreement, relating to interstate commerce or maritime transactions, is valid and enforceable; the statute does not mention the need for an attorney's signature), *with* Tex. Civ. Prac. & Rem. Code Ann. § 74.451 (Vernon 2005) (indicating that arbitration agreements in the health care field are void and without effect unless they are also signed by the patient's attorney).

ments are valid and enforceable absent an attorney's signature;[102] however, under section 74.451, arbitration agreements in the health care field are void and without effect unless they are also signed by the patient's attorney.[103] Conflict arises because while health-care related arbitration agreements lacking an attorney's signature are valid and enforceable under federal law, they are unenforceable under Texas law.[104] Therefore, the third prong is also met. However, the query under the second prong—whether section 75.451 was passed for the purpose of regulating the business of insurance—proves to be more difficult. The phrase "business of insurance" has suffered conflicting interpretations by federal district and appellate courts, and state courts since the enactment of the McCarran-Ferguson Act.[105]

Some have expressed that Congress's use of the phrase "business of insurance" left room for various interpretations regarding the application of the McCarran-Ferguson Act.[106] When attempting to discern Con-

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102. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2000) (failing to identify the need for an attorney's signature to make an arbitration agreement enforceable).

103. TEX. CIV. PRAC. & REM. CODE ANN. § 74.451 (Vernon 2005).

104. *Compare* Federal Arbitration Act, 9 U.S.C. § 2 (2000) (declaring that a written arbitration agreement, relating to interstate commerce or maritime transactions, is valid and enforceable; the statute does not mention the need for an attorney's signature), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 74.451 (Vernon 2005) (indicating that arbitration agreements in the health care field are void and without effect unless they are also signed by the patient's attorney).

105. *See* Jennifer Nicole Taylor, Recent Development, Erickson v. Aetna Health Plans of California, Inc.: *When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. ST. U. L. REV. 257, 272-73 (2000-2001) (reporting that "courts have reached differing conclusions over whether the McCarran-Ferguson Act precludes Federal Arbitration Act preemption," and furthermore, stating that "[t]he federal circuit courts appear to align on different sides of the Federal Arbitration Act and McCarran-Ferguson Act conflict"); *see also* Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes with the McCarran-Ferguson Act—1941-1999*, 43 CATH. U. L. REV. 399, 433-34 (1994) (discovering inconsistent federal court holdings when courts apply the McCarran-Ferguson Act to the Federal Arbitration Act).

106. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 247 (1979) (Brennan, J., joined by Marshall, C.J., Powell, J., dissenting) (noting that "[t]he Congress that passed [the] McCarran-Ferguson [Act] was composed of neither insurance experts nor dictionary editors," thus leaving the phrase "business of insurance" prone to varying interpretations); *see also* Jennifer Nicole Taylor, Recent Development, Erickson v. Aetna Health Plans of California, Inc.: *When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. ST. U. L. REV. 257, 273 (2000-2001) (indicating that "[t]he problem surrounding the mixed reception of the McCarran-Ferguson Act's protection of state statutes from the Federal Arbitration Act lies partly in the meaning of the term 'business of insurance' in section 1012(b) of the McCarran-Ferguson Act").

gress's intent and meaning of the phrase, committee reports and legislative history of the Act offer little assistance towards its construction.[107] Nevertheless, when Congress passed the McCarran-Ferguson Act in 1945, it was primarily "concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the [s]tates to tax insurance companies."[108] By enacting the McCarran-Ferguson Act, Congress sought "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation."[109] Notwithstanding how the term "business of insurance" is interpreted, it is clear that the focus of Congress in passing the Act "was on the relationship between the insurance company and the policyholder."[110]

Additionally, in an attempt to aid in the interpretation of the phrase "business of insurance," the Supreme Court in *Union Labor Life Insurance Co. v. Pireno*[111] asserted "three criteria relevant in determining whether a particular practice is part of the 'business of insurance'" under section 2 of the McCarran-Ferguson Act.[112] The three criteria, none determinative by themselves, are the following: "[*F*]*irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between an insurer and the insured; and *third*, whether the practice is limited to the entities within the insurance industry."[113] Subsequently,

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107. Sec. & Exch. Comm'n v. Nat'l Sec., Inc., 393 U.S. 453, 458-59 (1969); *see also* Jennifer Nicole Taylor, Recent Development, Erickson v. Aetna Health Plans of California, Inc.: *When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. ST. U. L. REV. 257, 273-74 (2000-2001) (stressing that even the Supreme Court has indicated that committee reports offer little aid in determining the meaning of the phrase "business of insurance").

108. *Nat'l Sec.*, 393 U.S. at 458-59.

109. *Id.* at 459.

110. *Id.* at 460.

111. 458 U.S. 119 (1982).

112. Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982) (announcing three criteria to be used when determining whether a particular practice is engaged in the business of insurance).

113. *Id.* Using these asserted criteria, the Court narrowly interpreted the phrase business of insurance. *Id.* The Court concluded that the health insurer's use of a peer review committee, to review the necessity and reasonableness of the chiropractor's statements and charges, was not within the business of insurance. *Id.* at 122, 134. The Court explained that the use of a peer review committee did not spread or underwrite the policyholder's risk because the transfer of the risk takes place upon the entering into an insurance contract, not upon the settlement of the insured's claim. *Id.* at 130-31. Furthermore, the Court asserted that the use of the peer review committee was "not an integral part of the policy relationship between the insurer and insured" because the committee was a "separate arrangement between the insurer and third parties not engaged in the business of insurance." *Pireno*, 458 U.S. at 131. Finally, the *Pireno* Court noted that the peer review committee

appellate federal and state courts have adopted these criteria as a method for determining whether the law is passed for the purpose of regulating the business of insurance.[114]

However, even with these indicated criteria, courts can still be grouped as employing either a broad or narrow interpretation of the phrase "business of insurance."[115] Courts employing a broad application of the

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"involves third parties wholly outside the insurance industry—namely, practicing chiropractors." *Id.* at 132.

114. *See, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48-49 (1987) (stating that "[t]he three criteria [*Pireno* factors] have been used to determine whether a practice falls under the 'business of insurance' for the purposes of the McCarran-Ferguson Act"); Metro. Life Ins. v. Massachusetts, 471 U.S. 724, 743 (1985) (asserting that "[c]ases interpreting the scope of the McCarran-Ferguson Act have identified three criteria relevant to determining whether a particular practice falls within that Act's reference to the 'business of insurance,'" and further indicating the factors asserted in *Pirenc*); Munich Am. Reinsurance Co. v. Crawford, 141 F.3d 585, 590-91 (5th Cir. 1998) (noting that the three criteria set forth in *Pireno* are relevant in determining whether a particular practice falls within the purview of the McCarran-Ferguson Act as involving the relationship between an insurer and insured); Jennifer Nicole Taylor, Recent Development, Erickson v. Aetna Health Plans of California, Inc.: *When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. ST. U. L. REV. 257, 275-76 (2000-2001) (declaring that "[i]n determining if a state is regulating 'the business of insurance,' courts will look at three additional factors regarding the relationship between the insured and insurer").

115. *Compare* U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 505 (1993) (applying a broad interpretation of the term "business of insurance"), *and Munich Am. Reinsurance*, 141 F.3d at 590-94, 596 (employing a broad interpretation of the phrase "business of insurance," concluding that Oklahoma law provisions governing insurance company delinquency proceedings were passed "for the purpose of regulating the business of insurance"), *and* Feinstein v. Nettleship Co. of L.A., 714 F.2d 928, 932 (9th Cir. 1983) (construing the phrase "business of insurance" broadly, stating that because the "medical association sought to provide a single insurance broker for all of its members in order to assure coverage for certain high-risk specialties, thereby distributing risk across the membership" the McCarran-Ferguson Act applied), *and* Anglin v. Blue Shield of Va., 693 F.2d 315, 321 (4th Cir. 1982) (employing a broad interpretation of the phrase "business of insurance," holding that the McCarran-Ferguson Act applied because defendant insurer refused to sell plaintiff health insurance unless he also purchased the insurance for his wife), *and* Dexter v. Equitable Life Assurance Soc'y of the U.S., 527 F.2d 233, 235 (2d Cir. 1975) (interpreting the phrase "business of insurance" broadly, asserting that "[a]n insurance company's methods of inducing people to become policyholders pertain[s] to the company-policyholder relationship, and thus constitute[s] an integral part of 'the business of insurance'"), *with Pireno*, 458 U.S. at 126-34 (interpreting the phrase "business of insurance" narrowly, finding the health insurer's use of a peer review committee not to be within the McCarran-Ferguson Act exemption), *and* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 214-17 (1979) (advocating a narrow interpretation of the phrase "business of insurance," stating that although a contractual agreement between an insurer and participating pharmacies "may well be sound business practice, and may well inure ultimately to the benefit of the policyholders in the form of lower premiums," it is not within the realm of the business of insurance), *and* Sec. & Exch. Comm'n v. Nat'l Sec., Inc., 393 U.S. 453, 459

phrase have indicated that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance."[116] Under a narrow interpretation of the phrase, the Supreme Court has declared that "[s]tatutes aimed at protecting or regulating this relationship [between the insurer and the insured], directly or indirectly, are laws regulating the 'business of insurance.'"[117] Nevertheless, the fixing of rates,[118] the selling and advertising of policies,[119]

(1969) (interpreting the phrase "business of insurance" narrowly), *and* FTC v. Dixie Fin. Co., 695 F.2d 926, 930 (5th Cir. 1983) (construing the phrase "business of insurance" narrowly, declaring that while the investigation of whether insurance sales are "a precondition to the extension of credit" is not within the business of insurance, the investigation of the sale of the policies themselves is within the business of insurance), *and* Va. Acad. of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476, 483 (4th Cir. 1980) (applying the term "business of insurance" narrowly, concluding that "defendants' policy regarding payment of payment of clinical psychologists is only tangential to that relationship [between the insurer and their policyholder] in that it does not affect the benefit conferred upon the subscriber"), *and* St. Bernard Hosp. v. Hosp. Serv. Ass'n of New Orleans, 618 F.2d 1140, 1145 (5th Cir. 1980) (interpreting the phrase "business of insurance" narrowly, stating that because the contract between the hospital and insurer "is merely an arrangement for the purchase of goods and services" used only to minimize the costs to the insurer necessary to fulfill its underwriting obligations, it is not within the business of insurance, citing *Royal Drug Co.*, 440 U.S. at 213-14), *and* Perry v. Fid. Union Life Ins. Co., 606 F.2d 468, 471 (5th Cir. 1979) (applying the phrase "business of insurance" narrowly, "hold[ing] that premium financing by an insurance company does not constitute the 'business of insurance' within the meaning of the McCarran[-Ferguson] Act"), *and* Homestead Mobile Homes Inc. v. Foremost Corp. of Am., 603 F. Supp. 767, 772 (N.D. Tex. 1985) (employing a narrow interpretation of the phrase "business of insurance," declining to apply the McCarran-Ferguson Act to an antitrust cause of action because the relationship to the insurance company involved a third party, one completely outside the insurance industry).

116. *Fabe*, 508 U.S. at 505 (citing BLACK'S LAW DICTIONARY 1236, 1286 (6th ed. 1990)). The *Fabe* Court concluded that a statute, "to the extent that it regulates policyholders, is a law enacted for the purpose of regulating the business of insurance," because it operated to protect and regulate insurance contracts. *Id.* at 508. The Supreme Court also noted that "[t]o the extent that [the statute] is designed to further the interests of other creditors, however, it is not a law enacted for the purpose of regulating the business of insurance." *Id.*

117. *Nat'l Sec.*, 393 U.S. at 460. The Supreme Court in *National Securities, Inc.* asserted that the "language [of the McCarran-Ferguson Act] refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.'" *Id.* at 459. Furthermore, the Court held that "only when [insurance companies] are engaged in the 'business of insurance' does the statute apply." *Id.* at 459-60.

118. *See id.* at 460 (indicating that the fixing of rates is within the scope of the McCarran-Ferguson Act).

119. *See* FTC v. Nat'l Cas. Co., 357 U.S. 560, 562-64 (1958) (holding that the selling and advertising of policies falls within McCarran-Ferguson Act "business of insurance" exemption).

"the licensing of companies and their agents,"[120] and "the actual performance of an insurance contract"[121] have been found to be within the scope of the McCarran-Ferguson Act reverse preemption.

Recently, the Houston Court of Appeals [1st District] in *In re Kepka* held that the McCarran-Ferguson Act prevented "the FAA from [preempting] former article 4590i, section 15.01(a)'s arbitration notice requirements."[122] Former article 4590i, section 15.01 of the Medical Liability and Insurance Improvement Act of Texas[123] (subsequently recodified under section 74.451 of the Texas Civil Practice and Remedies Code)[124] required an attorney's signature on arbitration agreements in order for them to be valid and enforceable in regard to health care liability claims.[125] When evaluating whether the McCarran-Ferguson Act barred federal law preemption, the *Kepka* court found it clear from section 1.02 (the "Findings and purposes" section of article 4590i)[126] that the purpose of the statute as a whole was as follows:

> to decrease the costs of health-care liability claims, through modifications of the insurance, tort and medical-practice systems, in order to make insurance reasonably affordable so that health-care providers could have protection against potential liability and so that citizens could have more affordable and accessible health care.[127]

Additionally, the court held that the Texas Legislature included the former notice provision, section 15.01, to protect patients and possibly to "reduce litigation over arbitration agreements' enforceability," thereby reducing litigation costs.[128] Therefore, based on the findings and purposes within article 4590i, the court concluded that the McCarran-Fergu-

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120. *See Nat'l Sec.*, 393 U.S. at 460 (declaring that "the licensing of companies and their agents" falls within the scope of the McCarran-Ferguson Act).

121. *See Fabe*, 508 U.S. at 503 (stating that "[t]here can be no doubt that the actual performance of an insurance contract falls within the 'business of insurance'" exemption under the statute).

122. *In re* Kepka, 178 S.W.3d 279, 292 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

123. Act of May 25, 1993, 73rd Leg., R.S., ch. 625, § 4, sec. 15.01, 1993 Tex. Gen. Laws 2347, 2349-50, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

124. TEX. CIV. PRAC. & REM. CODE ANN. § 74.451 (Vernon 2005).

125. Act of May 25, 1993, 73rd Leg., R.S., ch. 625, § 4, sec. 15.01, 1993 Tex. Gen. Laws 2347, 2349-50 (repealed 2003).

126. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02, 1977 Tex. Gen. Laws 2039, 2039-41, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

127. *In re Kepka*, 178 S.W.3d at 291.

128. *Id.*

son Act applied and operated to reverse preempt the FAA, thus precluding binding arbitration.[129]

2. Was Section 74.451 of the Texas Civil Practice and Remedies Code Passed for the Purpose of Regulating the Business of Insurance?

The holding in *Kepka* raises the inevitable question of whether the current arbitration notice provision, found in section 74.451 of the Texas Civil Practice and Remedies Code, was also passed for the purpose of regulating the business of insurance. Section 74.451, contained in chapter 74 of the Texas Civil Practice and Remedies Code, was passed by the 78th Texas Legislature in 2003 as a part of House Bill 4 (H.B. 4), the Medical Malpractice and Tort Reform Act.[130] While chapter 74 lacks a findings and purposes section as was contained in article 4590i, section 1.02 of the Medical Liability and Insurance Improvement Act of Texas,[131] the legislative history of H.B. 4 offers some insight into its purpose. When reviewing the legislative history of H.B. 4 and the context behind its passage, the rationale behind chapter 74 of the Texas Civil Practice and Remedies Code can be identified.

The sequence of events leading to the enactment of H.B. 4 began with the appointment of a senate committee after the 77th Session of the Texas Legislature.[132] Initially, the Senate Special Committee on Prompt Payment of Health Care Providers was appointed to study and evaluate the "[i]ssues relating to prompt payment of health care providers."[133] However, due to additional discussion on "the impact of rising medical malpractice insurance costs on patient access to health care," the Senate Special Committee was also charged with evaluating and assessing the "causes of rising malpractice insurance rates in Texas, including the impact of medical malpractice lawsuits, and their impact on access to health

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129. *See id.* at 291-92 (reasoning that the findings in article 4590i indicated a purpose of regulating the business of insurance).

130. *See* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, at i (2003) (outlining the history behind H.B. 4's enactment).

131. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02, 1977 Tex. Gen. Laws 2039, 2039-41 (repealed 2003).

132. *See* CAPITOL RESEARCH SERVS, THE LEGISLATIVE HISTORY OF TEX. H.B. 4, THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, at 1 (2003) (summarizing the events leading to the passage of H.B. 4).

133. *Tex. H.B. 4, Senate Special Comm. on Prompt Pay of Health Care Providers, Interim Report to the 78th Leg.*, 78th Leg., R.S. 1.3 (2002), *reprinted in* CAPITOL RESEARCH SERVS, THE LEGISLATIVE HISTORY OF TEX. H.B. 4, THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, at 1, ex. 1 (2003).

care."[134] After exploring "the factors giving rise to the instability in the medical malpractice insurance market" and "consider[ing] the approaches taken by other states and the federal government,"[135] the committee made their recommendations, which set forth the primary objective of medical liability reform.[136] The senate committee expressed that "[a] primary goal of medical liability reform is to decrease the frequency and severity of claims, thus minimizing any adverse affects that medical malpractice claims may have on patient access to quality health care."[137]

Subsequently, during the Regular Session of the 78th Texas Legislature, Republican Representative Nixon filed H.B. 4, along with H.B. 3, which made substantial changes to article 4590i of the Medical Liability and Insurance Improvement Act of Texas.[138] Initially, these bills did not include the arbitration notice provision found in former article 4590i.[139] However, the arbitration provision was subsequently included by the senate, adopted by the conference committee, incorporated, and passed as a

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134. *Tex. H.B. 4, Senate Special Comm. on Prompt Pay of Health Care Providers, Interim Report to the 78th Leg.*, 78th Leg., R.S. 2.3 (2002), *reprinted in* CAPITOL RESEARCH SERVS, THE LEGISLATIVE HISTORY OF TEX. H.B. 4, THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, at 1, ex. 1 (2003).

135. *Tex. H.B. 4, Senate Special Comm. on Prompt Pay of Health Care Providers, Interim Report to the 78th Leg.*, 78th Leg., R.S. 2.3 (2002), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, at 2, ex. 1 (2003).

136. *Tex. H.B. 4, Senate Special Comm. on Prompt Pay of Health Care Providers, Interim Report to the 78th Leg.*, 78th Leg., R.S. 2.22 (2002), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, at 2, ex. 1 (2003).

137. *Tex. H.B. 4, Senate Special Comm. on Prompt Pay of Health Care Providers, Interim Report to the 78th Leg.*, 78th Leg., R.S. 2.22 (2002), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, at 2, ex. 1 (2003).

138. *See* Tex. H.B. 4, 78th Leg., ch. 204, R.S., 2003 Tex. Gen. Laws 847, *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, at 5-7, ex. 3 (2003) (containing the original version of H.B. 4, referred to as legislation that reformed "certain procedures and remedies in civil actions"); Tex. H.B. 3, 78th Leg., R.S. (2003), *reprinted in* CAPITOL RESEARCH SERVS, THE LEGISLATIVE HISTORY OF TEX. H.B. 4, THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, at 8-10, ex. 10 (2003) (introducing H.B. 3, described as "a medical malpractice reform bill").

139. *See* Tex. H.B. 4, 78th Leg., R.S., 2003 Tex. Gen. Laws 204, *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 5-7, ex. 3 (2003) (introducing H.B. 4 and setting forth its provisions); Tex. H.B. 3, 78th Leg., R.S. (2003), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 8-10, ex. 3 (2003) (describing H.B. 3 and its terms).

part of H.B. 4.[140] When reviewing legislative history, it appears that the purpose of H.B. 4 was to indirectly reduce medical malpractice insurance rates.

During the initial house committee hearings regarding H.B. 4, members of the house discussed the medical malpractice litigation crisis and its relation to medical malpractice insurance.[141] Testimony was offered that caps on litigation awards would inevitably lead to significantly lower malpractice premiums.[142] During a house floor debate over H.B. 4, Representative Nixon, the chairman of the committee that considered both bills, labeled H.B. 4 as a means to strike a "balance between meaningful compensation in a medical malpractice case and the availability to health care."[143] When Representative Nixon discussed the reasoning behind combining H.B. 3 and H.B. 4, and whether H.B. 4 would lower medical malpractice insurance rates, he asserted that the purpose of H.B. 4 was not to lower premiums.[144] Instead, Representative Nixon indicated that the intent of the bill was to help doctors by dispensing with frivolous lawsuits and reducing unnecessarily large verdicts, which would in the process lower their medical malpractice premiums.[145] Nixon further explained that H.B. 4 is part of a "three-legged stool."[146] The purpose of

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140. *See Tex. H.B. 4, Conference Comm. Report*, 78th Leg., R.S. (May 31, 2003), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 2303-04, ex. 7 (2003) (summarizing the contents of H.B. 4 as set forth by the senate, the house and the conference committee).

141. *See Texas House Bill 4: Hearings on Medical Malpractice Before the House Comm. on Civil Practices*, 78th Leg., R.S. 20-22 (Feb. 12, 2003) (statement of Dr. Richard Anderson, on behalf of The Doctor's Company) (transcript available from the Office of the House Committee Coordinator), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 17-24, ex. 14 (2003) (commenting on the medical malpractice crisis).

142. *See id.* (discussing the impact of caps on medical malpractice insurance rates).

143. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 2 (Mar. 19, 2003) (transcript available from the Office of the House Committee Coordinator), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 380, ex. 18 (2003).

144. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 30 (Mar. 19, 2003) (transcript available from the Office of the House Committee Coordinator), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 396, ex. 18 (2003).

145. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 30-31 (Mar. 19, 2003) (transcript available from the Office of the House Committee Coordinator), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 396, ex. 18 (2003).

146. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 31 (Mar. 19, 2003) (transcript available from the Office of the House Committee Coordinator), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 397, ex. 18 (2003).

the stool, as a whole "is to create access to medical care and to provide [ ] access to quality medical care."[147] The first leg of the stool aims to improve access to quality medical care by giving the Texas Board of Medical Examiners more authority to revoke "licenses of physicians who should not be practicing medicine."[148] The second leg of the stool involves regulations, underwriting guidelines, reinsurance issues, and rate structuring of insurance in the state.[149] The last leg of the stool, involving tort and medical malpractice issues, attempts to improve access to quality medical care.[150] When prompted, Nixon expressed that eventually the effects of H.B. 4 would reduce medical malpractice premiums.[151]

Additionally, House Research Organization's bill analysis presented arguments in favor and in opposition to H.B. 4.[152] Supporters of the Bill asserted that due to the large jury awards from medical malpractice claims, the costs of medical malpractice insurance had driven physicians either to stop practice and retire altogether, or to abandon practice only in Texas.[153] Supporters of H.B. 4 advocated that the bill "would help ensure access to health care by limiting insurers' exposure to risk," and that "[t]his would lead to a reduction in medical malpractice rates which would permit more physicians to practice in the state."[154] However, opponents of the bill indicated that "[t]he tort system is not a significant cause of the medical malpractice liability crisis," and instead asserted that

147. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 30-32 (Mar. 19, 2003) (transcript available from the Office of the House Committee Coordinator), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 397, ex. 18 (2003).

148. *Id.*

149. *Id.*

150. *Id.*

151. Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 32 (Mar. 19, 2003) (transcript available from the Office of the House Committee Coordinator), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 397, ex. 18 (2003).

152. *See* HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 7-23 (Mar. 25, 2003), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 343-53, ex. 39 (2003) (outlining the arguments in favor and those in opposition to H.B. 4).

153. HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 7 (Mar. 25, 2003), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 345, ex. 39 (2003).

154. HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 8 (Mar. 25, 2003), *reprinted in* CAPITOL RESEARCH SERVS., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 345, ex. 39 (2003).

Texas should focus on insurance rate regulation, which would directly lead to lower medical malpractice rates.[155]

Whether section 74.451 of the Texas Civil Practice and Remedies Code falls within the McCarran-Ferguson Act's realm of protection depends upon whether courts find the indirect effects of H.B. 4 on the insurance industry sufficient. One could argue that the indirect effects of the bill are not enough to invoke the application of the McCarran-Ferguson Act, because chapter 74 does not satisfy the prongs of the *Pireno* test (it does not expressly regulate the relationship between an insurer or insured, involve any contracts between them, transfer or spread a policyholder's risk, or contain any provision limited to entities within the insurance industry). However, until the pressing issue of whether chapter 74 was passed for the purpose of regulating the "business of insurance" is resolved, plaintiffs in health care liability claims will attempt to use the McCarran-Ferguson Act as an avenue to avoid binding arbitration.[156]

B. *The Courts' Application of State Law Contract Principles to Arbitration Agreements*

Regardless of whether the McCarran-Ferguson Act applies, opponents to arbitration in health care liability claims may also attempt to assert state law contract defenses in order to prevent binding arbitration. Some of the defenses that have been asserted include claims of no intent, unconscionability, and lack of adequate consideration. Additionally, opponents have attempted to label the arbitration agreement as non-binding on a non-signatory, advocating that the agreement is incapable of binding one to arbitration in wrongful death claims.

1. Claims of No Intent, Unconscionability, and Illusory Promise

One way opponents have attempted to invalidate arbitration agreements is by claims that the contracting party did not intend to be bound by arbitration. For a contract to be valid and enforceable, both contracting parties must express mutual assent to be bound by the con-

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155. HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. 16 (Mar. 25, 2003), *reprinted in* CAPITOL RESEARCH SERV., THE LEGISLATIVE HISTORY OF TEX. H.B. 4, 78TH LEG., R.S. (2003), at 351, ex. 39 (2003).

156. *See* Jennifer Nicole Taylor, Recent Development, Erickson v. Aetna Health Plans of California, Inc.*: When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. ST. U. L. REV. 257, 281 (2000-2001) (proclaiming that "[w]hile the United States Supreme Court has yet to resolve the issue of whether the McCarran-Ferguson Act precludes the Federal Arbitration Act, the issue continues to percolate in state and lower federal courts and appears ready to boil-over").

tract.[157] In *Keymer v. Management Recruiters International, Inc.*,[158] the court acknowledged that "arbitrability questions must be considered with a 'healthy regard for the federal policy favoring arbitration,' and that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'"[159] However, the court also expressed that "the FAA's pro-arbitration policy does not operate [without] regard to the intent of the contracting parties."[160] "[A]rbitration is a matter of consent, not of coercion[,]" and "a party cannot be forced to submit to arbitration any dispute that he has not agreed to submit."[161]

When determining whether parties intended to arbitrate their claims, the court will first determine whether the arbitration agreement itself is valid, and if so, whether the disputed issue falls within the scope of the agreement.[162] It is difficult for plaintiffs to preclude arbitration by claims

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157. *See* MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 73 (4th ed. 2001) (indicating that "[t]he requirement of 'assent[,]' which is fundamental to the formation of a binding contract, implies in a general way that both parties to an exchange shall have a reasonably clear conception of what they are getting and what they are giving up").

158. 169 F.3d 501 (8th Cir. 1999).

159. Keymer v. Mgmt. Recruiters Int'l, Inc., 169 F.3d 501, 504 (8th Cir. 1999) (quoting Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983), and discussing the federal policy favoring arbitration and the application of state law contract defenses).

160. *Keymer*, 169 F.3d at 504. In *Keymer*, the court interpreted the agreement in accordance with the parties' intentions, and based upon an exclusionary clause, the court held that plaintiff never "agreed to arbitrate his age discrimination claims." *Id.* at 505-06; *see also* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) (asserting that "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties"); Teamsters Local Union No. 688 v. Indus. Wire Prods., Inc., 186 F.3d 878, 881 (8th Cir. 1999) (noting that "[w]here there exists an express agreement to arbitrate, there arises a presumption that the parties agreed to submit the dispute to arbitration unless there is a clear intent 'that the parties did not want to arbitrate the related matter'" (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995))).

161. *Keymer*, 169 F.3d at 504; *see also Mastrobuono*, 514 U.S. at 57 (reiterating the concept that "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit" (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989))); AT&T Techs. Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) (holding that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co. 363 U.S. 574, 582 (1960))); *Teamsters Local Union No. 688*, 186 F.3d at 881 (explaining that the presumption favoring arbitration "must operate with regard to the intent of the contracting parties since arbitration is a matter of consent").

162. *See In re* C & H News Co., 133 S.W.3d 642, 645 (Tex. App.—Corpus Christi 2003, pet. denied) (indicating that "[a] party seeking to compel arbitration must establish the existence of an arbitration agreement and show that the claims raised fall within the scope of that agreement"); *see also* Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Longoria, 783

of no intent because courts generally "give effect to the agreement's express terms,"[163] and parties are bound by the terms of the agreement of which they sign.[164] Furthermore, the Supreme Court has asserted that the parties can validly structure arbitration agreements as they wish by contract, thereby limiting the issues to be arbitrated and the rules under which arbitration should be conducted.[165] Therefore, where both inquiries are satisfied under state law, the parties will likely be bound to arbitration, and claims of no intent will likely fail.[166]

S.W.2d 229, 230 (Tex. App.—Corpus Christi 1989, no writ) (asserting that before a court can compel a motion to arbitrate the court must determine two questions: whether the parties agreed to arbitration, and, if so, the scope of the arbitration agreement).

163. *Keymer*, 169 F.3d at 504.

164. *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001); *see In re* McKinney, 167 S.W.3d 833, 835 (Tex. 2005) (orig. proceeding) (per curiam) (compelling arbitration despite the parties claims of no intent, stating that "[a]bsent fraud, misrepresentation, or deceit, a party is bound by the terms of the contract he signed, regardless of whether he read it or thought it had different terms"). In *McKinney*, the signatory to a contract containing an arbitration clause, claimed "that he had not agreed to arbitrate and had signed the document intending only to change" his account status. *In re McKinney*, 167 S.W. 3d at 835. However, despite this lack of intent, the Texas Supreme Court asserted that "by signing the agreement, [the signatory] had consented to arbitrate future disputes." *Id.*; *see also* EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 90 (Tex. 1996) (orig. proceeding) (per curiam) (rejecting claims of lack of knowledge or effect of an arbitration agreement to preclude arbitration, and reasoning that a party "who has the opportunity to read an arbitration agreement and signs it, knows its contents"); David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 142-43 (1998) (expressing that, generally, when one signs a contractual agreement he is bound by its terms regardless of whether or not the party understood or fully read the whole of the contract).

165. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior University, 489 U.S. 468, 478 (1989) (stating that parties have a right to validly structure their agreements by contract, which allows them to preclude certain claims from binding arbitration); *see also Mastrobuono*, 514 U.S. at 57 (asserting that "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit").

166. *See* Teamsters Local Union No. 688 v. Indus. Wire Prods., Inc., 186 F.3d 878, 881-83 (8th Cir. 1999) (holding that because the arbitration clause mandated arbitration regarding "the meaning or application of any of the provisions of [the] Agreement," the court concluded that "the question of whether the parties' unwritten agreement at the close of the negotiations included an intent to maintain the previously negotiated wage increase is a proper subject for the informed judgment of an arbitrator"); U.S. Fid. & Guar. Co. v. W. Point Constr. Co., 837 F.2d 1507, 1508 (11th Cir. 1998) (declaring that the parties intended to arbitrate claims). *But see Keymer*, 169 F.3d at 505-06 (interpreting the agreement in accordance with the parties' intentions, and holding, based upon an exclusionary clause, that plaintiff never "agreed to arbitrate his age discrimination claims"); *In re* ACG Cotton Mktg., L.L.C., 985 S.W.2d 632, 634-35 (Tex. App.—Amarillo 1999, no pet.) (declining to find that the parties agreed to arbitration, stating that nothing in the contract "clearly evinced the parties' intention to bind themselves to arbitration").

Additionally, plaintiffs in medical health care contracts have attempted to quash arbitration agreements on the grounds of unconscionability.[167] These challenges have had varying interpretations and conflicting results from state and federal courts.[168] Generally, the phrase unconscionability "describes a contract that is unfair because of its overall one-sidedness or the gross one-sidedness of one of its terms."[169] However, unconscionability does not have an exact legal definition because instead of being a concept, unconscionability is a determination that should be made after consideration of a multiplicity of factors.[170]

"Unconscionability includes two aspects: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers

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167. Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 981 (2004).

168. *Compare* Chappel v. Lab. Corp. of Am., 232 F.3d 719, 724-25 (9th Cir. 2000) (enforcing arbitration of a health care contract based upon an ERISA-governed health benefits plan, and overruling plaintiff's claims that the clause was unenforceable because of its restrictive terms and invalid cost-sharing provision), *and* Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157, 162-64 (2d Cir. 1998) (finding the provision requiring arbitration in a distant location not to be unconscionable), *and* Engalla v. Permanente Med. Group, Inc., 938 P.2d 903, 924-25 (Cal. 1997) (noting that although the health care contract contained some adhesion attributes, the agreement was not unconscionable because plaintiff did not complain of any defect or one-sidedness of the contractual provision, rather plaintiff complained of waiver), *and* Consol. Res. Healthcare Fund I, Ltd. v. Fenelus, 853 So. 2d 500, 504-05 (Fla. Dist. Ct. App. 2003) (finding the arbitration clause in a nursing home admission agreement not unconscionable, and therefore enforceable), *and* Lovey v. Regence BlueShield of Idaho, 72 P.3d 877, 889 (Idaho 2003) (declining to find the arbitration agreement in the insurance policy procedurally or substantively unconscionable), *and In re* Advance PCS Health L.P., 172 S.W.3d 603, 608 (Tex. 2005) (per curiam) (rejecting the claim that the arbitration agreement was substantively and procedurally unconscionable, stating that "there is nothing per se unconscionable about arbitration agreements," and furthermore, noting that "[u]nder the FAA, unequal bargaining power does not establish grounds for defeating an agreement to arbitrate"), *with* Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 565-68 (Ct. App. 1993) (declaring an arbitration provision requiring residents to arbitrate a claim in another state unconscionable), *and* Beynon v. Garden Grove Med. Group, 161 Cal. Rptr. 146, 150-52 (Ct. App. 1980) (refusing to enforce an arbitration clause due to one party's ability to unilaterally rescind the agreement and a provision requiring the unaware insurer to pay half the costs of arbitration), *and* William G. Wixted, M.D., Ltd. v. Pepper, 693 P.2d 1259, 1261 (Nev. 1985) (refusing to enforce an arbitration agreement, due to the inability of the patient to revoke the arbitration agreement in order to regain his rights to a jury trial).

169. Olshan Found. Repair Co. v. Ayala, 180 S.W.3d 212, 214-15 (Tex. App.—San Antonio 2005, pet. denied).

170. Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 821 (Tex. App.—San Antonio 1996, no pet.).

to the fairness of the arbitration provision itself."[171] When assessing the validity of an arbitration agreement, courts may weigh the procedural as well as the substantive unconscionability of the arbitration provision.[172] A central test for unconscionability asserted by some courts "is whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract."[173]

Plaintiffs in health care contracts generally make one of five arguments when attacking arbitration clauses on the basis of unconscionability: (1) the patient was coerced to sign the arbitration agreement, seeing as there was "no meaningful choice because the service at the heart of the contract was public or essential"[;][174] (2) the arbitration clause is non-mutual,

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171. *In re* Halliburton Co., 80 S.W.3d 566, 571 (Tex. 2002); *see also* Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999) (asserting that there are two types of unconscionability: "procedural, or 'unfair surprise,' unconscionability and substantive unconscionability"). "Procedural unconscionability pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language," while "[s]ubstantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent." *Harris*, 183 F.3d at 181.

172. *In re Halliburton*, 80 S.W.3d at 572.

173. *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001).

174. Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 981 (2004). When asserting grounds of unconscionability, plaintiffs have attempted to invalidate arbitration clauses on the basis that they are unconscionable adhesion contracts because of the nature of the situation in which they were forced to sign them. Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L.J. 45, 55 (2000); *see* David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 142 (1998) (noting that arbitration contracts in medical setting are generally criticized by patients on the grounds that the agreement is an unconscionable adhesion contract). An adhesion contract is "a standardized contract form offered to a consumer on a take it or leave it basis without affording the consumer a realistic opportunity to bargain so that the consumer does not have a choice to accept or refuse it." Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L.J. 45, 55 (2000); *see also* Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013, 1015 (Ariz. 1992) (asserting that "[a]n adhesion contract is typically a standardized form 'offered to consumers of goods and services on essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract'" (quoting Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 783 (Ct. App. 1976))); Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 980 (2004) (stating that adhesion contracts are contracts where "one party dictates the

binding to one party but not to the other;[175] (3) the arbitration process is

terms of the agreement" and where the other has no say in the contract's formulation). Generally, when one signs a contractual agreement he is bound by its terms regardless of whether or not the party understood or fully read the whole of the contract. *E.g.*, David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 142-43 (1998). However, this concept is sometimes not applicable to arbitration agreements in the health care field where the court finds the agreement to be unconscionable. *Id.* When faced with this determination, courts have invalidated arbitration clauses based upon its finding that the agreement is an unconscionable contract of adhesion. *Id.*; *see, e.g.*, *Broemmer*, 840 P.2d at 1017 (declining to enforce an arbitration contract, indicating that the contract fell outside the reasonable expectations of the plaintiff because of: the complexities of the situation, plaintiff's severe emotional strain, plaintiff's lack of education, the absence of a conspicuous or explicit waiver of plaintiff's right to a jury trial, and no evidence that she waived her right knowingly, voluntarily, or intelligently); Beynon v. Garden Grove Med. Group, 161 Cal. Rptr. 146, 149-54 (Ct. App. 1980) (finding an arbitration clause void as against public policy); Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 782-91 (Ct. App. 1976) (holding an arbitration agreement in a hospital admission form unenforceable due to the patient's lack of knowledge as to the existence of the clause, the failure of the hospital to advise, and because the agreement's terms were beyond the reasonable expectations of the party, as being unconscionable or oppressive). However, other courts have declined to render arbitration clauses invalid based upon claims that the contract is an unconscionable contract of adhesion and accordingly enforce binding arbitration. *See, e.g.*, Sanchez v. Sirmons, 467 N.Y.S.2d 757, 759 (N.Y. App. Div. 1983) (concluding that the arbitration agreement was not a contract of adhesion because it was not offered to plaintiff on a take it or leave it basis, and plaintiff could have sought care elsewhere due to the lack of emergency in treatment); Buraczynski v. Eyring, 919 S.W.2d 314, 321 (Tenn. 1996) (compelling arbitration between a physician and a patient, notwithstanding that the arbitration agreement was contained in an adhesion contract presented to the plaintiff on a take it or leave it basis, because the contract had numerous procedural safeguards in place, rendering the agreement as fair between the parties).

175. Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 981 (2004). Some courts have upheld this challenge to arbitration agreements, finding them to be unenforceable. *See* Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 692 (Cal. 2000) (asserting that "the lack of mutuality does not render the contract illusory, i.e., lacking in mutual consideration," but rather concluding that "in the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable"); Iwen v. U.S. W. Direct, 977 P.2d 989, 996 (Mont. 1999) (indicating that "this case presents a clear example of an arbitration provision that lacks mutuality of obligation, is one-sided, and contains terms that are unreasonably favorable to the drafter," and holding the arbitration agreement to be unconscionable and oppressive). However, most federal courts have rejected this challenge indicating that arbitration clauses need not possess mutuality of obligation as long as there is adequate consideration in the underlying contract. *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001); *see also* Harris v. Green Tree Fin. Corp., 183 F.3d 173, 180-83 (3d Cir. 1999) (advocating that mere "inequality in bargaining power, alone, is not a valid basis upon which to invalidate an arbitration agreement," and furthermore, stating that "mutuality is not a requirement of a valid arbitration clause"); Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 129 (2d Cir. 1997) (rejecting the assertion that the arbitration agreement was void for lack of mutual-

too costly for the individual to participate;[176] (4) lack of an independent

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ity); Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp., 878 F.2d 167, 168-69 (6th Cir. 1989) (finding the contract as a whole to be supported by adequate consideration, and stating that the arbitration clause need not be supported by separate consideration apart from the underlying contract); Young v. Jim Walter Homes Inc., 110 F. Supp. 2d 1344, 1350 (M.D. Ala. 2000) (asserting that "[w]hile lack of mutuality of remedy might be considered a factor in determining unconscionability, it is not in itself sufficient to support a claim of unconscionability"); Pridgen v. Green Tree Fin. Servicing Corp., 88 F. Supp. 2d 655, 658-59 (S.D. Miss. 2000) (denying plaintiff's claim that the arbitration clause was substantively unconscionable solely because it was one-sided and lacked mutuality of obligation); Dorsey v. H.C.P. Sales, Inc., 46 F. Supp. 2d 804, 807 (N.D. Ill. 1999) (rejecting the notion that an arbitration clause is void due to lack of mutuality); Rains v. Found. Health Sys. Life & Health, 23 P.3d 1249, 1255 (Colo. Ct. App. 2001) (finding an arbitration clause enforceable despite the lack of mutuality, and furthermore, asserting that as long as adequate consideration is provided for beyond the terms of the promise to arbitrate, the clause is enforceable absent mutuality).

176. Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 981 (2004). "[T]he United States and Texas Supreme Courts have recognized the possibility that the excessive costs of an arbitration might, under certain circumstances, render an arbitration agreement unconscionable." Olshan Found. Repair Co. v. Ayala, 180 S.W.3d 212, 215 (Tex. App.—San Antonio 2005, pet. denied); *see also* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90 (2000) (noting that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her . . . rights in the arbitral forum"); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574-75 (App. Div. 1998) (indicating that excessive costs can render an arbitration provision unconscionable); Teleserve Sys., Inc. v. MCI Telecomms. Corp., 659 N.Y.S.2d 659, 664-65 (App. Div. 1997) (indicating that the excessive filing fees contained in the arbitration provision rendered the clause unconscionable on its face); *In re FirstMerit Bank*, 52 S.W.3d at 756 (reiterating that the possibility that excessive costs of arbitration might render the arbitration agreement unenforceable); *In re* Luna, 175 S.W.3d 315, 327 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (declining to enforce an arbitration provision, noting that "the one-sidedness of the cost and remedy provisions tend to render the agreement as a whole unconscionable under the facts and circumstances," and furthermore, stating that "the high cost of arbitration, combined with the limitation of damages and reinstatement in the agreement, essentially [deprived plaintiff] of the opportunity to vindicate his claim effectively in the arbitral forum"). However, in light of "the strong policy favoring arbitration agreements," parties opposed to arbitration must verify the probability of incurring these costs. *Ayala*, 180 S.W.3d at 215; *see also Randolph*, 531 U.S. at 91-92 (declaring that the evidence of a mere possibility or "risk" that plaintiff might bear prohibitive costs is insufficient and speculative, and furthermore, asserting that a party who seeks to invalidate an arbitration agreement on the grounds of expense "bears the burden of showing the likelihood of incurring such costs"); *In re FirstMerit Bank*, 52 S.W.3d at 756-57 (declining to uphold plaintiff's assertion that the arbitration clause was unconscionable merely because "arbitration might subject them to substantial costs and fees," concluding that plaintiff's evidence was legally insufficient to defeat binding arbitration because plaintiffs failed to present evidence of such excessive costs imposed by arbitration).

or neutral arbitrator;[177] and (5) the arbitration clause is unreasonable since it reduces the individual's rights to things like remedies.[178] Regardless of the grounds alleged, it is difficult for plaintiffs to preclude binding arbitration based upon the assertion of unconscionability and challenges usually fail.[179]

Moreover, in today's health care setting, the sophisticated health care provider can easily employ terms and take precautions in health care contracts to preclude a patient's assertion of unconscionability. Health care providers can contract around unconscionability in several ways: (1) by making the agreement's signing voluntary (not contingent upon the provision of medical service); (2) by providing for counseling and education in regards to signing; (3) by offering to pay costs of the arbitration; (4) by allowing for revocability; and (5) by using clear and unequivocal language in the terms of the agreement.[180] Through these provisions, health care providers can render assertions of unconscionability futile in the medical setting.[181]

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177. Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 981 (2004).

178. *Id.*; *see also* Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 158-59 (Ct. App. 1997) (denying to enforce an arbitration provision, labeling the provision as unconscionable because of its one-sidedness and restrictions in regards to remedies).

179. *See, e.g.*, *Young*, 110 F. Supp. 2d at 1347-51 (asserting that because the plaintiffs did not meet their burden of proving that the arbitration agreement was unconscionable, the arbitration agreement was valid and enforceable); Green Tree Fin. Corp. v. Wampler, 749 So. 2d 409, 417 (Ala. 1999) (upholding an arbitration clause as valid and binding based upon the lack of substantial evidence presented to support a claim of unconscionability); Tjart v. Smith Barney, Inc., 28 P.3d 823, 830 (Wash. Ct. App. 2001) (finding the agreement to arbitrate not procedurally unconscionable, and furthermore, recognizing that "[m]ost courts have rejected plaintiffs' arguments that predispute mandatory arbitration clauses are unconscionable contracts of adhesion because of mere inequality of bargaining power").

180. *See* Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 997 (2004) (posing "suggestions for health care providers to use in drafting a fair and sound arbitration agreement"). Galle asserted that within arbitration agreements health care providers should: (1) educate the patients of their rights; (2) make the agreement's signing optional, revocable, and mutual; (3) draft the agreement's terms clearly and unequivocally; (4) prevent the patients from bearing a large financial burden; and (5) encourage patients to ask questions in regards to their rights. *Id.* at 997-99.

181. *See* Sanchez v. Sirmons, 467 N.Y.S.2d 757, 759 (App. Div. 1983) (concluding that the arbitration agreement was not a contract of adhesion because it was not offered to plaintiff on a take it or leave it basis, and plaintiff could have sought care elsewhere due to the lack of emergency in treatment); Buraczynski v. Erying, 919 S.W.2d 314, 321 (Tenn. 1996) (compelling arbitration between a physician and a patient, notwithstanding that the arbitration agreement was contained in an adhesion contract presented to the plaintiff on a

Along with assertions of lack of intent and unconscionability, plaintiffs have also attempted to preclude binding arbitration and render arbitration agreements invalid and unenforceable based upon lack of valid consideration. To be enforceable, "[a] contract must be based upon valid consideration or mutuality of obligation."[182] When a contract is only supported by illusory promises—a promise that "fails to bind the promisor, who retains the option of discontinuing performance"—there is no consideration or mutuality of obligation and, therefore, no contract.[183] Some courts have asserted that where one party has the right to unilaterally amend the claims covered by the arbitration agreement, the arbitration agreement is supported by an illusory promise and is thus unenforceable.[184] However, other courts have rejected the claim that the arbitration agreement is unenforceable due to lack of consideration, mostly because of the scarcity of evidence establishing a lack of consideration.[185]

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take it or leave it basis, because the contract had numerous procedural safeguards in place, rendering the agreement as fair between the parties).

182. *In re* C & H News Co., 133 S.W.3d 642, 647 (Tex. App.—Corpus Christi 2003, pet. denied) (citing Iacono v. Lyons, 16 S.W.3d 92, 94 (Tex. App.—Houston [1st Dist.] 2000, no pet.)). "Consideration may consist of either benefits or detriments to the contracting parties." *Id.* (citing *In re* Turner Bros. Trucking Co., Inc., 8 S.W.3d 370, 373 (Tex. App.—Texarkana 1999, orig. proceeding)); *see also* BLACK'S LAW DICTIONARY 324 (8th ed. 2004) (defining consideration as "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promise," and furthermore, stating that "[c]onsideration, or a substitute such as promissory estoppel, is necessary for an agreement to be enforceable").

183. *In re C & H News*, 133 S.W.3d at 647; *see also* BLACK'S LAW DICTIONARY 1249 (8th ed. 2004) (defining illusory promise as "[a] promise that appears on its face to be so insubstantial as to impose no obligation on the promisor; an expression cloaked in promissory terms but actually containing no commitment by the promisor"); *In re* AdvancePCS Health L.P., 172 S.W.3d 603, 607 (Tex. 2005) (per curiam) (responding to an assertion that the arbitration agreement was unenforceable due to lack of consideration, by stating that, "[i]n the context of stand-alone arbitration agreements, binding promises are required on both sides as they are the only consideration rendered to create a contract") However, "when an arbitration clause is part of the underlying contract, the rest of the parties' agreement provides the consideration." *Id.*

184. *See In re C & H News*, 133 S.W.3d at 647 (asserting that "[b]ecause realtor has reserved the right to unilaterally amend the types of claims covered by said agreement, we conclude that the arbitration agreement is supported only by an illusory promise, and is unenforceable"); *see also* Ming Kai v. Asia Source, Inc., No. Civ.A. 304CV1188M, 2004 WL 2545006, at *2 (N.D. Tex. Nov. 4, 2004) (stating that the arbitration agreement was invalid due to lack of consideration, as it was based upon an illusory promise); Benyon v. Garden Grove Med. Group, 161 Cal. Rptr. 146, 150-52 (Ct. App. 1980) (refusing to enforce an arbitration clause based upon one party's ability to unilaterally rescind the agreement and the provision requiring the unaware insurer to pay half the costs of arbitration).

185. *See In re* Dillard Dept. Stores Inc., 198 S.W.3d 778, 781-82 (Tex. 2006) (per curiam) (responding to signatory's claims of an illusory arbitration agreement by stating that "an arbitration agreement is not illusory, despite being formed in an at-will employ-

2. Binding on a Non-signatory?

An increasing problem in regards to arbitration agreements in the health care field is the issue of who is bound by the arbitration agreement. There have been conflicting interpretations by Texas courts as to whether one seeking recovery under the Texas Wrongful Death Act is bound by an arbitration contract entered into by the deceased. The Texas Legislature enacted the Wrongful Death Act in 1860, and the Act has since been re-codified in chapter 71 of the Texas Civil Practice and Remedies Code.[186] The Texas Legislature passed the Wrongful Death Act to rectify the inability at common law "to recover for the wrongful death of another."[187] This Act provides the sole "remedy for wrongful death in Texas, compensating the decedent's spouse, parents, and children for" their loss resulting from the decedent's death or injury.[188]

Many Texas courts have indicated that a wrongful death cause of action is purely derivative in nature.[189] These courts assert that a wrongful

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ment relationship, if the promises to arbitrate do not depend on continued employment"); Palm Harbor Homes, Inc. v. McCoy, 944 S.W.2d 716, 724 (Tex. App.—Fort Worth 1997, no pet.) (per curiam) (finding "no evidence of lack of consideration," and thus upholding the arbitration agreement as valid and enforceable).

186. TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001-.012 (Vernon 1997 & Supp. 2005).

187. Coffey v. Johnson, 142 S.W.3d 414, 417 (Tex. App.—Eastland 2004, no pet.); *see also* Fort Worth Osteopathic Hosp., Inc. v. Reese, 148 S.W.3d 94, 96 (Tex. 2004) (indicating that the Texas Legislature passed the Wrongful Death Act in order to ameliorate the harsh results of the common law, which did not provide a third person the right to recovery upon the wrongful death of another).

188. Holman & Langdon, LLP, Wrongful Death, Survival and Bystander Claims, www.ark-la-texlaw.com/FSL5CS/Articles/articles5.asp (last visited Nov. 6, 2006) (on file with the *St. Mary's Law Journal*); *see also* Shepherd v. Ledford, 962 S.W.2d 28, 31 (Tex. 1998) (stating that "[a]n action to recover damages for wrongful death is for the exclusive benefit of the deceased's surviving spouse, children, and parents"); *Coffey*, 142 S.W.3d at 417 (asserting that "[t]he Wrongful Death Act created a statutory cause of action, but limited it to actions on behalf of the surviving spouse, children, and parents of the decedent").

189. *See, e.g.*, Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 347 (Tex. 1992) (asserting that the court has "consistently held that the right of statutory beneficiaries to maintain a wrongful death action is entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death, and is subject to the same defenses to which the decedent's action would have been subject"); Richardson v. Monts, 81 S.W.3d 889, 892-93 (Tex. App.—Austin 2002, no pet.) (noting that "[i]t is well settled that wrongful death suits are derivative in nature," and furthermore, asserting that if the deceased patient could maintain a health care liability cause of action at the time of her death, a surviving minor could also maintain a wrongful death action); Davenport v. Phillip Morris, Inc., 761 S.W.2d 70, 71 (Tex. App.—Houston [14th Dist.] 1988, no writ) (indicating that "[a] cause of action under the Texas Wrongful Death Act is, by its nature, a derivative action"); Pastor v. Champs Rest., Inc., 750 S.W.2d 335, 336 (Tex. App.—Houston [14th Dist.] 1988, no writ)

death action "is subject to all the conditions to which the decedent would have been subject had he or she only been injured."[190] Under this view, a claim may be brought under the Act "only if the individual injured would have been entitled to bring an action for the injury if the individual had lived."[191] Thus, plaintiffs who assert a wrongful death cause of action are held to be "in the procedural shoes of the victim, and the defenses to victim's personal injury action are defenses to plaintiff's wrongful death claim."[192] Therefore, if the Wrongful Death Act is viewed as a derivative cause of action, non-signatories may be bound by the arbitration contract of the deceased.[193]

(asserting that because the suit was brought under the Texas Wrongful Death Act "the action on behalf of the decedent's family is . . . a purely derivative one"); Washam v. Hughes, 638 S.W.2d 646, 648 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (stating that a wrongful death cause of action and loss of consortium action are both derivative in nature).

190. Holman & Langdon, LLP, Wrongful Death, Survival and Bystander Claims, www.ark-la-texlaw.com/FSL5CS/Articles/articles5.asp (last visited Nov. 6, 2006) (on file with the *St. Mary's Law Journal*).

191. TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(a) (Vernon Supp. 2005); *see also* Bangert v. Baylor Coll. of Med., 881 S.W.2d 564, 566 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (indicating that "if a decedent could have maintained suit for personal injuries at his or her death, the decedent's statutory beneficiaries may sue for wrongful death"); Avila v. St. Luke's Lutheran Hosp., 948 S.W.2d 841, 849-50 (Tex. App.—San Antonio 1997, no pet.) (asserting that "a wrongful death claim derives wholly from the cause of action that the decedent could have asserted for personal injuries had he lived").

192. Holman & Langdon, LLP, Wrongful Death, Survival and Bystander Claims, www.ark-la-texlaw.com/FSL5CS/Articles/articles5.asp (last visited Nov. 6, 2006) (on file with the *St. Mary's Law Journal*); *see also* Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 347-49 (Tex. 1992) (stating that "wrongful death action plaintiffs stand in the legal shoes of the decedent," and furthermore, expressing that "[i]f a decedent's own cause of action were barred by governmental immunity, or statute, or release, or res judicata, or any other affirmative defense, there is no wrongful death action to accrue"); *Avila*, 948 S.W.2d at 850 (indicating that an action under the Wrongful Death Act is a derivative cause of action in that the surviving beneficiaries step into the shoes of the decedent).

193. *See In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 755-56 (Tex. 2001) (holding the non-signatories bound to a contract's arbitration provision because "a litigant who sues based on a contract subjects him or herself to the contract's terms"); *In re* Ledet, No. 04-04-00411-CV, 2004 WL 2945699, at *4-5 (Tex. App.—San Antonio Dec. 22, 2004, orig. proceeding) (mem. op.) (finding a daughter bound to arbitration when asserting her negligence claim, based upon the actual authority of the brother to sign the arbitration agreement on his mother's behalf as her legal representative); *In re* Rangel, 45 S.W.3d 783, 787 (Tex. App.—Waco 2001, no pet.) (holding that non-signatory third party beneficiaries are bound to all the terms of the contract, including binding arbitration clauses); Nationwide of Bryan, Inc. v. Dyer, 969 S.W.2d 518, 520 (Tex. App.—Austin 1998, no pet.) (asserting that third party beneficiaries are bound by all the terms of the contract, even an arbitration provision); Stonewall Ins. Co. v. Modern Exploration, Inc., 757 S.W.2d 432, 434 (Tex. App.—Dallas 1988, no writ) (advocating that a third party beneficiary essentially "steps into the shoes" of the contracting party, and thus, is bound by all the conditions and provisions of the prior completed contract).

However, other courts have held that non-signatories to an arbitration agreement are not bound to arbitration agreements entered into by the deceased when asserting wrongful death claims.[194] Recently, in *In re Kepka*, the court held that because plaintiff did "not sign the arbitration agreement in her individual capacity," and because plaintiff brought the wrongful death claim "in her individual capacity for damages personal to her," she was not bound to arbitrate her individual wrongful death claim.[195] The court asserted that "[w]rongful-death claims are personal to the statutory beneficiaries who assert the claims, and recovery for those claims does not benefit the estate."[196] Furthermore, the *Kepka* court declined to follow the holding in *Allen v. Pacheco*,[197] in which the Colorado Supreme Court held that a non-signatory wife's wrongful-death claim was subject to arbitration under a contract between her deceased husband and his HMO.[198]

The *Kepka* Court distinguished its decision from the holding in *Pacheco* four ways: (1) by stating that "[o]ur state supreme court has held that the presumptions and policy favoring arbitration have no application until af-

194. *See In re* Kepka, 178 S.W.3d 279, 294 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding) (holding that plaintiff, a non-signatory wife, was not bound to arbitrate her individually asserted wrongful death claim); Gomez v. Zardenetta, No. 04-97-00119-CV, 1998 WL 19858, at *7 (Tex. App.—San Antonio Jan. 21, 1998, no pet.) (not designated for publication) (asserting that "[a]lthough there are no specific cases on whether a person suing for wrongful death can be compelled to arbitration, there is a plethora of cases stating that non-signatories cannot be compelled to arbitration"). The court in *Gomez* held that a non-signatory is not bound to arbitration when asserting a wrongful death claim because a "wrongful death claim is a separate claim from decedent's personal injury claim." *Gomez*, 1998 WL 19858, at 7. Furthermore, the *Gomez* Court asserted that plaintiff was not the "[d]ecedent's agent, partner or alter-ego," and therefore could not be bound by one of those concepts. *Id.*; *see also* Merrill Lynch Pierce, Fenner, & Smith, Inc. v. Longoria, 783 S.W.2d 229, 231 (Tex. App.—Corpus Christi 1989, no pet.) (concluding that the derivative claims of non-signatories to arbitration agreements are not bound to arbitration when recovery is based upon independent grounds for damages as opposed to one acting as the signatories' agent).

195. *In re Kepka*, 178 S.W.3d at 294.

196. *Id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 71.004(a) (Vernon 1997) (stating that "[a]n action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased"); Palmer v. Coble Wall Trust Co., Inc., 851 S.W.2d 178, 181-82 (Tex. 1992) (indicating that recovery under the Texas Wrongful Death Act does not benefit the estate of the statutory beneficiaries but rather provides them with a remedy for their loss).

197. 71 P.3d 375 (Cal. 2003) (en banc).

198. Allen v. Pacheco, 71 P.3d 375, 381 (Cal. 2003) (en banc) (holding a non-party spouse bound to arbitrate her wrongful death claim, reasoning that "[b]ecause the term 'heir' as used in the arbitration agreement is ambiguous and susceptible of an interpretation that encompasses spouses, we construe the term inclusively and hold that spouses are within the scope of the agreement").

ter the movant has shown the existence of a valid arbitration agreement," and therefore, "Texas courts would not apply the favorable-to-arbitration presumption that the *Pacheco* court applied to resolve an ambiguity about which non-signatories were bound by the arbitration agreement"[;][199] (2) by indicating that "[a] non-signatory wife, asserting in her individual capacity personal statutory claims for damages such as her own mental anguish and loss of consortium, earnings, companionship, society, and inheritance, lacks the type of privity contemplated for the contracting parties to bind her to a contract that she did not sign in her individual capacity[,]" and furthermore, while "a surviving wife may be an heir, within the meaning of an arbitration agreement that she did not sign individually, to her late husband's claims; she cannot be an heir to her own claims"[;][200] (3) by asserting that the Texas "wrongful-death statute (which grants a personal right [of recovery] to the spouse, children, and parents)" does not indicate that heirs are bound; however, the survival statute, where claims are derived purely from the decedent's rights, indicates that the action survives to favor the heirs;[201] and (4) by declaring that the non-signatories listed in the disputed arbitration clause were those who would stand in the decedent's shoes or have the authority to act on his behalf, thereby concluding that the arbitration clause meant only to bind heirs contracting in that capacity, not heirs suing on behalf of their own personal loss.[202]

The holding in *Kepka* raises the issue of who is bound by an arbitration contract of the deceased when asserting wrongful death claims. This question will likely arise in the context of wrongful death claims where there is an arbitration contract signed by the deceased, a power of attorney, or another heir. For example, where the son of the deceased, as the power of attorney, signs an arbitration agreement, the question arises as to whether another heir is bound to arbitrate their wrongful death claim. Furthermore, if one heir or beneficiary signs an arbitration contract, the issue again arises as to whether the other heirs of the decedent are bound by the arbitration agreement when asserting their own wrongful death claims. The issue of who is bound in wrongful death cases has yet to be resolved by the Texas or United States Supreme Courts. Foreseeable problems will likely arise where one is bound by arbitration regarding a survival action, but not bound in a wrongful death cause of action. Judicial economy will likely be trampled if claims of wrongful death and sur-

199. *In re Kepka*, 178 S.W.3d at 295.

200. *Id.* at 296.

201. *Id.*

202. *See id.* (noting that the contracting parties did not use the term heirs to mean those suing based on personal loss).

vival are severed in order to be resolved separately in forums of arbitration and litigation.

Notwithstanding the interpretation of wrongful death actions, "[f]ederal courts have recognized six theories, arising out of common principles of contract and agency law, that may bind non-signatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary."[203] Therefore, plaintiffs may still be bound to arbitration if one of these principles is applicable to the case at hand.[204]

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203. *In re* Kellogg, Brown & Root, Inc., 166 S.W.3d 732, 739-40 (Tex. 2005) (asserting that "under 'direct benefits estoppel, a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes'"; however, also noting that "if the non-signatory's claims can stand independently of the underlying contract, then arbitration should not be compelled under this theory" (quoting R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 160-61 (4th Cir. 2004))); *see also* Charles Davant IV, Note, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 532 (2001) (indicating that "nonsignatories to an arbitration agreement may be bound according to ordinary principles: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing, and (5) estoppel").

204. *See In re Kepka*, 178 S.W.3d at 293 (asserting that none of the "six cited theories" recognized by federal courts were argued as grounds to bind plaintiff to arbitration and furthermore, stating that none apply to plaintiff's case). *But see In re* Weekley Homes, L.P., 180 S.W.3d 127, 129, 131 (Tex. 2005) (acknowledging that Texas has "previously compelled arbitration by nonparties to an arbitration agreement when they brought suit 'based on a contract[,]'" and asserting that "contract and agency law may bind a nonparty to an arbitration agreement" (quoting *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 755 (Tex. 2001))); *see also* Keystone Shipping Co. v. New England Power Co., 109 F.3d 46, 51 (1st Cir. 1997) (holding plaintiff bound to arbitration under the theory of incorporation by reference); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1121 (3d Cir. 1993) (finding claims against a sister corporation bound to arbitration based upon agency principles); J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988) (noting that "[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement"); *In re FirstMerit Bank*, 52 S.W.3d at 755-56 (orig. proceeding) (holding plaintiff bound by arbitration under the third party beneficiary theory); McMillian v. Computer Translation Sys. & Support, Inc., 66 S.W.3d 477, 482-83 (Tex. App.—Dallas 2001, orig. proceeding) (permitting agents to enforce arbitration agreements signed by their principle); *In re* Nasr, 50 S.W.3d 23, 28 (Tex. App.—Beaumont 2001, orig. proceeding) (compelling arbitration based upon equitable estoppel, and asserting that "a party may be estopped from avoiding arbitration of claims against a nonsignatory of the underlying contract if those claims and the claims against the signatory are based on the same operative facts and are inherently inseparable"); Hearthshire Braeswood Plaza Ltd. v. Bill Kelly Co., 849 S.W.2d 380, 392 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (indicating that non-signatories can be bound by an arbitration agreement by their "acts, conduct or acquiescence in the terms of the contract"); Wetzel v. Sullivan, King & Sabom, P.C., 745 S.W.2d 78, 82 (Tex. App.—Houston [1st Dist.] 1988, no writ) (concluding that the

IV. CONCLUSION

In the future, plaintiffs will continue their attempts to avoid binding arbitration under the FAA in regards to health care liability claims. The inevitable question raised by these challenges is whether defendants—health care providers, physicians, or other professionals in the medical field—should advocate for binding arbitration or whether they, too, should demand the protections of a jury trial. For many years, proponents of binding arbitration have praised arbitration as being an effective means to resolve disputes between parties quickly, efficiently, and cheaply.[205] Nevertheless, while many commend arbitration, it has its shortcomings and may not be appropriate for use in the medical field.

Supporters of binding arbitration assert that arbitration is quicker, more economical, more informal, and more efficient than a jury trial.[206] Proponents claim that arbitration tends to have more straightforward procedural and evidentiary rules than litigation, making the arbitration process preferrable for parties in regards to planning times and places for hearings.[207] Additionally, the use of arbitration serves to minimize hostility between the parties by allowing them to proceed with only nominal

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acceptance of the contract's benefits stopped the non-signatory corporation from denying the existence of the arbitration agreements).

205. *See, e.g.*, Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 401 (1998) (stating that arbitration was thought to be the preferred method of dispute resolution between two parties of equal bargaining power because of the belief that it was "more efficient than litigation, less costly and a better process for parties with continuing business relationships").

206. *See, e.g.*, Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 535 (2005) (declaring that arbitration has "certain advantages over litigation, such as confidentiality, speed, flexibility, and [the] ability of the parties to choose the arbitrators"); Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or a Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 362 (1996) (asserting that arbitration agreements are valuable tools which provide "consumers speedy, inexpensive, access to justice"); Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 971-72 (2004) (advocating that "[n]umerous arbitration supporters believe that arbitration is inherently a better way to resolve disputes because it is faster, cheaper, and at least as fair as litigation").

207. See Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 490 (1998) (commenting that the informality of arbitration not only provides for the quicker resolution of the claims, but also allows parties to "schedule a hearing at any day or time as long as the arbitrator(s) and witnesses are able to attend"). "In order to maintain simplicity and in order to expedite resolution of the claim, the procedures in arbitration are streamlined." *Id.* at 482.

disruption to their business relationships, thereby preserving relations for possible future business dealings.[208]

Specifically, in the health care field, proponents claim arbitration is more favorable than litigation based upon the lower costs involved when resolving disputes.[209] They assert that arbitration is less expensive than litigation because of its ability to reduce administrative and transactional costs to the plaintiff, flexibility in allowing parties to plan procedural boundaries, and ability to lead to finality of disputes.[210] Supporters of binding arbitration allege that arbitration "offer[s] the health care provider the advantages of privacy, lower defense costs, and objective damage awards."[211] Concurrently, it is argued that arbitration benefits the patient by providing "a lower cost forum for his or her case, relaxed rules of evidence, and a prompt resolution of complaints."[212]

Furthermore, proponents claim that arbitration is more efficient in the medical field because of the parties' ability to select an arbitrator with

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208. *See* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 490 (1998) (declaring that the informality of arbitration "may also help preserve the relationship between the parties"); Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L.J. 45, 49-50 (2000) (asserting that arbitration allows the maintenance of relationships between a doctor and his patient, while also simultaneously serving to satisfy the claimant); David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 157-58 (1998) (commenting that by using arbitration as a dispute resolution process, the doctor-patient relationship is preserved and physical and emotional trauma to the parties is reduced).

209. *See, e.g.*, Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 489 (1998) (asserting that "[a]rbitration is typically less costly and time consuming than litigation"); Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L.J. 45, 49 (2000) (advocating that "[t]he reasons to resolve medical malpractice disputes through arbitration include the parties' ability to control the procedure, the ability to select the arbitrator or expert, reduced cost, shortened time to resolve the dispute, finality of the decision, privacy, reduced emotional trauma of litigation, and self autonomy though the ability to contract and resolve disputes outside of the courts"); Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 972 (2004) (noting that "[s]ome argue that the expense of litigation combined with the minute chance that one's case will actually get to trial, has essentially rendered the tort system inaccessible to the average litigant").

210. *E.g.*, David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 153-54 (1998) (noting the positive aspects of arbitration).

211. Fillmore Buckner, *A Physician's Perspective on Mediation Arbitration Clauses in Physician-Patient Contracts*, 28 CAP. U. L. REV. 307, 313 (2000).

212. *Id.*

expertise in a certain area.[213] They allege that arbitration allows parties to choose an arbitrator, such as a medical care provider, who will understand the factual intricacies of the case, ultimately leading to better decisions, less time consumption, and a reduction in emotional trauma to patients and health care providers.[214] Supporters emphasize that because arbitrators are able to perform a case-by-case assessment of liability, they have the ability to be more flexible "in fashioning remedies than a judge or a jury; they are not bound by the binary approach seen in court adjudication, where either plaintiff or defendant will prevail."[215] Finally, advocates of arbitration stress that resolving disputes through arbitration compensates more plaintiffs and renders more equitable awards than litigation.[216]

Notwithstanding the arguments in favor of binding arbitration in the health care field, there are multiple reasons for opposition. Some of the disadvantages asserted by opponents to the use of arbitration as a jury trial substitute include: the lack of full range of discovery;[217] the potential

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213. *E.g.*, David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 155 (1998) (recognizing that an arbitrator familiar with medical issues is advantageous to the participants).

214. *E.g.*, *id.* at 155-56 (outlining the advantages of an arbitrator familiar with medical issues).

215. Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 490 (1998).

216. Fillmore Buckner, *A Physician's Perspective on Mediation Arbitration Clauses in Physician-Patient Contracts*, 28 CAP. U. L. REV. 307, 313 (2000); *see also* Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L.J. 45, 50 (2000) (declaring that "[a] 1992 General Accounting Office (GAO) study of medical malpractice litigation found that arbitration took less time than litigation, was effective in compensating more plaintiff[s] for their injuries, and yielded lower and more consistent awards"). "In arbitration, every dollar of the arbitration award goes to the plaintiff whereas in traditional litigation, a large amount of the award lands in the pockets of the plaintiff's attorney." Ann H. Nevers, *Medical Malpractice Arbitration in the New Mellennium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L.J. 45, 50 (2000).

217. *See, e.g.*, Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 489 (1998) (noting the limited right to discovery in arbitration proceedings); Charles Davant IV, Note, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 549 (2001) (commenting on the lack of availability of discovery through the use of arbitration); David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 164-65 (1998) (observing the hesitation regarding the use of arbitration as a dispute resolution forum because of the limited and shortened discovery allowed).

for use of unqualified arbitrators;[218] the difference in bargaining strength of the parties;[219] the perceived bias in favor of physicians;[220] and the imposition of substantial fees in complex cases.[221] Furthermore, opponents claim that when making the awards, arbitrators "split the baby" or split the difference, thus "making compromise decisions which do not fully exonerate a client's interests."[222]

Another disadvantage in the health care field is the ability of arbitrators to render decisions which are not in compliance with the protections passed by the legislature for health care providers.[223] When arbitrating

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218. *See* Charles Davant IV, Note, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 549 (2001) (discussing that arbitration is generally conducted by nonlawyers who have a potential to be altogether unqualified to determine legal issues); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting) (discussing that arbitrators need not be lawyers to resolve disputes and in all likelihood will be nonlawyers who are "wholly unqualified to decide legal issues").

219. *See generally* Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 547 (2005) (asserting that the goals of arbitration have "been distorted to permit arbitration to displace court proceedings without the knowledge or consent of the weaker party to an adhesion contract, thereby denying court access and jury trials for an enormous segment of disputes"); Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 970 (2004) (noting that "[c]ritics often say that when patients forgo their right to sue, the health care industry strips them of a valuable right at a time when they might be at their most vulnerable").

220. *See* Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L.J. 45, 50 (2000) (discussing the "bias against arbitration among the parties," specifically noting defense attorneys' comfort with the protections afforded by litigation and the perception among plaintiffs that arbitration is biased towards the defendant); Kathrine Kuhn Galle, Comment, *The Appearance of Impropriety: Making Agreements to Arbitrate in Heath Care Contracts More Palatable*, 30 WM. MITCHELL L. REV. 969, 972 (2004) (stating that opponents to arbitration clauses in health care contracts maintain that arbitration clauses are just "a way for the health care industry to exploit consumers").

221. *See, e.g.*, Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 535 (2005) (noting that consumers will be forced to pay higher fees when arbitrating as compared to litigation).

222. David Zukher, Note, *The Role of Arbitration in Resolving Medical Malpractice Disputes: Will a Well-Drafted Arbitration Agreement Help the Medicine Go Down?*, 49 SYRACUSE L. REV. 135, 165 (1998). *See generally* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 490-91 (1998) (stating that arbitrators "are not bound by the binary approach seen in court adjudication, where either plaintiff or defendant will prevail," thus allowing arbitrators to fashion appropriate remedies).

223. *See* Charles Davant IV, Note, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 549 (2001) (stating that arbitrators have "no duty to resolve a dispute in compliance with the parties' legal rights"); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S.

under the FAA, there is no provision or requirement obligating the arbitrator to comply with substantive law.[224] Because of this unchecked authority, arbitrators may disregard the protections afforded to health care providers under chapter 74 of the Texas Civil Practice and Remedies Code, including time limits for expert reports, qualifications for expert witnesses, and discovery limitations.[225] Furthermore, under chapter 74, the judge has the authority to dismiss the case or impose sanctions for failing to comply with these special provisions.[226] If a judge fails to dismiss a case in which the plaintiff does not comply with the requirements for expert reports, there is a right of mandamus for the health care provider.[227] However, in arbitration, there is no right to mandamus and arbitrators are not bound to follow the law under chapter 74, thus negating a clear advantage that health care providers have under this special statute.

In choosing arbitration, the health care provider also relinquishes very important rights to an appeal.[228] Under the FAA, courts are limited to

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395, 407 (1967) (Black, J., dissenting) (commenting that arbitrators are not bound to apply the law).

224. *See* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 483-84 (1998) (commenting that "there is no language in the FAA that imposes such an obligation" upon the arbitrators to follow the law).

225. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001-507 (Vernon 2005 & Supp. 2006) (mandating protective procedures for health care providers in regards to health care liability claims such as: time limits for expert reports, discovery limitations, and qualifications for expert witnesses to be used in suits against health care providers and physicians).

226. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon Supp. 2006) (indicating that if an expert report is not served within 120 days, subsequent to the date the original petition was filed, a court shall, subject to time to cure for deficiency, award "the affected physician or health care provider reasonable attorney's fees and costs of court incurred" and may dismiss the claim with prejudice); *see also id.* § 74.352 (Vernon 2005) (stating that plaintiff shall, within 45 days, serve on defendant or defendant's attorney, complete answers to interrogatories and requests for production of documents and things, and unless there is good cause, the "[f]ailure to file full and complete answers and responses to standard interrogatories and requests for production of documents and things . . . shall be grounds for sanctions").

227. *See In re* Samonte, 163 S.W.3d 229, 233 (Tex. App.—El Paso 2005, orig. proceeding) (stating that "[m]andamus will lie only to correct a clear abuse of discretion" such as one where "a court issues a decision which is without basis or reference to guiding principles of law"). The court in *In re Samonte* conditionally granted an anesthesiologist's petition for writ of mandamus because it found that the expert report filed under former statute, article 4590i of the Medical Liability and Insurance Improvement Act of Texas, failed to comply with the requirements of the Act, and that there was no adequate remedy on appeal. *Id.* at 238.

228. *See* Federal Arbitration Act, 9 U.S.C. § 16 (2000) (declaring specific grounds for the appeal of an arbitration award and stating that generally, no appeal may be taken until

specific statutory grounds upon which they may vacate an arbitrator's award.[229] Thus, due to the strong policy favoring arbitration and the limited statutory grounds for appeal, an arbitration award is almost impossible to appeal, making it difficult for parties to overturn arbitrator's decisions.[230] Moreover, the Supreme Court has asserted that "a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one."[231] Therefore, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, [the fact] that a court is convinced he committed serious error does not suffice to overturn his decision."[232]

Despite the well-known advantages to arbitration, health care professionals should be wary of employing binding arbitration in the medical field. Health care providers are encouraged to consider the disadvantages of binding arbitration when determining whether to include arbitration clauses in health care contracts. While the advantages of lower defense costs, more objective awards, and privacy might be appealing, a favorable jury verdict may be a better solution for the health care provider's reputation and self-assurance.

In any event, despite how arbitration is perceived by the medical field, many issues regarding the enforceability of binding arbitration have yet to be resolved. Future court decisions regarding FAA preemption and state law defenses to binding arbitration will continue to be split unless the issues are addressed by the Supreme Court or the Texas Legislature.

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after a final decision); *see also* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 NEB. L. REV. 397, 489 (1998) (noting "the limited right to appeal" when arbitrating).

229. *See* Federal Arbitration Act, 9 U.S.C. § 10 (Supp. IV 2004) (mandating statutory grounds upon which an arbitration award may be vacated). Under the FAA, a court may vacate an arbitrator's award:

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.

230. *See* Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 535 (2005) (advocating that by using arbitration as a dispute resolution process, plaintiffs will "have no right to an appeal on the merits of the case").

231. W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers, 461 U.S. 757, 764 (1983).

232. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

Until the bounds of arbitration are defined, courts will continue to expand the scope of arbitration, and opponents of binding arbitration in the health care field will be encouraged to apply the McCarran-Ferguson Act and other general state law contract principles to override the application of the FAA.