IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NO. 2007-CA-01250

Covenant Health & Rehabilitation of Picayune,
LP; Covenant Dove, Inc.; and
Unidentified Entities 1 through 10
(as to Picayune Convalescent Center, now known as
Covenant Health and Rehabilitation Center of Picayune) APPELLANTS

versus

Estate of Mittie M. Moulds, by and through
James Braddock, Administrator, for the use
and benefit of the Estate and Wrongful Death
Beneficiaries of Mittie M. Moulds APPELLEES

BRIEF OF APPELLEE
Oral Argument Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal:

1. Defendants/Appellants Covenant Health and Rehabilitation of Picayune, L.P.; and Covenant Dove, Inc.

2. Plaintiffs/Appellees James Braddock and Estate of Mittie Moulds

3. John L. Maxey, II, Esquire and Paul H. Kimble, Esquire, Attorneys for Defendants/Appellants

4. F. M. Turner, III, Esquire, Attorney for Plaintiffs/Appellees

5. The Honorable Prentiss G. Harrell, Pearl River County Circuit Court Judge

F. M. Turner, III (MB[redacted]
Attorney for Appellees

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STATEMENT REGARDING ORAL ARGUMENT

The Appellees believe that oral argument would aid the resolution of the appeal before this Court and respectfully request that the Court grant Appellees' request for oral argument. The jurisprudence concerning the issues of the instant case is in flux and resolution of each case is highly dependent upon the facts and circumstances of that particular case. Oral argument will assist the Court in continuing to develop the law surrounding the enforcement of nursing home arbitration agreements.

APPELLEE'S STATEMENT OF THE CASE

On November 15, 2006, Plaintiff, The Estate of Mittie Moulds, by and through James Braddock, Administrator, filed suit against Appellants, Covenant Health & Rehab of Picayune, L.P., and its general partner, Covenant Dove, Inc., for personal injuries and wrongful death suffered by Mittie Moulds while a resident of Appellants' nursing home, Picayune Convalescent Center, between November 16, 2000, and September 20, 2004, which resulted in her death on October 2, 2004. (R. 2)

At the time of Mrs. Moulds' admission, the Appellants fraudulently induced Mrs. Moulds son, James Braddock, to execute an Admission Agreement containing an arbitration clause. (R. 54-57) On April 24, 2002, Mr. Braddock was fraudulently induced to execute another Admission Agreement containing an arbitration provision and other terms held unconscionable by this Court. (R. 61-66) The affidavit of Keri Ladner, the administrator of Picayune Convalescent Center, establishes that execution of the arbitration agreement was not a part of the consideration for admission to Picayune Convalescent Center.

> Our facility has never refused to admit an individual based on a refusal to consent to the Arbitration Agreement aspect of the Admission Agreement. A refusal to consent to the Arbitration Agreement would not lead the facility to refuse admittance.

(Affidavit of Keri Ladner, R. 59, ¶6) Based upon the affidavit of Ms. Ladner, neither Mrs. Moulds' admission or refusal of admission to the nursing home, nor the provision of services to her while a resident, was based upon execution of the arbitration clause. However, the specific provisions of the Admission Agreement itself represented that its terms were not optional or subject to negotiation:

a. The Resident and/or Responsible Party were required to complete the agreement or make satisfactory arrangements for its completion before or at the time of admission. (R. 64, ¶ D.1)

b. While the Admission Agreement contained a termination provision, its exercise required discharge of the Resident. (R. 64, ¶ D.2)

c. The Facility reserved the right to discharge the Resident if in the Facility's sole discretion the Resident and/or Responsible Party were unable to comply with the terms of the agreement. (R. 64, ¶ D.3)

d. The provisions of the Admission Agreement altering the standard of care, eliminating liability of the Facility for negligent and criminal acts, shortening the statute of limitations, limiting actual damages, eliminating punitive damages, shifting costs and attorneys' fees for challenging arbitration or an arbitration award, waiving "jural" trial, and requiring the Resident and Responsible Party to submit all of their claims to binding arbitration, were declared to survive the termination of the agreement "for any reason" and "[n]otwithstanding any other provision set forth" in the agreement. (R. 64, ¶ D.4)

The statements in the Admission Agreement represented that acceptance of the arbitration clause was an essential condition for admission and that rejection of the arbitration clause was grounds for discharge from the facility. According to the sworn testimony of Keri Ladner, the managing agent of the Defendants' nursing facility, both of these representations were false. It is clear that they were intended to be accepted and relied upon by residents and their families, being a part of the printed Admission Agreement. The affidavit of James Braddock establishes that no statements were made to him during the admission process or at the time the second agreement was presented for signature to indicate that execution of the admission agreement was voluntary,

indicating an intent on the part of the Defendants that the printed statements be relied upon. (R. 160-165)

The arbitration provision stated that "the Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them and the Facility or its Owners, officers, directors or employees shall be resolved by binding arbitration." (R. 66, ¶ F) The Facility, its owners, officers, directors and employees made no corresponding agreement. The Admission Agreement included no undertaking or obligation by the Facility, its owners, officers, directors or employees to submit any "claim, dispute and/or controversy" to binding arbitration. The arbitration provision was but the final step of a three step "grievance resolution process" set out in the Admission Agreement. However, this "grievance resolution process" applied only to "a claim, dispute and/or controversy [arising] between the Parties *other than* regarding matters concerning the payment for services rendered or refunds due." (R. 65, ¶ E.5) (emphasis added)

e. Following written notice of the claim, "delivered within 20 days of the date of the incident giving rise to the claim," the Parties are required to conduct a "Grievance Resolution Meeting." (R. 65, ¶ E.5)

f. "[A]ny claim, dispute and/or controversy ... which has not been resolved as set forth in Section E.5" is subject to "a formal mediation" to be conducted within 60 days of when the dispute arises. (R. 65, ¶ E.6)

g. If the claim, dispute and/or controversy is not resolved by mediation, then the Parties proceed to arbitration "as set forth below." (R. 65, ¶ E.6)

For the Appellants' benefit, the Financial Agreement section of the Admission Agreement provided that "[s]hould an account become delinquent and be referred to an attorney and/or agency for collection, the Resident and/or Responsible Party shall be responsible for all costs of

collection. This includes, but is not limited to, attorney's fees and other costs of *litigation.*" (emphasis added) (R. 62, ¶ A.5)

Taken together, the exemption of "claim[s], dispute[s] and/or controvers[ies] ... regarding matters concerning the payment for services rendered or refunds due" (R. 65, ¶ E.5), the lack of an undertaking by the Facility, its owners, officers, directors or employees to submit any "claim, dispute and/or controversy" to binding arbitration (R. 66, ¶ F), and the provision allowing the Facility to collect "costs of litigation" (R. 62, ¶ A.5) clearly establish that the Appellants never intended for their interests to be bound to the arbitration provisions of the Admission Agreement.

In addition to the foregoing provisions, the Admission Agreement also contained all of the provisions found to be substantively unconscionable in *Covenant Health and Rehab, L.P. v. Brown*, 924 So. 2d 732 (Miss. 2007), and *Covenant Health and Rehabilitation of Picayune, L.P. v. Lambert*, 2005-CA-02223-COA (Miss. App. 2006). Both of those decisions involved the Appellants here and substantially similar admission agreements. The unconscionability of Sections C.5, C.8, D.4, E.5, E.6, E.7, E.8, E.12, E.13, and E.16 of the Admission Agreement is conceded by the Appellants in their brief in this action. (Brief of Appellants at 12 n. 1)

The trial court properly held the Admission Agreement to be substantively unconscionable and refused to enforce the same.

STATEMENT OF FACTS

Mittie Moulds was a resident of Picayune Convalescent Center, a skilled nursing facility operated by the Defendants, from November 16, 2000, until September 20, 2004, and suffered personal injuries and damages while a resident there, which resulted in her death on October 2, 2004.

At the time of her admission to Picayune Convalescent Center on November 16, 2000, Mittie Moulds was 76 years old. She was suffering from Alzheimer's disease, dementia, depression, short and long term memory loss, impaired cognitive abilities, poor decision making ability and visual impairment. (See Accumulative Diagnosis listing for November 16, 2000, R. 110, R. Ex. 5) She had difficulty finding words or finishing thoughts while speaking and only sometimes understood what others were saying to her, usually responding only to simple, direct communications. She was not able to read normal sized print, although she could read large print like newspaper headlines. She was dependent on others for all activities of daily living. Due to her mental and physical condition, she was unable to appreciate her situation or understand her legal rights sufficiently to manage her personal affairs. (See affidavit of James Braddock, R. 160-161, R. Ex. 7 ¶4)

Due to Mrs. Moulds' physical and mental impairments, the Admission Agreement was signed by James Braddock, Mrs. Moulds' son, as her health-care surrogate pursuant to Miss. Code Ann. §41-41-201 *et seq.* As her health-care surrogate, Mr. Braddock had the authority to make health-care decisions for Mrs. Moulds, including selecting a nursing home and agreeing to payment for health-care services. However, Mr. Braddock had no authority, expressly granted or implied in law, to waive any of his mother's legal or constitutional rights, such as the right to a jury trial or the right to collect her full legal redress. (See affidavit of James Braddock, R. 161-162, R. Ex. 7 ¶¶5 and 8)

Mrs. Moulds was not present when Mr. Braddock signed the Admission Agreement on November 16, 2000, and was not asked to sign the agreement. She would not have been able to understand the Admission Agreement if it had been presented to her, not could she have made an informed decision about executing the agreement. (See affidavit of James Braddock, R. 161, R. Ex. 7 ¶6)

The Defendants' initial Care Plan for Mittie Moulds lists as Problem/Need #1 "Short term memory problems with moderately impaired decision making skills secondary to diagnosis of dementia, Alzheimer's type. Mental functions vary over course of day. Potential for unavoidable decline. Usually makes needs known and usually understands verbal cues." The specific plan of care for this problem was:

> Keep daily routine simple and consistent.
>
> Reorientate [sic.] as able throughout day for periods of confusion.
>
> Encourage to make decisions regarding ADLs [activities of daily living] such as clothing choice, activities to attend, etc.
>
> Break down ADL tasks using simple directions and extra time as needed.
>
> Verbally cue as needed, may need frequent reminders.
>
> If decisions are inappropriate, counsel as needed on appropriate decisions using terms and giving simple reason why decision may be poor. Provide alternate choices that are appropriate.
>
> Encourage to pursue active life in facility.
>
> Monitor for gradual decline that may fluctuate secondary to diagnosis of dementia, Alzheimer's type. Notify MD as needed for acute changes.

(See Care Plan, Problem/Need #1, R. 111, R. Ex. 6)

When Mr. Braddock was presented the Admission Agreement to sign on April 24, 2002, it was not in connection with an admission or readmission of Mrs. Moulds to Picayune Convalescent Center. It was presented to him for signature as something necessary for his mother's care. The provisions of the agreement were presented on a take-it-or-leave-it basis,

with no explanation of the meaning or effect of the arbitration provision. (See affidavit of James Braddock, R. 163, R. Ex. 7 ¶16)

Although the Defendants claim that Mrs. Moulds signed the Admission Agreement of April 24, 2002 (R. 61-66, R. Ex. 2)), according to the sworn affidavit of Mr. Braddock, his mother was not present when the admission paperwork was completed and was never asked to sign the Admission Agreement in his presence. Her signature on the Admission Agreement was apparently obtained by someone at the nursing home without his knowledge and agreement. At that time, Mrs. Moulds was not capable of making independent decisions about the matters contained in the Admission Agreement. She would not have been able to read the Admission Agreement if it had been presented to her, nor would she have been able to understand its meaning and effect on her legal rights. (See affidavit of James Braddock, R. 164, R. Ex. 7 ¶19)

According to the affidavit of Kerri H. Ladner, the administrator of Picayune Convalescent Center:

> Our facility has never refused to admit an individual based on a refusal to consent to the Arbitration Agreement aspect of the Admission Agreement. A refusal to consent to the Arbitration Agreement would not lead the facility to refuse admittance.

(See affidavit of Kerri H. Ladner, R. 59, R. Ex. 9 ¶6)

Mr. Braddock was never told that any term of the Admission Agreement could be waived. If he had been told that he could reject the arbitration paragraph, along with the effect of accepting it, Mr. Braddock would have rejected it. (See affidavit of James Braddock, R. 163, R. Ex. 7 ¶¶13-14 and R. 164, R. Ex. 7 ¶¶17-18)

Both versions of the Admission Agreement provide that arbitration shall be "administered by the American Arbitration Association ...." (R. 57, R. Ex. 8 ¶F; R. 66, R. Ex. 2 ¶F) The American Arbitration Association refuses to administer arbitration proceedings involving an individual patient in the absence of a *post-dispute* agreement to arbitrate.

"'Although we support and administer pre-dispute arbitration in other cases, we thought it appropriate to change our policy in these cases since medical problems can be life or death situations and require special consideration,' said Robert Meade, Senior Vice President, American Arbitration Association." (R. 112-113, R. Ex. 10)

SUMMARY OF THE ARGUMENT

I. NO ARBITRATION AGREEMENT CAME INTO EXISTENCE

The mere existence of an arbitration term in a writing is not enough to find the existence of a binding agreement to arbitrate and to compel arbitration. *See Pre-Paid Legal Services, Inc. v. Battle*, 873 So. 2d 79, 83 (Miss. 2004) *citing East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002). The elements of a valid contract are "(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation." *Rotenberry v. Hooker*, 864 So. 2d 266, 270 (¶13) (Miss. 2003); *Gatlin v. Methodist Medical Center, Inc.*, 772 So.2d 1023, 1029 (¶20) (Miss. 2000); *Lanier v. State*, 635 So.2d 813, 826 (Miss. 1994).

A. No one with legal capacity to bind Mrs. Moulds to an arbitration agreement executed the Admission Agreement

Due to Mrs. Moulds' physical and mental condition, she was not competent to comprehend the Admission Agreement or to make decisions concerning her medical care and treatment, business affairs or legal rights. (See Care Plan, Problem/Need #1, R. 111, R. Ex. 6) According to the sworn affidavit of James Braddock, his mother was not present when the admission paperwork was completed on November 16, 2000, or on April 24, 2002, when the second Admission Agreement was signed, and was never asked to sign either Admission Agreement. (See affidavit of James Braddock, R. 161 ¶6 and R. 164 ¶19, R. Ex. 7)

James Braddock acted as his mother's health-care surrogate pursuant to Miss. Code Ann. §41-41-201 *et seq.* in signing the Admission Agreement.

Unlike the situations in *Vicksburg Partners, L.P. v. Stephens,* 911 So. 2d 507 (Miss. 2005), and *Covenant Health and Rehab, L.P. v. Brown,* 949 So. 2d 732 (Miss. 2007), in the present case, the execution of the arbitration provision was *not* a part of the consideration for the

resident's admission to the facility or the provision of health care while a resident. Based upon the affidavit of the nursing home's administrator, Keri H. Ladner, neither Mrs. Moulds' admission to the nursing home nor the provision of services to her while a resident was dependent upon execution of the arbitration clause. (Affidavit of Keri Ladner, R. 59, ¶6)

Under the Uniform Health-Care Decisions Act, Miss. Code Ann. §41-41-202(g)-(h), the authority of a health-care surrogate is limited to making only "health-care decisions." Appellants themselves have established that the execution of the arbitration provision in this case was ***not*** a part of the health-care decision, since it was not a part of the consideration necessary for Mrs. Moulds' admission to the facility or the provision of health care to her.

Appellants' claim that, beyond acting as a health-care surrogate, James Braddock had *apparent authority* to execute the arbitration clause is without basis in law or fact. In Mississippi, the burden is on the one relying on an agent's authority to prove the authority of that alleged agent. See *Cue Oil Co. v. Fornea Oil Co., Inc.*, 45 So. 2d 597 (Miss. 1950). Appellants produced no evidence to establish that Mr. Braddock had actual or apparent authority to bind his mother to the arbitration provision.

B. The arbitration clause is not supported by consideration.

Based upon the affidavit of Ms. Ladner, neither Mrs. Moulds' admission to the nursing home nor the provision of services to her while a resident was based upon execution of the arbitration clause. Thus, the consideration for the arbitration clause was not "(a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation." *City of Starkville v. 4-County Electric Power Assoc.*, 819 So.2d 1216, 1220 (¶10) (Miss. 2002).

Under the Arbitration section of the Admission Agreement, "the Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them and

the Facility or its Owners, officers, directors or employees shall be resolved by binding arbitration." (R. 66, ¶ F) The Admission Agreement includes no undertaking or obligation by the Facility, its owners, officers, directors or employees to submit any "claim, dispute and/or controversy" to binding arbitration. There being no "return promise [by the Appellants], bargained for and given in exchange for the promise [on Mrs. Moulds' part to arbitrate her claims]", the arbitration clause fails for want of consideration. *City of Starkville v. 4-County Electric Power Assoc.*, 819 So.2d at 1220 (¶10).

II. THE ARBITRATION CLAUSE IS VOID DUE TO FRAUD IN THE INDUCEMENT.

Execution of the arbitration clause was not a condition for admission to the facility or the provision of services. Specific provisions of the Admission Agreement itself represented that acceptance of the arbitration clause was an essential condition for admission and that rejection of the arbitration clause was grounds for discharge from the facility. Both of these representations were false. It is clear that they were intended to be accepted and relied upon by residents and their families, being a part of the printed Admission Agreement. A contract procured by fraud is voidable as to all provisions and the entire transaction may be avoided by the party who entered into the contract without knowing of the fraud. *Allen v. Mac Tools, Inc.*, 671 So.2d 636, 641 (Miss. 1996); *Turner v. Wakefield*, 481 So.2d 846 (Miss. 1985).

III. THE ADMISSION AGREEMENT IS SUBSTANTIVELY UNCONSCIONABLE

The Admission Agreement in this action also contains all of the provisions found to be substantively unconscionable in *Covenant Health and Rehab, L.P. v. Brown*, 924 So. 2d 732 (Miss. 2007), and *Covenant Health and Rehabilitation of Picayune, L.P. v. Lambert*, 2005-CA-02223-COA (Miss. App. 2006). Appellants concede the unconscionability of these provisions of the Admission Agreement in this action. (Brief of Appellants at 12 n. 1)

The arbitration provision of the admission agreement is itself substantively unconscionable. In *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 525 (Miss. 2005), the Court made clear that "Arbitration is about choice of forum – period." The present contract grossly exceeds this limited scope. The Admission Agreement in this case goes even further than the agreement in *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005), containing additional terms even more oppressive than those found sufficient to strike the *Pitts* agreement on grounds of substantive unconscionability.

IV. THE ARBITRATION PROVISION IS NOT ENFORCEABLE AGAINST MITTIE MOULDS AS A THIRD PARTY BENEFICIARY

Defendants argue, relying upon the very recent Court of Appeals decision in *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-01299-COA (August 28, 2007), that the arbitration provision is enforceable against Mrs. Moulds' estate because she was a third-party beneficiary of the contract executed by James Braddock. Despite the fact that the Court of Appeals found that Mr. Barber had no authority to act directly for his mother as either attorney-in-fact or health-care surrogate, the Court of Appeals held that the arbitration provision was nonetheless enforceable against her as a third-party beneficiary of the contract. In doing so, the Court of Appeals relied upon the fact that "Mrs. Barber's care was the *sine qua non* of the contract." *Slip op.* at 10 (¶ 25). The Court of Appeals is silent, however, on whether the terms of the admission agreement in *Barber* made the arbitration provision a part of the consideration for the provision of those services by Trinity such that acceptance of those services would bind the resident. Their reasoning only makes logical sense if it did so or they presumed that it did.

Here, however, as the Defendants have admitted, execution of the arbitration agreement was not a condition for Mittie Moulds' admission to the facility or the receipt of services there. (See affidavit of Keri H. Ladner, R. 59, R. Ex. 9 ¶6) Therefore, the holding in *Barbour* is not applicable.

V. THE ARBITRATION PROVISION IS NOT ENFORCEABLE AGAINST MITTIE MOULDS BY EQUITABLE ESTOPPEL

Defendants attempt to invoke the doctrine of equitable estoppel as a basis for reversing the Court's decision in this case. It is clear that this equitable doctrine is inapplicable to the facts here presented. Equitable estoppel is an exceptional remedy and should be used only in exceptional circumstances. *Eagle Management, LLC v. Parks*, 938 So.2d 899, 904 (¶12) (Miss. App. 2006); *Powell v. Campbell*, 912 So. 2d 978, 982 (¶12) (Miss. 2005); *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201, 206 (Miss. 1984). To satisfy the elements of equitable estoppel, the Defendants must assert (1) that they relied upon the arbitration provision of the admission agreement as a necessary condition for the provision of services to Mittie Moulds, (2) that they admitted Mitties Moulds and provided services to her on the basis of the validity of the arbitration provision, and (3) that they suffered detriment or prejudice from the provision of such services. *Eagle Management, LLC v. Parks*, 938 So.2d at 904 (¶13), *citing, Cothren v. Vickers*, 759 So. 2d 1241, 1249 (¶19) (Miss. 2000).

However, this position is directly contradicted by the affidavit of Keri Ladner, the Defendants' managing agent, that the execution of the arbitration agreement was not a condition for admission or receipt of services.

VI. THE DESIGNATED ARBITRATION FORUM IS UNAVAILABLE

The arbitration provision of Section F of the Admission Agreement requires that "claims, disputes and/or controversies" within its scope "shall be resolved by binding arbitration administered by the American Arbitration Association and its rules and procedures." (R. 66 ¶F, R. Ex. 2). On June 13, 2002, the American Arbitration Association announced that, effective January 1, 2003, it would no longer accept the administration of cases in the health care area involving individual patients without a post-dispute agreement to arbitrate.

The "FAA does not confer a right to compel arbitration of any dispute at any time"; it confers only the right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement." *Volt Information Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75, 109 S. Ct. 1248, 103 L.Ed.2d 488 (1989). If the "manner provided for in [the] agreement" is unavailable, neither state nor federal law allows the Court to substitute another arbitration method for that stated in the agreement.

In light of the AAA's withdrawal from administration of arbitration of health care disputes, the arbitration provision of the Admission Agreement, even if otherwise deemed valid, is impossible of performance and therefore unenforceable.

The decision of the Circuit Court denying enforcement of the arbitration provision should be affirmed.

ARGUMENT

I. NO ARBITRATION AGREEMENT CAME INTO EXISTENCE

The mere existence of an arbitration term in a signed writing is not enough to find the existence of a binding agreement to arbitrate and to compel arbitration. The Court must first examine the question of whether a valid agreement to arbitrate exists based upon state-law principles governing contract formation without any inherent bias favoring arbitration. *See Pre-Paid Legal Services, Inc. v. Battle*, 873 So. 2d 79, 83 (Miss. 2004) *citing East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002). In deciding whether to grant a motion to compel arbitration, the threshold issue for the Court is whether the parties have entered into an enforceable, written agreement to arbitrate.

The standard for determining the validity and enforceability of an arbitration clause is by now well known:

> In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement.
>
> Under the second prong, the United States Supreme Court has stated the question is "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims."

Pre-Paid Legal Services, Inc. v. Battle, 873 So. 2d 79, 83 (Miss. 2004), *citing East Ford, Inc. v. Taylor*, 826 So. 2d at 713 (Miss. 2002); *see also, Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003); *American Medical Technologies, Inc. v. Miller*, 149 S.W.3d 265 (Tex. Ct. App. (4th Div-Houston) 2004); *and Patterson v. Red Lobster*, 81 F.Supp.2d 681 (S.D. Miss. 1999). Indeed, "the FAA does not confer a right to compel arbitration of any dispute at any time"; it confers only the right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland*

Stanford Junior Univ., 489 U.S. 468, 474-75, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); *see also* 9 U.S.C. §4 (directing that the trial court is to order arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue").

Mississippi law should be used to decide questions of contract formation when dealing with an arbitration clause/agreement. *East Ford, Inc. v. Taylor*, 826 So.2d 709 (Miss. 2002). The usual defenses to a contract, such as fraud, unconscionability, duress, and lack of consideration can be used to invalidate an arbitration clause. *Id.* The Agreement in this case is invalid and should not be enforced.

In *American Medical Technologies, supra*, the Texas Court of Appeals recognized that, "Even though policy strongly favors arbitration, it only does so when an agreement exists. If the possibility exists that an agreement never was reached, policy does not compel referral to an arbitrator until a court has concluded that an agreement to arbitrate did exist." *Id.*, 149 S.W.3d at 273 (*citing Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir.2002).

Similarly, in *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211 (5th Cir. 2003), the Fifth Circuit held that when the "very existence of a contract is in issue," courts have authority and responsibility to decide the matter. *Id.* at 218. This holding is in line with other Circuits' holdings that defenses which attack the very existence of the agreement, such as forgery and lack of authority, must be resolved by the court, not an arbitrator. *See, e.g., Opals on Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 370 (2d Cir.2003) (forgery); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591-92 (7th Cir.2001) (lack of authority); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 111-12 (3d Cir.2000) (lack of authority).

The elements of a valid contract are "(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation."

Rotenberry v. Hooker, 864 So. 2d 266, 270 (¶13) (Miss. 2003); *Gatlin v. Methodist Medical Center, Inc.*, 772 So.2d 1023, 1029 (¶20) (Miss. 2000); *Lanier v. State*, 635 So.2d 813, 826 (Miss. 1994).

A. No one with legal capacity to bind Mrs. Moulds to an arbitration agreement executed the Admission Agreement

According to the assessment of Mrs. Moulds carried out by the Defendants' nursing staff as a necessary step in planning her care at the time of admission in November, 2000, Mrs. Moulds was not competent to comprehend the Admission Agreement or to make decisions concerning her medical care and treatment, business affairs or legal rights due to her physical and mental condition. (See Care Plan, Problem/Need #1, R. 111, R. Ex. 6)

According to the sworn affidavit of James Braddock, his mother was not present when the admission paperwork was completed on November 16, 2000, or on April 24, 2002, when the second Admission Agreement was signed, and was never asked to sign either Admission Agreement. (See affidavit of James Braddock, R. 161 ¶6 and R. 164 ¶19, R. Ex. 7) Therefore, to be binding, the Admission Agreement must have been executed by someone having express or implied authority to waive Mrs. Moulds' constitutional right to a jury trial and to bind Mrs. Moulds to arbitrate her claims as provided in the agreement. James Braddock possessed no express authority to act as his mother's attorney-in-fact, a fact known by the Defendants. (See affidavit of James Braddock, R. 161-162 ¶¶5 and 8, R. Ex. 7)

Due to Mrs. Moulds' physical and mental impairments, James Braddock acted as her health-care surrogate pursuant to Miss. Code Ann. §41-41-201 *et seq.* in signing the Admission Agreement of November 16, 2000. According to the Uniform Health-Care Decisions Act:

> "Health care" means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition.
>
> "Health-care decision" means a decision made by an individual or the individual's agent, guardian, or surrogate, regarding the individual's health care, including:

(i) *Selection and discharge of health-care providers and institutions*;
(ii) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and
(iii) Directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care

Miss. Code Ann. §41-41-202(g)-(h) (emphasis added). Under the Act, as a health-care surrogate, Mr. Braddock had authority to contract on November 16, 2000, for his mother's health care to be rendered by the Defendants.

With respect to the Admission Agreement of April 24, 2002, the question of Mr. Braddock's authority is more problematic. When Mr. Braddock was presented the Admission Agreement to sign on April 24, 2002, it was not in connection with an admission or readmission of Mrs. Moulds to Picayune Convalescent Center. It was presented to him for signature as something necessary for his mother's care. (See affidavit of James Braddock, R. 163 ¶16, R. Ex. 7) The *selection of ... health-care providers and institutions*, Miss. Code Ann. §41-41-202(h)(i), had been made on November 16, 2000, long before this contract was tendered to Mr. Braddock. Thus, there is no basis to support a claim that the execution of this second contract was part of a *health-care decision*. Apart from a health-care decision, the Uniform Health-Care Decisions Act has no application and provides no authority to Mr. Braddock to act for his mother.

Appellants argue that *Vicksburg Partners, L.P. v. Stephens,* 911 So. 2d 507 (Miss. 2005), and *Covenant Health and Rehab, L.P. v. Brown,* 949 So. 2d 732 (Miss. 2007), compel the enforcement of the arbitration provision in this case. However, factual distinctions between those cases and the instant case contradict that position.

The first distinction is that in *Stephens*, the resident was found to have the capacity to execute, and to have executed, the admission agreement on his own behalf. *Stephens,* 911 So. 2d at 510-511. In the instant case, the Appellants themselves determined that Mrs. Moulds lacked the capacity to make such decisions. At the time of her admission to Picayune Convalescent

Center on November 16, 2000, Mittie Moulds was 76 years old. She was suffering from Alzheimer's disease, dementia, depression, short and long term memory loss, impaired cognitive abilities, poor decision making ability and visual impairment. (See Accumulative Diagnosis listing for November 16, 2000, R. 110, R. Ex. 5) The Defendants' initial Care Plan for Mittie Moulds lists as Problem/Need #1 "Short term memory problems with moderately impaired decision making skills secondary to diagnosis of dementia, Alzheimer's type. Mental functions vary over course of day. Potential for unavoidable decline. Usually makes needs known and usually understands verbal cues." The specific plan of care for this problem was:

> Keep daily routine simple and consistent.
>
> Reorientate [sic.] as able throughout day for periods of confusion.
>
> Encourage to make decisions regarding ADLs [activities of daily living] such as clothing choice, activities to attend, etc.
>
> Break down ADL tasks using simple directions and extra time as needed.
>
> Verbally cue as needed, may need frequent reminders.
>
> If decisions are inappropriate, counsel as needed on appropriate decisions using terms and giving simple reason why decision may be poor. Provide alternate choices that are appropriate.
>
> Encourage to pursue active life in facility.
>
> Monitor for gradual decline that may fluctuate secondary to diagnosis of dementia, Alzheimer's type. Notify MD as needed for acute changes.

(See Care Plan, Problem/Need #1, R. 111, R. Ex. 6)

The second and primary distinction is that, in the present case, the execution of the arbitration provision was *not* a part of the consideration for the resident's admission to the facility or the provision of health care while a resident. The Defendants in this action offered the affidavit of the nursing home's administrator, Keri H. Ladner, to establish this fact:

> Our facility has never refused to admit an individual based on a refusal to consent to the Arbitration Agreement aspect of the Admission Agreement. A refusal to consent to the Arbitration Agreement would not lead the facility to refuse admittance.

(See affidavit of Keri H. Ladner, R. 59, R. Ex. 9 ¶6) Based upon the affidavit of Ms. Ladner, neither Mrs. Moulds' admission to the nursing home nor the provision of services to her while a resident was dependent upon execution of the arbitration clause, and thus, agreement to the arbitration provision was *not a health-care decision.*

According to the Uniform Health-Care Decisions Act, Mr. Braddock, as his mother's health-care surrogate, had authority to contract for his mother's health care to be rendered by the Defendants. However, the authority of a health-care surrogate is limited to making only "health-care decisions." In both *Stephens* and *Brown*, the Court apparently found that the execution of the arbitration provision as a part of the admission agreement was part of the "health-care decision," even though arbitration of a personal injury claim has nothing whatever to do with "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition." Miss. Code Ann. §41-41-202(g). Including execution of an arbitration provision within the term "health-care decision" in those decisions can only rest on the arbitration provisions' being an essential part of the consideration for receipt of "health care" in those cases.

In the instant case, the Defendants themselves have established that the execution of the arbitration provision was ***not*** a part of the health-care decision, since it was not a part of the consideration necessary for Mrs. Mould's admission to the facility or the provision of health care to her. While the Uniform Health-Care Decisions Act granted Mr. Braddock the authority to make health-care decisions for his mother, neither the Act nor the Court's holdings in *Stephens* and *Brown* can be read to create a general power on the part of a health-care surrogate to make business decisions for the patient, and certainly cannot be stretched to include authority to waive a patient's legal or constitutional rights, such as the right to a jury trial or the right to collect full legal redress for damages. Such an interpretation would allow an unsupervised surrogate to do

that which a duly appointed guardian or conservator could not, without court authority or accountability. *Compare, e.g.,* Miss. Code Ann. §93-13-38 *and* §93-13-59 *with* Miss. Code Ann. §41-41-202.

As the Supreme Court has recently reiterated, the Court has "recognized its duty to apply a strict standard of statutory construction, applying the plain meaning of unambiguous statutes." *Caves v. Yarbrough*, Docket No. 2006-CA-01857-SCT (Nov. 1, 2007), slip op. at 10 (¶22); *see, also, Walker v. Whitfield Nursing Ctr., Inc.*, 931 So. 2d 583, 590 (Miss. 2006); *Arceo v. Tolliver*, 949 So. 2d 691, 694 (Miss. 2006) and *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927, 929 (Miss. 2006) (both requiring strict compliance with the sixty-day notice provision of Mississippi Code Annotated Section 15-1-36(15) (Rev. 2003)); *Walker v. Whitfield Nursing Ctr., Inc.*, 931 So. 2d 583, 591 (Miss. 2006) (requiring strict compliance with the certification provisions of Mississippi Code Annotated Section 11-1-58 (Rev. 2002)); and *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 820 (Miss. 2006) (requiring strict compliance with the ninety-day notice provision of Mississippi Code Annotated Section 11-46-11(1) (Rev. 2002) and overruling cases permitting "substantial compliance"). The Uniform Health-Care Decisions Act is clear and unambiguous in its definition of what constitutes "health care" and a "health-care decision." It includes no express grant of power for a surrogate to execute an arbitration agreement binding on the patient. While the Court in *Stephens* and *Brown* apparently found that the execution of the arbitration provision was a part of the "health-care decision," the Act itself neither creates nor implies such authority. The basis for such an inference is clearly not present here, where the Defendants have expressly rejected the notion with respect to their own contract. Holding that a health-care surrogate had implied authority to execute an arbitration provision in a case where the Defendants admit that the arbitration provision was unnecessary to the provision of health care would constitute a substantial, judicially-created revision of the terms of the Uniform

Health-Care Decisions Act, clearly violating the constitutional limits recognized by the Court. To the extent that *Stephens* and *Brown* appear to establish such a rule, those decisions should be clarified or overruled to avoid overstepping the constitutional authority of the Court.

As a fallback position, Defendant's claim that James Braddock had *apparent authority* to execute the arbitration clause; this assertion is without basis in law or fact. In Mississippi, the burden is on the one relying on an agent's authority to prove the authority of that alleged agent. See *Cue Oil Co. v. Fornea Oil Co., Inc.*, 45 So. 2d 597 (Miss. 1950). Defendants offered no proof that James Braddock had the express authority to bind Mittie Moulds to an arbitration agreement. Mr. Braddock's affidavit negates any such assertion.

"The authority of an agent to bind his principal rests upon the powers conferred upon him by the principal." *Bailey v. Worton*, 752 So. 2d 470, 475 (Miss. 2000). "In Mississippi, the burden of proving an agency relationship is upon the party asserting it." *Ciba-Geigy Corp. v. Murphree*, 653 So. 2d 857, 872 (Miss. 1995); *Woods v. Nichols*, 416 So. 2d 659, 664 (Miss. 1982); *Highlands Ins. Co. v. McLaughlin*, 387 So. 2d 118 (Miss. 1980). Here the Defendants are asserting the existence of the agency relationship. However, Defendants produced no evidence to establish that Mr. Braddock had actual or apparent authority to bind his mother to the arbitration provision.

In order for Mr. Braddock to have had apparent authority, Mrs. Moulds must have created that apparent authority.

> There are three essential elements to apparent authority: (1) *acts or conduct of the principal indicating the agent's authority*; (2) reliance thereon by a third person; and (3) a change of position by the third person to his detriment. *All must occur to create such authority.*

Bailey v. Worton, 752 So. 2d at 475 (emphasis added); *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172 (Miss. 1990); *Gulf Guaranty Life v. Middleton*, 361 So. 2d 1377 (Miss. 1978). The agent's actions or statements, standing alone, do not establish actual or apparent authority.

Thorp Finance Corp. v. Tindle, 249 Miss. 368, 162 So. 2d 497 (1964); *Cue Oil Co. v. Fornea Oil Co.*, 208 Miss. 810, 45 So. 2d 597 (1950).

> [T]he principal is bound *if the conduct of the principal* is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power he assumes to have.

McPherson v. McLendon, 221 So. 2d 75, 78 (Miss. 1968)(emphasis added).

Given Mrs. Moulds' physical and mental condition, as set forth in the Defendants' own evaluation of her (See Accumulative Diagnosis listing for November 16, 2000, R. 110, R. Ex. 5 and Care Plan, Problem/Need #1, R. 111, R. Ex. 6), there would have been no reasonable basis for the Defendants to have relied upon any act or statement by Mrs. Moulds as creating apparent authority for anyone to act on her behalf to waive her legal and constitutional rights.

Since no one having legal capacity to bind Mittie Moulds to the arbitration clause executed the Admission Agreement, it is not enforceable. Beyond that, the presence of the general contract defenses of fraud, unconscionability, duress, and lack of consideration will invalidate it. *East Ford, Inc. v. Taylor*, 826 So.2d 709 (Miss. 2002).

B. The arbitration clause is not supported by consideration.

The Court has defined "[c]onsideration for a promise [a]s '(a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise.'" *City of Starkville v. 4-County Electric Power Assoc.*, 819 So.2d 1216, 1220 (¶10) (Miss. 2002), *quoting Lowndes Coop. Ass'n v. Lipsey*, 240 Miss. 511, 126 So.2d 276, 277 (1961), *quoting* Restatement of Contracts § 75 (1932); *see, also, Marshall Durbin Food Corp. v. Baker*, 2003-CA-02073-COA (¶14) (Miss. App. 2005).

As noted above, the affidavit of Keri Ladner, the administrator of Picayune Convalescent Center, establishes that execution of the arbitration agreement was not a part of the consideration

for admission to Picayune Convalescent Center.

> Our facility has never refused to admit an individual based on a refusal to consent to the Arbitration Agreement aspect of the Admission Agreement. A refusal to consent to the Arbitration Agreement would not lead the facility to refuse admittance.

(See affidavit of Keri H. Ladner, R. 59, R. Ex. 9 ¶6) Based upon the affidavit of Ms. Ladner, neither Mrs. Moulds' admission to the nursing home nor the provision of services to her while a resident was based upon execution of the arbitration clause. Thus, the consideration for the arbitration clause was not "(a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation." *City of Starkville v. 4-County Electric Power Assoc.*, 819 So.2d at 1220 (¶10).

In fact, the Defendants' requiring a resident to agree to arbitration as a condition for provision of services would violate requirements of federal law for receipt of payments from Medicaid for the services provided to Mittie Moulds, who was a Medicaid recipient. Under federal law, a nursing home accepting Medicaid recipients as residents may not "charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State [Medicaid] plan under this title, any gift, money, donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility." 42 U.S.C. §1395r(c)(5)(A)(iii); see, also, 42 C.F.R. §483.12(d)(3)(October 1, 2002). To require waiver of legal rights to damages and a jury trial as a condition of admission by a Medicaid recipient would constitute the requirement of "other consideration" in violation of federal law.

Clearly, the Court cannot find consideration based upon an interpretation of the Admission Agreement that would make it an illegal contract.

The only remaining source of consideration for the arbitration clause would be "a return promise, bargained for and given in exchange for the promise." *City of Starkville v. 4-County*

Electric Power Assoc., 819 So.2d at 1220 (¶10). In other words, if both the Defendants and Mrs. Moulds were bound by mutual obligations to arbitrate, then the clause would be adequately supported by consideration.

Under the Arbitration section of the Admission Agreement, "the Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them and the Facility or its Owners, officers, directors or employees shall be resolved by binding arbitration." (R. 66 ¶F, R. Ex. 2; R. 57 ¶F, R. Ex. 8)

The Facility, its owners, officers, directors and employees make no corresponding agreement. The Admission Agreement includes no undertaking or obligation by the Facility, its owners, officers, directors or employees to submit any "claim, dispute and/or controversy" to binding arbitration. (R. 66 ¶F, R. Ex. 2; R. 57 ¶F, R. Ex. 8)

Although the intent is subtly concealed, the arbitration clause of the Admission Agreement is applicable only to claims brought by or on behalf of the Resident or the Responsible Party. The arbitration provision is but the final step of a three step "grievance resolution process" set out in the Admission Agreement. However, this "grievance resolution process" applies only to "a claim, dispute and/or controversy [arising] between the Parties *other than* regarding matters concerning the payment for services rendered or refunds due." (R. 65 ¶E.5, R. Ex. 2)

For the Facility's benefit, the Financial Agreement section of the Admission Agreement provides that "[s]hould an account become delinquent and be referred to an attorney and/or agency for collection, the Resident and/or Responsible Party shall be responsible for all costs of collection. This includes, but is not limited to, attorney's fees and other costs of *litigation.*" (emphasis added) (R. 62 ¶A.5, R. Ex. 2) "Litigation" is by definition a proceeding in a court of justice. Black's Law Dictionary (3rd Ed.)

Taken together, the exemption of "claim[s], dispute[s] and/or controvers[ies] ... regarding matters concerning the payment for services rendered or refunds due" (R. 65 ¶E.5, R. Ex. 2), the lack of an undertaking by the Facility, its owners, officers, directors or employees to submit any "claim, dispute and/or controversy" to binding arbitration (R. 66 ¶F, R. Ex. 2), and the provision allowing the Facility to collect "costs of litigation" (R. 62 ¶A.5, R. Ex. 2) clearly establish that the Defendants never intended for their interests to be bound to the arbitration provisions of the Admission Agreement.

In addition, the Admission Agreement dated November 16, 2000, which was signed by Mr. Braddock in connection with Mrs. Moulds' actual admission to the facility, was never signed by a Facility Representative, further confirming that the Defendants never undertook to be bound by it. (R. 57, R. Ex. 8)

There being no "return promise [by the Defendants], bargained for and given in exchange for the promise [on Mrs. Moulds' part to arbitrate her claims]", the arbitration clause fails for want of consideration. *City of Starkville v. 4-County Electric Power Assoc.*, 819 So.2d at 1220 (¶10).

II. THE ARBITRATION CLAUSE IS VOID DUE TO FRAUD IN THE INDUCEMENT.

The affidavit of Keri Ladner states that execution of the arbitration clause was not a condition for admission to the facility or the provision of services. (R. 59 ¶6, R. Ex. 9) The specific provisions of the Admission Agreement itself represented that its terms were not optional or subject to negotiation:

a. The Resident and/or Responsible Party were required to complete the agreement or make satisfactory arrangements for its completion before or at the time of admission. (R. 64 ¶ D.1, R. Ex. 2)

b. While the Admission Agreement contained a termination provision, its exercise required discharge of the Resident. (R. 64 ¶ D.2, R. Ex. 2)

c. The Facility reserved the right to discharge the Resident if in the Facility's sole discretion the Resident and/or Responsible Party were unable to comply with the terms of the agreement. (R. 64 ¶ D.3, R. Ex. 2)

d. The provisions of the Admission Agreement altering the standard of care, eliminating liability of the Facility for negligent and criminal acts, shortening the statute of limitations, limiting actual damages, eliminating punitive damages, shifting costs and attorneys' fees for challenging arbitration or an arbitration award, waiving "jural" trial, and requiring the Resident and Responsible Party to submit all of their claims to binding arbitration, were declared to survive the termination of the agreement "for any reason" and "[n]otwithstanding any other provision set forth" in the agreement. (R. 64 ¶ D.4, R. Ex. 2)

The statements in the Admission Agreement represented that acceptance of the arbitration clause was an essential condition for admission and that rejection of the arbitration clause was grounds for discharge from the facility. According to the sworn testimony of Keri Ladner, the managing agent of the Defendants' nursing facility, both of these representations were false. It is clear that they were intended to be accepted and relied upon by residents and their families, being a part of the printed Admission Agreement. The affidavit of James Braddock establishes that no statements were made to him during the admission process to indicate that execution of the arbitration provision was voluntary, indicating an intent on the part of the Defendants that the printed statements be relied upon.

According to the affidavit testimony of Keri Ladner, the arbitration provision of the Admission Agreement is severable from the remaining agreement, since its acceptance was not a condition of admission or receipt of services. The fraudulent misrepresentations related directly to the non-severability of the arbitration provision and so relate directly to the execution of the arbitration provision, rather than to the remainder of the contract. As such, this is an issue for the Court to decide. *Garris v. Smith's G&G, LLC*, 941 So.2d 228 (Miss. App. 2006).

The representations in the Admission Agreement concerning the necessity of acceptance of the arbitration provision were false and fraudulent. A contract procured by fraud is voidable as to all provisions and the entire transaction may be avoided by the party who entered into the contract without knowing of the fraud. *Allen v. Mac Tools, Inc.*, 671 So.2d 636, 641 (Miss. 1996); *Turner v. Wakefield*, 481 So.2d 846 (Miss. 1985). The Plaintiff's first knowledge of the fraud worked upon him was when the affidavit of Keri Ladner was filed in the Circuit Court. Thus, rescission of the fraudulently induced arbitration agreement, if the same was ever effective, was appropriate at that time.

III. THE ADMISSION AGREEMENT IS SUBSTANTIVELY UNCONSCIONABLE

Pursuant to 9 U.S.C. § 2, an arbitration agreement is enforceable "save upon such grounds as exists at law or in equity for the revocation of any contract." It is clear that in matters regarding the enforceability of an arbitration agreement, common law contract defenses such as fraud, duress or unconscionability may be applied to invalidate arbitration agreements. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996); *East Ford, Inc. v. Taylor*, 826 So. 2d at 713 (Miss. 2002).

In *East Ford, Inc. v. Taylor, supra,* the Mississippi Supreme Court recognized that there are two types of unconscionability, procedural and substantive. The existence of either type is sufficient to invalidate the contract.

> Procedural unconscionability may be proved by showing "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms."
>
> Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive.... Substantively unconscionable clauses have been held to include waiver of choice of forum and waiver of certain remedies. (Internal citations omitted)

Id. at 714, *citing Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655 (S.D.Miss.2000), *quoting York v. Georgia–Pac. Corp.*, 585 F. Supp. 1265, 1278 (N.D.Miss.1984); *see, also, Russell v. Performance Toyota, Inc.*, 826 So. 2d 719 (Miss. 2002); *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So.2d 1202 (Miss.1998). In the *East Ford* decision, the Court found the arbitration provision in issue to be both procedurally and substantively unconscionable. The Court found sufficient evidence of substantive unconscionability from the facts that the arbitration provision was included in a pre-printed form drafted by the seller; the arbitration provision bound only the buyer, while the seller was free to pursue its claims in court; and the buyer's damages were limited to actual damages only, regardless of the egregiousness on the part of the seller. The fact that the buyer could in some circumstances pursue a remedy in court was not sufficient to save the contract from substantive unconscionability. These same substantively unconscionable limitations exist in the arbitration provisions at issue here (R. 66, R. Ex. 2 ¶F; R. 57, R. Ex. 8 ¶F) and should likewise be held unenforceable.

In addition to the substantively unconscionable arbitration provisions, the Admission Agreements in this action also contain other provisions found to be substantively unconscionable in *Covenant Health and Rehab, L.P. v. Brown*, 924 So. 2d 732 (Miss. 2007), and *Covenant Health and Rehabilitation of Picayune, L.P. v. Lambert*, 2005-CA-02223-COA (Miss. App. 2006):

a. Paragraph C.5 of the Admission Agreement alters the standard of care by requiring the Resident and Responsible Party to "arrange for and provide supplemental private duty nursing to help reduce the risk of injury or to improve overall care if the Resident or Responsible Party wish to reduce risks associated with the staffing provided by the Facility" and to "hold harmless the Facility for injury or harm to the Resident when said injury or harm could have been avoided had supplemental one-on-one private duty nursing been provided by the Resident or Responsible Party." (R. 63, R. Ex. 2)

b. Paragraph C.5 of the Admission Agreement further alters the legal liability of the Facility for its own and its employees' negligence by requiring the Resident and Responsible Party to "indemnify and hold harmless the Facility from and against claims, loss, costs and expenses incurred as a result of claims against the Facility for any reason by Responsible Party, family members and friends of the Resident unless such claim, loss, cost and expense is the result of the Facility's willful misconduct." (R. 63, R. Ex. 2)

c. Paragraph C.8 of the Admission Agreement alters the legal liability of the Facility and its employees for criminal acts by the employees themselves by requiring the Resident and Responsible Party to "hold harmless the Facility, its officers, owners, directors and employees for the criminal actions of any individual(s)," whether "employees of the Facility or not." (R. 64, R. Ex. 2)

d. Paragraph E.5 of the Admission Agreement attempts to exclude a Resident's claims entirely unless written notice of the claim is "delivered within 20 days of the date of the incident giving rise to the claim," regardless of when that incident

was or might reasonably have been discovered and regardless of the physical or mental competence of the Resident to bring such a claim. (R. 65, R. Ex. 2)

e. Paragraph E.6 of the Admission Agreement attempts to require a Resident's claim to be mediated "within 60 days of when the dispute arises," regardless of when the events were or might reasonably have been discovered and regardless of the physical or mental competence of the Resident to bring such a claim. (R. 65, R. Ex. 2)

f. Paragraph E.7 of the Admission Agreement limits the damages that can be recovered by the Resident against the Facility's owners, officers, directors and employees to the *lesser* of $50,000.00 or the product of the number of days Mrs. Moulds was in the nursing home multiplied by the daily room rate applicable during her stay, regardless of the conduct of the Facility, its officers, owners, directors or employees. The provision purports to apply to "the Resident, Responsible Party and the Resident's heirs, estate and assigns" but not to the Facility's Owners, officers, directors, employees, successors or assigns. (R. 65, R. Ex. 2)

g. Paragraph E.8 of the Admission Agreement purports to waive punitive damages "under any circumstances." (R. 65, R. Ex. 2)

h. Paragraph E.12 of the Admission Agreement requires the Resident to pay for all costs of enforcement of the agreement if the Resident avoids or challenges either the grievance resolution process or the arbitration provision or challenges the arbitrator's award. (R. 65, R. Ex. 2)

i. Paragraph E.13 of the Admission Agreement purports to waive "all rights to a jural *[sic.]* trial." (R. 65, R. Ex. 2) The word "jural" is defined as "of or

pertaining to jurisprudence; juristic; juridical" or "recognized or sanctioned by positive law." Black's Law Dictionary (3rd Ed.)

j. Paragraph E.16 of the Admission Agreement shortens the two-year statute of limitations by providing that "no legal action shall be initiated against the Facility by the Resident or any other Party hereto ... in any event more than one year following the happening of the event giving rise to such complaint, claim or grievance," regardless of when that complaint, claim or grievance was or might reasonably have been discovered and regardless of the physical or mental competence of the Resident to bring such a claim. (R. 66, R. Ex. 2)

At the time of this submission, the ruling in *Covenant Health and Rehabilitation of Picayune, L.P. v. Lambert*, 2005-CA-02223-COA (Miss. App. 2006), remains pending on Motion for Rehearing. The unconscionability of Sections C.5, C.8, E.5, E.6, E.7, E.8, E.12, E.13, and E.16 of the Admission Agreement was conceded by the Appellants in the *Lambert* appeal and is not challenged in their Motion for Rehearing. *Appellants concede the unconscionability of these provisions of the Admission Agreements in this action.* (Brief of Appellants at 12 n. 1) The Court should find the identical provisions of the Admission Agreements in this action substantively unconscionable and strike the same.

As noted above, in addition to these substantively unconscionable provisions, the arbitration provision of the admission agreement is itself substantively unconscionable. In *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 525 (Miss. 2005), the Court made clear that "Arbitration is about choice of forum – period." The present contract grossly exceeds this limited scope, both in the language of the arbitration paragraph itself and in other, clearly unconscionable provisions that bear directly on the arbitration process.

In *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005), this Court denied enforceability of an arbitration clause solely on grounds of substantive unconscionability. The *Pitts* decision should be controlling, because the provisions found unconscionable in that case are strikingly similar to the provisions of the Admission Agreement cited above.

Pitts contract	**Moulds contract**
Any dispute concerning the interpretation of this Agreement or arising from the Inspection and Report (unless based on payment of fee) shall be resolved by . . . arbitration.	In the event a claim, dispute and/or controversy shall arise between the Parties other than regarding matters concerning the payment for services rendered or refunds due, the Parties agree to participate in a grievance resolution process. (R. 65 ¶ E.5, R. Ex. 2) The Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them and the Facility or its Owners, officers, directors or employees shall be resolved by binding arbitration .... (R. 66 ¶ F, R. Ex. 2)
Should you fail to timely pay the agreed upon fee(s), you shall be responsible for paying any and all fees associated with collection, including but not limited to administration costs, attorney's fees, and cost of litigation.	Should an account become delinquent and be referred to an attorney and/or agency for collection, the Resident and/or Responsible Party shall be responsible to pay all costs of collection. This includes, but is not limited to, attorney's fees and other costs of litigation. (R. 62 ¶ A.5, R. Ex. 2)
The limitation of liability clause limits Watkins's liability for any wrongdoing at $265 (the amount paid for the inspection)	Should any claim, dispute and/or controversy arise between the Parties or be asserted against any of the Facility's owner's *[sic.]*, officers, directors or employees, the settlement thereof shall be for actual damages not to exceed the lesser of a) $50,000 or b) the number of days the Resident was in the facility multiplied by the daily rate applicable to said Resident. (R. 65 ¶ E.7, R. Ex. 2) ... [T]he Arbitrator(s) may not award punitive damages and actual damages awarded, if any, shall be awarded pursuant to Section E.7. (R. 66 ¶ F, R. Ex. 2)
[Y]ou release us from any and all additional liability. There will be no recovery for consequential damages.	The Parties hereto agree to waive punitive damages against each other and agree not to seek punitive damages under any circumstances. (R. 65 ¶ E.8, R. Ex. 2) ... [T]he Arbitrator(s) may not award punitive damages .... (R. 66 ¶ F, R. Ex. 2)
Any legal action arising from this Agreement or from the Inspection and Report, including	[N]o legal action shall be initiated against the Facility by the Resident or any other

(but not limited to) the arbitration proceeding more specifically described above, must be commenced within one (1) year from the date of the Inspection.	Party hereto ... more than one year following the happening of the event giving rise to such complaint, claim or grievance. (R. 66 ¶ E.16, R. Ex. 2)

The Court in *Pitts* found that the foregoing provisions of a home inspection agreement were sufficient, without more, to declare the *entire contract* void for substantive unconscionability and to refuse to enforce those provisions or compel arbitration.

> The limitation of liability clause and the arbitration clause are substantively unconscionable. The arbitration clause unreasonably favors Watkins because it reserves Watkins's ability to pursue claims in a court of law but requires the Pittses to arbitrate their disputes, and as such should be declared substantively unconscionable. Additionally, the attempt to shorten the statute of limitations is oppressive and in violation of statutory law. It is also substantively unconscionable to limit the Pittses' recovery to $265 when the alleged negligence of Watkins caused them to incur thousands of dollars in damages. Furthermore, the interaction of the limitation of liability clause with the arbitration clause renders the Pittses without a meaningful remedy. All three clauses are therefore unenforceable.

Pitts v. Watkins, 905 So. 2d at 558 (¶20).

The Admission Agreement in this case goes even further than the agreement in *Pitts*, containing additional terms even more oppressive than those found sufficient to strike the *Pitts* agreement on grounds of substantive unconscionability, including: requiring the Resident to provide private duty nursing care to replace the facility's nursing care (R. 63 ¶C.5, R. Ex. 2), changing the standard of care to eliminate a duty to provide care that could have been provided by private duty nursing (R. 63 ¶C.5, R. Ex. 2), changing the grounds for legal liability to require "willful misconduct" on the part of the facility (R. 63 ¶C.5, R. Ex. 2), requiring the Resident to hold the facility harmless for the facility's negligence (R. 63 ¶C.5, R. Ex. 2), and avoiding liability for criminal acts of facility employees (R. 64 ¶C.8, R. Ex. 2). This Court and the Court of Appeals have previously found all of these provisions to be substantively unconscionable.

In *Vicksburg Partners, L.P. v. Stephens*, the arbitration provision read:

> The Patient and Responsible Party agree that any and all claims, dispute and/or controversies between them and the Facility shall be resolved by binding arbitration administered by the American Arbitration Association. The Arbitration shall be heard and decided by one qualified Arbitrator selected by the Facility. The Parties agree that the decision of the Arbitrator shall be final. All Parties hereto agree to arbitration for their individual respective anticipated benefit of reduced costs of pursuing resolution of a claim, dispute or controversy, should one arise. All Parties hereto are hereby waiving all rights to a jural trial.

911 So. 2d at 510. This arbitration provision is clearly limited to "choice of forum – period." The arbitration provision in the instant case goes far beyond the *Stephens* provision, containing provisions that are themselves substantively unconscionable and incorporating substantively unconscionable provisions from other portions of the contract. It is even more oppressive than the provisions found unenforceable in *East Ford* and *Pitts* and should suffer the same fate.

IV. THE ARBITRATION PROVISION IS NOT ENFORCEABLE AGAINST MITTIE MOULDS AS A THIRD PARTY BENEFICIARY

Defendants argue, relying upon the very recent Court of Appeals decision in *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-01299-COA (August 28, 2007), that the arbitration provision is enforceable against Mrs. Moulds' estate because she was a third-party beneficiary of the contract executed by James Braddock. The *Barber* decision is not yet final, since there is a pending motion for rehearing and the potential for further review by the Supreme Court on writ of certiorari.

In *Barber*, the resident's son had executed an admission agreement on her behalf. The admission agreement contained an arbitration provision, the terms of which are not stated in the court's opinion. The nursing home argued that Mr. Barber had acted either on apparent authority or as his mother's health-care surrogate, the same positions argued by the Defendants here. The Court of Appeals rejected both arguments, finding that the defendants had failed to establish a

basis for apparent agency or the underlying conditions for Mr. Barber to act as a health-care surrogate.

The Court of Appeals then took a sudden turn. Despite the fact that Mr. Barber had no authority to act directly for Mrs. Barber, they found that the arbitration provision was nonetheless enforceable against her as a third-party beneficiary of the contract. In doing so, the Court of Appeals relied upon the fact that "Mrs. Barber's care was the *sine qua non* of the contract." *Slip op.* at 10 (¶ 25).

> It is beyond dispute that the benefits of receiving Trinity's health care services outlined in the admissions agreement flowed to Ms. Barber as a "direct result of the performance within the contemplation of the parties as shown by its terms." ... The admissions agreement states that, *inter alia*, "the facility agrees to furnish room, board, linens and bedding, general duty nursing and nurse aide care, and certain personal services." Trinity had a duty to provide these services to Ms. Barber and these rights "spring from the terms of the contract itself." (citations omitted)

Id. The Court of Appeals is silent, however, on whether the terms of the admission agreement in *Barber* made the arbitration provision a part of the consideration for the provision of those services by Trinity such that acceptance of those services would bind the resident. Their reasoning only makes logical sense if it did so or they presumed that it did.

Here, however, as the Defendants have admitted, execution of the arbitration agreement was not a condition for Mittie Moulds' admission to the facility or the receipt of services there. (See affidavit of Keri H. Ladner, R. 59, R. Ex. 9 ¶6) Therefore, the holding in *Barbour* is not applicable.

The basic rule concerning third-party beneficiaries to contracts addresses the right of the third-party beneficiary to bring an action on the contract. That rule has no application here. Instead, the question is the right to enforce terms of the contract *against* the third party. There are only four Mississippi cases that discuss this issue: *Adams v. GreenPoint Credit, LLC*, 943 So.

2d 703 (Miss. 2006); *Holman Dealerships, Inc. v. Davis*, 934 So. 2d 356 (Miss. App. 2006); *Terminix International, Inc. v. Rice*, 904 So. 2d 1051 (Miss. 2004); and *Smith Barney, Inc. v. Henry*, 775 So. 2d 722 (Miss 2001). None of the four cases deals with enforcing terms of a contract not conditioned upon the provision of goods or services received by the third party.

Terminix International, Inc. v. Rice does not support the argument made by the Defendants in this action. Terminix entered into a termite protection contract with David Rice for treatment of the home jointly owned by David Rice and his wife, Cynthia Rice. The contract contained an arbitration provision. Upon discovery of termite damage, David and Cynthia Rice filed suit in Circuit Court and Terminix filed a motion to enforce the arbitration provision. Cynthia sought to avoid the arbitration requirement because she was not a signatory to the contract. The Supreme Court cited the then-recent decision of the U.S. Court of Appeals for the Fifth Circuit in *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260, 266 (5th Cir. 2004), for the following:

> [We have made] clear that a nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency.

904 So. 2d at 1058. In deciding the case, the Supreme Court relied upon the doctrine of equitable estoppel, again citing *Washington Mutual Finance Group, LLC v. Bailey*, finding that under the circumstances, Mrs. Rice was estopped to deny the validity of the contract. The Supreme Court adopted this statement from *Washington Mutual Finance Group, LLC v. Bailey*:

> In the arbitration context, the doctrine [of estoppel] recognizes that a party may be estopped from asserting that the lack of a signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

364 F.3d at 268; 904 So. 2d at 1058. A significant distinction is apparent. There was no claim that Mrs. Rice was aware of the contract or incapable of contracting on her own behalf. There is no evidence in this case that Mrs. Moulds was ever capable of making such a decision on her

own. In fact, the Defendants own evaluations of her contradict any such assertion. (See Accumulative Diagnosis listing for November 16, 2000, R. 110, R. Ex. 5; and Care Plan, Problem/Need #1, R. 111, R. Ex. 6)

Equitable estoppel is an exceptional remedy and should be used only in exceptional circumstances. *Eagle Management, LLC v. Parks*, 938 So.2d 899, 904 (¶12) (Miss. App. 2006); *Powell v. Campbell*, 912 So. 2d 978, 982 (¶12) (Miss. 2005); *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201, 206 (Miss. 1984). A party asserting a claim for equitable estoppel must establish three essential elements: (1) belief and reliance upon some representation by the opposing party, (2) change of position as a result thereof, and (3) detriment or prejudice caused by the change of position. *Eagle Management, LLC v. Parks*, 938 So.2d at 904 (¶13), *citing, Cothren v. Vickers*, 759 So. 2d 1241, 1249 (¶19) (Miss. 2000). There is no evidence that Mittie Moulds made any representation to the Defendants about the arbitration provision or any other term of the admission agreement or that, given her mental condition, it would have been reasonable on their part to rely on her representation if she had. *See, Adams v. GreenPoint Credit, LLC*, 943 So. 2d at 709 (¶16).

To satisfy the remaining elements of equitable estoppel, the Defendants must assert (1) that they relied upon the arbitration provision of the admission agreement as a necessary condition for the provision of services to Mittie Moulds, (2) that they admitted Mittie Moulds and provided services to her on the basis of the validity of the arbitration provision, and (3) that they suffered detriment or prejudice from the provision of such services. However, this position is directly contradicted by the affidavit of Keri Ladner, the Defendants' managing agent, that the execution of the arbitration agreement was not a condition for admission or receipt of services. As to the second agreement of April 24, 2002, upon which the Defendants seem to be relying, at the time of that alleged agreement, Mrs. Moulds was already a resident of the facility and had

been receiving services there for nearly 18 months. In fact, the Defendants could not have required Mrs. Moulds to leave the facility if she or Mr. Braddock had refused to sign the agreement.

Paragraph D.3 of the Admission Agreement of April 24, 2002, states in part:

> The Facility reserves the right to discharge the Resident if in the Facility's sole discretion a) the Resident and/or Responsible Party are unable to comply with the terms of this Agreement ....

The Defendants have no basis on which to impose any such condition. Federal law and regulations establish admission and discharge rights of residents. 42 U.S.C. §1396r(c)(2) and 42 CFR §483.12. The statute and regulation set forth six specific grounds for discharge of a resident and provide that unless one of those six grounds exists, the facility must permit the resident to remain in the facility. None of the six grounds includes requiring execution of a new admission agreement during the term of a stay or agreement to an arbitration provision. This provision of the Admission Agreement is substantively unconscionable, like so many other parts thereof. Equitable estoppel simply does not apply.

The other Mississippi cases, *Adams* and *Holman*, specifically and solely rely upon *Smith Barney* as the basis for their holdings that arbitration provisions can be enforced against third party beneficiaries. *Adams* in fact found that the claimed third party beneficiary was a stranger to the contract and refused to enforce it against her. *Holman*, citing only *Smith Barney* as authority, reaches the opposite conclusion based on the facts before that court. However, *Smith Barney* itself did not itself turn on a third party beneficiary issue. In *Smith Barney*, the plaintiff, Henry, was the mother of the holder of a brokerage account with Smith Barney. The account holder died leaving a will that created a testamentary trust for the benefit of her mother. The testamentary trust specifically included the brokerage account. When the executrix, with the knowledge and assistance of Smith Barney's broker, misappropriated the trust funds, Henry sued

Smith Barney. The account agreements between Smith Barney and its original customer, Henry's daughter, contained arbitration clauses, which Smith Barney attempted to enforce. Ms. Henry raised the issue of her status as a third party beneficiary, arguing that she was "a non-signatory, unintended, third-party beneficiary of the agreements and therefore not bound by the arbitration clauses." 775 So. 2d at 727 (¶18). The Supreme Court enforced the arbitration clause, *not* because Ms. Henry was a third-party beneficiary, but because she was not.

> In the case at hand, we are dealing with an arbitration clause in which Henry is a successor under the terms of Hilliard's will, and as such, she is specifically covered by the agreement. According to the terms of the agreement, Henry is not required to be a signatory in order to be bound by the arbitration clause. As a successor of Hilliard, Henry is covered by the arbitration clause of the client agreements.

Id. at 727 (¶20). Mittie Moulds was not a successor to any interest of James Braddock, the actual signatory to the contract, and therefore *Smith Barney* is inapplicable.

In *Holman Dealerships, Inc. v. Davis*, the facts were that Vera Davis purchased a car for her son and daughter-in-law, Paul and Catherine Davis. The sales contract contained an arbitration clause binding upon "the buyer/lessee and dealer and the officers, employees, agents and affiliated entities of each of them." Vera, Paul and Catherine joined in one suit against the dealership, which sought to enforce the arbitration clause. The Supreme Court, citing only *Smith Barney v. Henry*, found that as third part beneficiaries of the contract, Paul and Catherine were "affiliated entities" under the terms of the arbitration clause. As in *Terminix*, the arbitration clause was an essential part of the consideration for the sale.

Here, however, where arbitration was not a condition of admission or receipt of services, one must ask the question: What benefit, if any, flowed from the arbitration provision of the admission agreement to Mittie Moulds to bind her as a third party beneficiary? Reading the arbitration provision, it is clear that – if enforced against her as written – Mittie Moulds and her

heirs would lose the constitutional right to an inexpensive public forum, instead of an expensive forum specifically selected by her opponent; the right to an independent judge (and in the case of the November 2000 agreement, even the right to participate in the selection of the arbitrator); the right to even-handed Rules of Civil Procedure, including broad rights to discovery; the right to clear and binding Rules of Evidence; the constitutional right to a jury of her peers; the right to appeal errors in the initial decision; the right to collect punitive damages under any circumstances, including intentional injury to her; and even the right to collect her full, actual damages. (R. 66 ¶F, R. Ex. 2) What is also clear is that no benefit flowed to Mittie Moulds or her heirs from the arbitration provision to offset the loss of these rights. Absent a benefit to her, she is by definition not a beneficiary.

V. THE ARBITRATION PROVISION IS NOT ENFORCEABLE AGAINST MITTIE MOULDS BY EQUITABLE ESTOPPEL

Defendants attempt to invoke the doctrine of equitable estoppel as a basis for reversing the Court's decision in this case. However, as discussed above (see p. 24, *supra*), it is clear that this equitable doctrine is inapplicable to the facts here presented. Equitable estoppel is an exceptional remedy and should be used only in exceptional circumstances. *Eagle Management, LLC v. Parks*, 938 So.2d 899, 904 (¶12) (Miss. App. 2006); *Powell v. Campbell*, 912 So. 2d 978, 982 (¶12) (Miss. 2005); *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201, 206 (Miss. 1984). A party asserting a claim for equitable estoppel must establish three essential elements: (1) belief and reliance upon some representation by the opposing party, (2) change of position as a result thereof, and (3) detriment or prejudice caused by the change of position. *Eagle Management, LLC v. Parks*, 938 So.2d at 904 (¶13), *citing, Cothren v. Vickers*, 759 So. 2d 1241, 1249 (¶19).

To satisfy the elements of equitable estoppel, the Defendants must assert (1) that they relied upon the arbitration provision of the admission agreement as a necessary condition for the provision of services to Mittie Moulds, (2) that they admitted Mitties Moulds and provided

services to her on the basis of the validity of the arbitration provision, and (3) that they suffered detriment or prejudice from the provision of such services. However, this position is directly contradicted by the affidavit of Keri Ladner, the Defendants' managing agent, that the execution of the arbitration agreement was not a condition for admission or receipt of services.

Indeed, Defendants' taking the position asserted would violate requirements of federal law for receipt of payments from Medicaid for the services provided to Mittie Moulds, who was a Medicaid recipient. Under federal law, a nursing home accepting Medicaid recipients as residents may not "charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State [Medicaid] plan under this title, any gift, money, donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility." 42 U.S.C. §1396r(c)(5)(A)(iii); *see, also,* 42 C.F.R. §483.12(d)(3). To require waiver of legal rights to damages and a jury trial as a condition of admission by a Medicaid recipient would constitute the requirement of "other consideration" in violation of law. An equitable remedy cannot be based on a violation of positive law.

By logical extension, Defendants' equitable estoppel argument would also preclude the Plaintiff's challenging the portions of their Admission Agreements held substantively unconscionable by this Court in *Vicksburg Partners, L.P. v. Stephens,* 911 So. 2d 507 (Miss. 2005), and *Covenant Health and Rehab, L.P. v. Brown,* 949 So. 2d 732 (Miss. 2007), which the Defendants admit are substantively unconscionable here. (*See* Brief of Appellant at 12 n.1) Those provisions limiting damages, altering the standard of care and shortening the statute of limitations were no less valuable to the Defendants than the arbitration provision. Yet the Court had no difficulty striking these provisions of the agreement and Defendants do not challenge that action here.

Equitable estoppel is an equitable remedy. "Fundamental notions of justice and fair dealings provide its undergirding." *PMZ Oil Co. v. Lucroy, supra,* at 206. In light of the overwhelming number of admitted unfair and unjust provisions in the Admission Agreements at issue here, equity does not support the application of equitable estoppel to this case.

VI. THE DESIGNATED ARBITRATION FORUM IS UNAVAILABLE

The arbitration provision of Section F of the Admission Agreement requires that "claims, disputes and/or controversies" within its scope "shall be resolved by binding arbitration administered by the American Arbitration Association and its rules and procedures." (R. 66 ¶F, R. Ex. 2). On June 13, 2002, the American Arbitration Association announced that, effective January 1, 2003, it would no longer accept the administration of cases in the health care area involving individual patients without a post-dispute agreement to arbitrate. The announcement went on to explain:

> This change, which becomes effective on January 1, 2003, will only affect cases where one party is an individual patient....
>
> This announcement is the latest in ongoing efforts by the AAA to establish and enforce standards of fairness for alternative dispute resolution, following recent changes to the Association's rules and procedures for consumer arbitrations. The AAA has also helped develop and adheres to tailored consumer rules and three due process protocols that set guidelines and provide safeguards in business-to-individual arbitrations.
>
> "Although we support and administer pre-dispute arbitration in other cases, we thought it appropriate to change our policy in these cases since medical problems can be life or death situations and require special consideration," said Robert Meade, Senior Vice President, American Arbitration Association.

See "AAA Announces Change in Health Care Policy," www.adr.org/sp.asp?id=21975 (June 13, 2003) (R. 112, R. Ex. 10)

In light of the AAA's withdrawal from administration of arbitration of health care disputes, the arbitration provision of the Admission Agreement, even if otherwise deemed valid, is impossible of performance and therefore unenforceable.

In *Volt Information Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75, 109 S. Ct. 1248, 103 L.Ed.2d 488 (1989), the United States Supreme Court reiterated that "the FAA does not confer a right to compel arbitration of any dispute at any time"; it confers only the right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement." 489 U.S. at 474-75. If the "manner provided for in [the] agreement" is unavailable, neither state nor federal law allows the Court to substitute another method for that stated in the agreement.

This precise issue was presented to the Fifth Circuit in *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326 (5th Cir. 1987). In that case, National Iranian Oil Co. (NIOC) sought to compel arbitration in Mississippi of a dispute arising under an agreement containing an arbitration clause specifying that any arbitration under the agreement would be held in Tehran, Iran, applying Iranian law. The District Court refused to order arbitration, because section 4 of the Federal Arbitration Act, 9 U.S.C. §4, limits the Court's power to entry of "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement," and that the relief requested (arbitration in Mississippi) varied from the terms of the parties' agreement. The Fifth Circuit affirmed the decision of the District Court. In its appeal, NIOC argued that use of the forum designated in the arbitration agreement had become impossible due to external events (the Islamic revolution and seizure of the American Embassy in Tehran) and so, the forum selection provision of the arbitration clause should be severed and arbitration compelled in another forum. In its decision, the Fifth Circuit rejected that argument. The court held that in order to sever the forum selection from the rest of the arbitration clause, the provision to be

severed must have been "merely a minor consideration." 817 F.2d at 333. The Court found that the language of the agreement, which had been drafted by NIOC, belied such an argument and that the site selection was an integral part of the arbitration agreement (i.e., the agreement was entire and not severable). *Id.* at 334.

In the instant case, the issue is much more than the location of the arbitration hearing. The Admission Agreement, a standard form document imposed by the Defendants, requires that "any and all claims, disputes and/or controversies" within its scope "shall be resolved by binding arbitration *administered* by the American Arbitration Association and its rules and procedures." (R. 66 ¶F, R. Ex. 2)(emphasis added).

Administration of an arbitration proceeding, as defined by the American Arbitration Association, involves more than passive involvement in the process, such as publication of rules and procedures or maintaining a list of persons available to act as arbitrators. Administration under their definition involves "the general management of a particular case, including panel [i.e., arbitrator] selection, scheduling and exchange of information among the parties, and all of the other administrative details involved in moving cases through the system." AAA Glossary of Dispute Resolution Terms, www.adr.org/Glossary.

Because of the active involvement of the staff of the AAA in the administration of a proceeding before it, AAA charges substantial fees for its administrative services. The administrative fees chargeable by AAA range from $500 to more than $10,000, based on the size of the claim, and are in addition to the arbitrators' compensation. AAA also charges "case service fees" of between $200 and $4,000, also based on the size of the claim, for all cases that proceed to a first hearing before the arbitrator. American Arbitration Association, "Commercial Arbitration Rules and Mediation Procedures," http://www.adr.org/sp.asp?id=22440.

Under the AAA's Commercial Arbitration Rules, which would govern this dispute if subject to arbitration, the parties do not have access to the full panel of potential arbitrators from which to make their selection. Instead, the AAA selects ten candidates for service as arbitrator and submits this list to the parties for selection. Under some circumstances, the rules authorize AAA to select the arbitrator[s] without agreement of the parties. Rules R-11 and R-12, Commercial Arbitration Rules and Mediation Procedures, http://www.adr.org/sp.asp?id=22440.

Rules of the AAA prescribe the rules and procedures for production of documents, identification of witnesses, conduct of hearings (including rules of evidence), and govern the scope, timing and form of the arbitrator's award. Commercial Arbitration Rules and Mediation Procedures, http://www.adr.org/sp.asp?id=22440.

Review of the terms of the arbitration provision of the Admission Agreement makes clear that administration of the arbitration proceeding by the American Arbitration Association was not "merely a minor consideration" of the provision such that it can be severed from the rest of the arbitration provisions, but rather that it was central to the agreement and indivisible from it.

Because the involvement of the American Arbitration Association cannot be severed from the rest of the terms of the arbitration provision, the entire provision has been rendered impossible of performance. Therefore, the Court cannot enter "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement," 9 U.S.C. §4, which is the only affirmative relief that the Court is empowered by law to award on this question. This being so, enforcement of the arbitration provision must be denied.

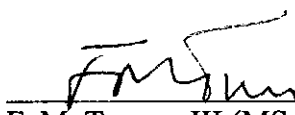
CONCLUSION

The arbitration provision of the Admission Agreement in the instant action is unenforceable. No contract to arbitrate came into existence because no one with authority to

bind Mittie Moulds to an arbitration agreement executed the agreement. It was obtained by fraud on the part of the Defendants. The arbitration provisions are unsupported by consideration. The entire agreement, and specifically the arbitration paragraph itself, are suffused throughout with provisions that the Court has previously declared unconscionable and unenforceable. Even if enforceable in the abstract, the arbitration provision is incapable of enforcement here due to unilateral action by the American Arbitration Association. This Court should affirm the trial court's decision refusing to enforce the agreement in its entirety.

Respectfully submitted,

Estate of Mittie Moulds,
by and through
James Braddock, Administrator



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CERTIFICATE OF SERVICE

I, F. M. Turner, III, attorney of record for Appellee, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing document to:

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This 15th day of November, 2007.