SPECIAL ISSUE

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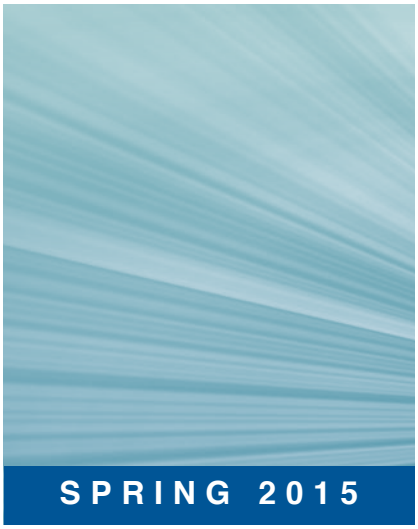

REVISITING ARBITRATION AGREEMENTS:
Legal Trends and Practical Advice

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I. Summary

Arbitration agreements have been a fixture in the seniors housing sector for decades. These agreements range from the concise (a clause in the residency agreement) to the comprehensive (a stand-alone, separately executed contract). Regardless of their format, arbitration agreements have one feature in common: they are likely be challenged at some point. Providers should proactively review their arbitration agreements to ensure that they stand up to legal challenge. This *Special Issue Brief* will review the current state of the law regarding seniors housing arbitration agreements and provide practical advice on what provisions will help strengthen an arbitration agreement's enforceability.

II. Introduction

Providers value arbitration for three main reasons. First, arbitration agreements allow providers to design an efficient dispute resolution process tailored to their circumstances. Second, unlike litigation, arbitration proceedings are typically confidential and do not produce a public record. Third, and most importantly, arbitration is decided by arbitrators, not juries, and allows providers to avoid the risk of potentially catastrophic, multimillion-dollar jury verdicts.

Unfortunately, bad press surrounding credit industry arbitration has cast doubt on arbitration practices across the country, including in the seniors housing sector.[1] Increasingly, plaintiffs are

[1] In 2009, the National Arbitration Forum ("NAF"), at the time the largest consumer arbitration organization in U.S., was sued by the Minnesota Attorney General. The widely publicized lawsuit alleged that NAF engaged in deceptive business practices in its credit collection arbitrations because it heavily marketed to (and was partially owned by) the same financial institutions whose disputes it was arbitrating. The lawsuit cited statistics showing that credit companies prevailed in NAF arbitrations more than 95% of the time. NAF quickly settled, agreeing to permanently cease overseeing consumer arbitrations.

challenging arbitration agreements as unfair, and some are succeeding in getting their cases out of arbitration and into a courtroom. One of many allegations leveled against the arbitration process is that it is inherently skewed in favor of corporations. Is this criticism warranted? Are residents worse off in arbitration proceedings than in traditional litigation? The literature on the topic does not support such a sweeping conclusion.

A 2009 survey of national skilled nursing providers compared the outcomes of arbitrated and non-arbitrated claims brought against the providers. The study found that the proportion of arbitrated disputes resulting in no payment to the claimant (20.8%) was virtually identical to non-arbitrated disputes (20.2%),[2] meaning that in both forums, claimants had a roughly equal "fail" rate. In addition, the study found that the average awards for arbitrated outcomes were on average 35% lower than those awarded in other contexts. A more recent 2013 survey found more modest cost differences, concluding that the total cost of arbitrated disputes (including legal fees, costs, and awards made to claimants) was on average 16% lower than in non-arbitrated disputes.[3]

Whether these differences are "fair" or "unfair" is in the eye of the beholder. From the point of view of plaintiffs, higher damage awards are by definition better. On the other hand, it is clear that juries have awarded astronomical damages in some cases to send a message to corporations, rather than to compensate the plaintiffs' injuries. Needless to say, plaintiffs will challenge arbitration agreements when they think they can achieve a better outcome in court. As described below, providers should invoke the Federal Arbitration Act in their agreements in order to reduce the chance that such challenges will succeed.

III. The Federal Arbitration Act

Congress enacted the Federal Arbitration Act (the "FAA")[4] on February 12, 1925 to address widespread state and judicial resistance to arbitration. In enacting the FAA, Congress announced a national policy in favor of arbitration which places arbitration agreements on equal footing

[2] *Special Study on Arbitration in the Long Term Care Industry*, Aon Global Risk Consulting, available at: http://www.ahcancal.org/research_data/liability/Documents/2009ArbitrationStudy.pdf. Note that outcomes in non-arbitrated disputes include both litigation that resulted in a jury verdict as well as litigation settled before trial.

[3] *2013 Long Term Care: General Liability and Professional Liability Actuarial Analysis*, Aon Global Risk Consulting, available at: http://www.ahcancal.org/research_data/liability/Documents/2013%20Liability%20Analysis.pdf.

[4] 9 U.S.C. §1 *et seq.*

with all other contracts.[5] The FAA provides that all written arbitration agreements are valid, irrevocable, and enforceable,[6] subject to limited defenses available under state contract law, as described in Section IV below. Because the FAA is a federal law, it will take precedence over conflicting state laws that undermine the purposes of the FAA.

In order for the FAA to apply, an arbitration agreement must implicate "interstate commerce." In the context of seniors housing and long-term care, providers will almost always satisfy this requirement. Multistate providers conduct business across state lines and, therefore, by definition, they engage in interstate commerce.[7] However, courts find that even small, single-site providers participate in interstate commerce if they purchase supplies, food, medicine, or equipment from out-of-state vendors.[8] In addition, providers that bill Medicare, Medicaid, or other federal programs participate in interstate commerce because they accept federal funds.[9] In short, the FAA is available to virtually all seniors housing providers, if the providers choose to invoke the FAA in their arbitration agreements.

IV. Grounds for Invalidating Agreements Under the FAA

Under the FAA, arbitration agreements are presumed to be valid, and can only be invalidated under limited state contract law theories. The most common challenges are listed below.

A. Substantive Unconscionability

Under the "substantive unconscionability" doctrine, the court evaluates the legality and fairness of the written terms of the arbitration agreement. The analysis focuses on issues such as: (i) whether the contract terms are fair; (ii) the intended purpose and practical effect of the terms; (iii) the one-sidedness of the terms of the agreement; and (iv) whether the agreement violates public policy (note that the public policy inquiry has been significantly narrowed by recent Supreme Court decisions, as described in Section V below).

[5] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

[6] 9 U.S.C. §2.

[7] *Estate of Ruszala v. Brookdale Living Communities, Inc.*, 1 A.3d 806, 817-18 (N.J. Super. Ct. 2010).

[8] *Id.*; see also *Estate of Ruszala*, 1 A.3d at 817-18.

[9] *THI of N.M. at Hobbs Ctr., LLC v. Spradlin* ("*Spradlin*"), 893 F. Supp. 2d 1172, 1184 (D.C.N.M. 2012).

B. Procedural Unconscionability

Under the "procedural unconscionability" doctrine, the court looks beyond the written terms of the agreement and evaluates the specific facts surrounding the agreement's formation. This will include factors such as: (i) the relative bargaining power of the parties; (ii) the sophistication of the individuals signing the agreement; (iii) whether the agreement was presented on a "take-it-or-leave-it" basis; (iv) whether the resident understood what he or she was signing; and (v) whether the resident was rushed or felt pressured to sign the agreement.[10] No one factor will be determinative or sufficient to succeed under this analysis. Rather, the challenger must show that, on the whole, the resident was either unaware of what he or she was signing, was not sufficiently informed of the terms of the agreement, or had no meaningful choice when entering into the agreement. The fact that a resident is elderly or in poor health, for example, is not sufficient to prove that an agreement is procedurally unconscionable, without additional factors.[11]

C. Legal Authority to Enter into Agreement

Plaintiffs may challenge an arbitration agreement by alleging that either the resident was not competent to enter into the agreement, or the resident's representative did not have legal authority to act on behalf of the resident.

When a resident is mentally competent, the resident's signature should appear on the arbitration agreement. If the resident has an authorized representative assisting with the admission process, the resident's representative may also sign the arbitration agreement in addition to (but not instead of) the resident.

Legal issues can arise, however, when a resident lacks capacity to enter into a contract and another person signs on the resident's behalf. If an incompetent resident is under the care of a court-appointed conservator or guardian, that person's consent to arbitration is almost certainly binding on the resident. As a practical matter, however, residents with dementia rarely have court-appointed conservators or guardians.

[10] See, for example, *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731 (Tenn. App. 2003).

[11] *Hayes v. Oak Ridge Homes*, 908 N.E.2d 408, 410 (Ohio 2009).

On the other hand, many residents have executed durable powers of attorney, designating a representative to make healthcare and/or financial decisions on their behalf, in the event the resident becomes incapacitated. Providers should ensure that the representative(s) who sign an arbitration agreement on behalf of an incapacitated resident hold both healthcare and financial power of attorney. Courts have held that a representative with power of attorney for healthcare decisions, but not for financial decisions, does not have sufficient authority to bind the resident to an arbitration agreement.[12] Furthermore, the signature of a spouse or other relative without formal power of attorney may not be enough to bind an incompetent resident to arbitration.[13]

D. Arbitrating Third-Party Survival and Wrongful Death Actions

Arbitration agreements will often contain language that extends the terms of the agreement to third parties, such as the following:

> *By entering into this Agreement, you agree that any and all claims and disputes arising out of or related to this Agreement or to your residency, care, or services at our facility shall be resolved by binding arbitration… This Agreement binds all parties to this Agreement and their spouses, heirs, representatives, executors, administrators, successors, and assigns, as applicable.*

In most states, courts have held that a resident can bind third parties to arbitrate any "survival" action raised on behalf of a deceased resident, such as personal injury, negligence, and elder abuse claims.

However, state laws may differ with respect to wrongful death actions. In some states, such as Arizona, California, Illinois, Ohio, Pennsylvania, Utah, and Washington, a resident cannot bind his or her heirs to arbitrate wrongful death actions.[14] In these states, a wrongful death plaintiff is only bound by the arbitration agreement if the plaintiff signed the agreement in his or her personal capacity.

[12] *Johnson v. Kindred Healthcare, Inc.*, 2 N.E.3d 849, 852 (Mass. 2014).

[13] *Id*; see also *Warfield v. Summerville Senior Living, Inc.*, 158 Cal. App. 4th 443, 448-49 (2007). For additional cases regarding authority of third parties to bind residents to arbitration, see Section VII.L below.

[14] *Estate of DeCamacho v. La Solana Care & Rehab, Inc.*, 316 P.3d 607 (Ariz. Ct. App. 2014); *Daniels v. Sunrise Senior Living, Inc.*, 212 Cal. App. 4th 674 (2013); *Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344, 360 (Ill. 2012); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258 (Ohio 2007); *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 663 (Pa. Super. Ct. 2013); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 231 P.3d 1252 (Wash. Ct. App. 2010).

In other states, such as Florida, Michigan, New Mexico, and Texas, the law considers wrongful death actions to be related to the deceased resident's personal claims.[15] In these states, a resident can bind his or her heirs to arbitrate wrongful death claims without the heirs being party to the arbitration agreement.

Arbitration agreements should expressly provide that any representative signing the agreement on behalf of the resident is doing so in his or her personal capacity, as well.

V. State Public Policy Restrictions: The Supreme Court Weighs In

During its 90-year history, the FAA has prompted a large body of case law, as state courts and legislatures have tried to chip away at the FAA's broad scope and protections. In recent years, the U.S. Supreme Court has issued two rulings that are particularly relevant to the seniors housing sector.

AT&T Mobility LLC v. Concepcion

Historically, California courts have ruled that class action waivers in consumer arbitration agreements were invalid. In theory, the "California rule" did not prohibit consumer arbitration, but it required providers to make class action procedures available in their arbitrations. In reality, however, few if any providers chose to do this, because class actions are large, complex, and not suited to arbitration. Challenges to the California rule ultimately reached the Supreme Court in *AT&T Mobility LLC v. Concepcion*.[16] The Court ruled that the FAA preempts (overrides) the California rule because the rule discourages arbitration and undermines the goals of the FAA. Under *AT&T Mobility*, providers may include provisions in their arbitration agreements waiving residents' class action rights.

[15] *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 762 (Fla. 2013); *Ballard v. SW Detroit Hosp.*, 327 N.W.2d 370, 371-72 (Mich. Ct. App. 1982); *Estate of Krahmer ex rel. Peck v. Laurel Healthcare Providers, LLC*, 315 P.3d 298, 302 (N.M. Ct. App. 2013); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 645-46 (Tex. 2009).

[16] 131 S. Ct. 1740, (2011).

Marmet Health Care Center, Inc. v. Brown

In 2012, the Supreme Court heard arguments in a case involving arbitration agreements between West Virginia nursing homes and their residents. The West Virginia Supreme Court recognized that the FAA applied to the arbitration agreements, but invalidated the agreements anyway. The West Virginia court concluded that requiring nursing home residents to arbitrate personal injury and wrongful death claims was against West Virginia public policy, and held that such agreements were therefore "substantively unconscionable" and invalid under West Virginia contract law. The Supreme Court rejected West Virginia's line of reasoning in *Marmet Health Care Center, Inc. v. Brown*.[17] The Court held that state laws and public policies that prohibit arbitration of specific types of claims (such as personal injury and wrongful death claims of nursing home residents) cannot be used to invalidate arbitration agreements governed by the FAA.[18] Because such state laws and policies undermine the goals of the FAA, they are preempted by federal law.

VI. State Responses

Since the Supreme Court's holdings in *AT&T Mobility* and *Marmet*, there have been numerous cases regarding challenges to seniors housing arbitration agreements, generally upholding arbitration clauses. By and large, the courts have followed the Supreme Court's advice and have employed a more nuanced approach to evaluating arbitration agreements challenged under public policy grounds. To date, courts in California, New Mexico, Virginia, Pennsylvania, Kentucky, and Michigan have applied the Supreme Court's reasoning to uphold seniors housing and long-term care arbitration agreements, despite conflicting state laws or state public policies against arbitrating certain types of claims.[19]

[17] 132 S. Ct. 1201 (2012).

[18] Note that courts can still use the "unconscionability" doctrines to invalidate arbitration agreements for other reasons, but *Marmet* holds that, under the FAA, states can't simply declare public policies against arbitrating certain types of claims. See following footnote for collected cases.

[19] See *Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016 (E.D. Cal. 2014) (holding that a California skilled nursing law granting exclusive right to litigate patients' rights violations in court is preempted by the FAA); *THI of NM at Hobbs Center LLC v. Patton*, 741 F.3d 1162 (10th Cir. 2014) (New Mexico law preempted by the FAA); see also *GGNSC Morgantown, LLC v. Phillips*, 2014 U.S. Dist. LEXIS 151910 (N.D. Va., Oct. 24, 2014) (holding that public policy argument, without other factors, cannot render arbitration agreement unconscionable); *Estate of Hodges v. Green Meadows,* 2013 U.S. Dist. LEXIS 46878 (D.C. E.D. Pa. Mar. 29, 2013) (holding the same); *Brookdale Senior Living Inc. v. Hibbard*, 2014 U.S. Dist. LEXIS 76486 (D.C. E.D. Ky. June 4, 2014) (same); *Larsen v. Pine Ridge Operator LLC,* 2014 U.S. Dist. LEXIS 165470 (D.C. E.D. Mich. Nov. 26, 2014) (same).

VII. Steps to Improve Enforceability of Arbitration Agreements

Although the Supreme Court has limited the extent to which states can rely on public policy to invalidate arbitration agreements governed by the FAA, common contract law principles still apply. Agreements that are one-sided, overly burdensome, signed under questionable circumstances, or signed by the wrong party may still be invalidated. Some factors that courts have used in this analysis are:

A. Voluntary Versus Mandatory Arbitration Agreements

Courts have held that the mandatory nature of an arbitration agreement is one factor in determining whether it is fair and reasonable.[20]

B. Additional Methods of Alternative Dispute Resolution

Providers may consider adding additional dispute resolution steps before requiring arbitration, such as provisions requiring good-faith resolution of disputes and/or mediation prior to arbitration.

C. Consider Providing a Separate Arbitration Agreement

A separate agreement eliminates the argument that the arbitration language was buried in the admission agreement.

D. Provide the Arbitration Agreement Early in the Admissions Process

The sooner the resident sees the arbitration agreement, the better. Many states require licensed providers to provide a copy of the entire agreement to prospective residents upon request. Providers who are not licensed, such as independent living communities, may want to consider adopting this as a best practice, as well.

D. Avoid One-Sided Provisions

Courts can invalidate an arbitration agreement under the "substantive unconscionability" doctrine if the agreement is unreasonably stacked in favor of the provider. Even with a

[20] See Hayes, 908 N.E. 2d at 410; GGNSC Morgantown LLC, 2014 LEXIS 151910, at *10.

severability clause, the following provisions may be viewed by a court as so one-sided that the entire arbitration agreement is invalidated as "substantively unconscionable," under the theory that no rational person would intentionally agree to such a limitation of his or her legal rights.

1. **Limiting Compensatory or Punitive Damages.** The arbitration agreement should not restrict a resident's rights to damages more than otherwise provided by state law.
2. **Shorter Statutes of Limitation than Provided by Law.** Such limitations are unfair to the resident and advantageous to the provider.
3. **Severe Discovery Limitations.** Although, on its face, a provision to equally limit both sides' discovery rights may appear neutral, in practice, the provider holds most of the evidence and access to witnesses in a personal injury lawsuit. Thus, for example, a provision limiting each party to deposing no more than three witnesses might be viewed as giving the provider a decided advantage in the arbitration.
4. **Leaving the Choice of Arbitrator to the Provider Only.** The selection of a neutral arbitrator (or a panel of arbitrators) should be made by both the provider and the resident/resident's representative. Leaving the decision solely in the hands of the provider raises significant questions as to the neutrality of the arbitration.
5. **One-Sided Access to Courts.** The agreement should not require the resident to arbitrate certain claims, while giving the provider the discretion to pursue the same claims against the resident in court.

F. Include an Alternative in your Choice-of-Forum Clause

Narrowly written choice-of-forum clauses may backfire if the preferred forum becomes unavailable after the agreement is executed. Following the departure of NAF from consumer arbitration, many seniors housing agreements suddenly contained language mandating arbitration in a forum that was no longer available. Some jurisdictions have

found such clauses to be integral to the agreement and invalidated the entire arbitration agreement based on the non-available forum.[21] Most courts, however, have upheld agreements that refer to an unavailable forum, noting that the FAA permits the parties, or the courts, to choose an alternate arbitration forum if the stated forum becomes unavailable.[22] An arbitration agreement can avoid such uncertainty altogether by providing that, in the event that the desired forum is unavailable, an alternative forum will be selected in accordance with the FAA.

G. Emphasize that Arbitration Waives Trial Rights

Arbitration agreements should underscore that, by agreeing to arbitrate, the resident understands that he or she is waiving his or her right to have the matter heard in a court before a judge or jury, and that the decision of the arbitrator will be final. Such language should be boldfaced or in a larger font to call attention to the fact that the resident is waiving important legal rights.

H. Provide an Opt-Out Process

Residents have challenged arbitration agreements by claiming that they felt pressured to sign, or that they were not given adequate time to review the agreement before signing. These challenges can be neutralized by providing a method by the resident can revoke his or her consent to arbitration, in writing, within a set period of time (for example, 30 days) after signing the agreement. The method of delivery should be independently verifiable (for example, requiring that revocations be sent via certified mail, email, or another tracked delivery service). Courts have viewed such provisions favorably when upholding arbitration agreements.[23]

I. Emphasize that Signing the Arbitration Agreement is not a Condition of Admission to the Community

In some states, this is a legal requirement for licensed providers.[24] Even where not required by law, providers should consider adopting such a provision as a best practice.[25]

[21] See, for example, *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 686 (Ga. Ct. App. 2013); *Riley v. Extendicare Health Facilities, Inc.*, 826 N.W.2d 398, 411 (Wis. App. 2012); *Covenant Health & Rehabilitation of Picayune, LP v Estate of Moulds*, 14 S.3d 695, 707 (Miss. 2009); *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435, 438 (S.C. 2009).

[22] See, for example, *Rivera v. American General Financial Services, Inc.*, 259 P.3d 803, 813 (N.M. 2011); *Estate of Eckstein v. Life Care Centers of America, Inc.*, 623 F. Supp. 2d 1235, 1238 (E.D. Wash. 2009); *Mathews v. Life Care Centers of America, Inc.*, 177 P.3d 867, 872 (Ariz. App. 2008).

[23] *Hayes*, 908 N.E. 2d at 413.

J. Provide Exceptions for Small Claims and Evictions

By excluding some claims from mandatory arbitration, providers demonstrate that residents retain some litigation rights. Small claims actions are natural candidates to exclude from arbitration because the stakes are relatively low, and in most states, small claims courts prohibit representation by attorneys. Similarly, arbitration is not efficient for eviction proceedings because even if a provider prevails, the provider will still need to petition a court of law to enforce the arbitration. In addition, most states have expedited eviction procedures, further reducing the benefit of arbitration in these cases.

K. Include a Severability Clause

In the event that an arbitration agreement is challenged, the court may exercise its discretion to sever the offending portion and enforce the remaining contract.[26] Severability clauses demonstrate that the parties expressly contemplated this contingency when entering into the agreement.

L. Get the Right Signatures

Generally, parties are presumed to be competent to enter into a legal agreement. In independent living, most incoming residents will be mentally competent, and getting the right signature is a simple matter. Questions arise, however, in the assisted living and skilled nursing context, when residents have diminished capacity, or have appointed personal representatives who may or may not have legal authority to bind the resident. As noted in Section IV.D above, a resident's spouse or family member does not necessarily have the authority to execute an arbitration agreement on the resident's behalf, even if the representative is authorized to make medical decisions for the resident.[27]

[24] See, for example, Cal. Health & Safety Code §1569.269(c).

[25] *Hayes*, 908 N.E. 2d at 410.

[26] See, for example, *Schuilling v. Harris*, 747 S.E.2d 833, 835 (Va. 2013); *Jones v. GGNSC Pierre LLC,* 684 F. Supp. 2d 1161, 1167 (D. S.D. 2010).

[27] See, for example, *Flores v. Evergreen at San Diego, LLC*, 148 Cal. App. 4th 581, 582 (2007);

M. Don't Overreach

As noted above, a court has the discretion to sever offending provisions of an agreement and enforce the remaining provisions, particularly when the agreement expressly contains a severability clause. Note, however, that a severability clause should not be treated as a cure-all for defects in the arbitration agreement. If the agreement contains multiple offending provisions (or even one particularly egregious provision) the court may simply invalidate the entire agreement as unconscionable or unfairly one-sided.[28]

VIII. Conclusion

Arbitration can provide significant benefits to seniors housing operators. To maximize the likelihood that an arbitration agreement will withstand legal challenges down the road, the agreement should invoke the FAA and be carefully tailored to provide benefits to both the provider and the resident. Providers should avoid the temptation to overreach in their arbitration agreements and assume that the severability clause will save the day. Often, courts will throw out an entire arbitration agreement rather than engage in legal reconstructive surgery, especially when the agreement contains multiple offending clauses or attempts to limit important individual rights.

[28] See, for example, *Hogsett v. Parkwood Nursing & Rehab Center, Inc.*, 997 F. Supp. 2d 1318 (D.C. N.D. Ga. 2014); *Goldman v. Sunbridge Healthcare, LLC*, 220 Cal. App. 4th 1160, 1173 (2013); *Crossman v. Life Care Centers of America, Inc*. 738 S.E.2d 737, 741 (N.C. App. 2013); *Riley*, 826 N.W. 2d at 411-412; *Estate of Irons v. Arcadia Healthcare, LC*, 66 So. 3d 396, 397 (Fla. App. 2011).

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