

**RECENT DECISION ON COURT'S DISCRETION TO REFUSE
TO ENFORCE AN ARBITRATION AGREEMENT WHERE
THERE ARE THIRD PARTIES IN THE ACTION UNAFFECTED
BY THE AGREEMENT**

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In Birl v. Heritage Care LLC (April 9, 2009) 09 C.D.O.S. 4360, Division Two of the Second Appellate District held that a trial court acted within its discretion to refuse to enforce an arbitration agreement of defendant Heritage Rehabilitation Center. The court found that because there were other co-defendants who were not subject to the arbitration agreement, and the plaintiffs alleged several causes of action in their individual capacities and beyond the scope of the agreement, the trial court acted appropriately by refusing to enforce Heritage's arbitration agreement to "avoid the possibility of conflicting rulings on common issues of law or fact."

Plaintiffs' decedent was initially treated at Kaiser Permanente Hospital at Sunset (Kaiser), where he had surgery. About a month later he was transferred to Brier Oak Terrace Care nursing facility despite the fact that, according to plaintiffs, he still needed acute hospital care. He developed complications and was transferred back to Kaiser. At some point he was transferred to Fountain View Subacute and Nursing Center, where he was allegedly cared for improperly and developed another infection. He was then transferred back to Kaiser's ER. He remained at Kaiser for several days then was admitted to the Heritage nursing facility.

While at Heritage, plaintiffs allege Mr. Birl was not properly cared for and was allowed to deteriorate. When his family visited him and found him to be unresponsive, they had him transferred by ambulance to Harbor-UCLA Hospital, where he died on the day of his transfer.

Plaintiffs were the surviving spouse and adult children of Mr. Birl. They sued Kaiser, the physicians of the Southern California Permanente Medical Group, various entities of Kaiser and the three residential nursing facilities. They alleged causes of action as successors of interest to Mr. Birl, and also in their own capacities as family members entitled to sue for wrongful death, loss of consortium (Mrs. Birl) and negligent infliction of emotional distress.

The Kaiser/SCPMG defendants filed a motion to compel arbitration, which was denied and not appealed; they answered the complaint and the court observed they were apparently going to trial. Neither Brier Oak Terrace nor Fountain View had arbitration agreements and answered the complaint. Heritage filed a petition to compel arbitration,

but curiously, only as to some of the causes of action which the court noted would go to trial regardless of the outcome of the appeal.

Heritage did move to compel arbitration on 8 of the causes of action alleged against it. Some of the causes of action were alleged by plaintiffs in their role as successors in interest, some were brought in their individual capacity. All arose out of the care Mr. Birl received throughout the course of his treatment at the various facilities being sued by plaintiffs.

The trial court denied the motion to compel arbitration. In so doing, it exercised its discretion under CCP 1281.2(c) in order to “avoid the possibility of conflicting rulings on common issues of law or fact.” It also found the arbitration agreement did not comply with the statutory language and formatting requirements for such agreements. Heritage appealed.

The appellate court first reviewed de novo whether CCP section 1281.2(c) was, as a matter of law, properly invoked. Finding it was, the court then looked at whether the trial court abused its discretion under an abuse of discretion standard by refusing to compel arbitration. Here, the court found the “third party requirement” of section 1281.2(c) “was satisfied as a matter of law, and the trial court did not abuse its broad discretion in refusing to compel arbitration on the basis that there was a possibility of conflicting rulings on a common issue of law or fact.”

CCP section 1281.2(c) provides that a court shall order parties to arbitrate when there is a written arbitration agreement, “unless it determines” as follows: “A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.” The appellate court observed that in order for Heritage to show the trial court abused its discretion, it needed to show that none of the other parties to the action are “third parties” within the meaning of section 1281.29(c).

Heritage acknowledged that Kaiser/SCKPMG and the other nursing care facilities are third parties; however it argued that the time the patient stayed at Heritage could be sequestered out from the treatment timeline. It ignored the fact that Kaiser/SCKPMG physicians attended Mr. Birl while he was at Heritage. The court noted it was of “no consequence that Heritage’s services were separated by time from the sequential services provided by the other long-term care facilities. A temporal separation does not necessarily negate the existence of the requisite ‘series of related transactions.’ (Cite) Likewise, all the co-defendants contributed to the cause of the injuries suffered by Mr. Birl’s wife and two daughters, as alleged in their individual causes of action for loss of consortium and the negligent infliction of emotional distress.”

The court also found the plaintiffs were third parties to the agreement within the meaning of section 1281.2(c) with respect to their individual claims for wrongful death and emotional distress. These claims clearly arose out of the same series of transactions involved in the injury causes of action that survived Mr. Birl and were pled against Heritage.

Finally, the Court of Appeal held the trial court correctly assessed the risk of conflicting rulings on common questions of law and fact if Heritage were allowed to arbitrate some of its claims and the remaining defendants went before a jury trial. “[i]f the trier of fact is the same for all defendants, as would occur if all defendants are joined in the court action, then the possibility of conflicting rulings concerning fault and apportionment of damages (see Civ.Code §1430 et seq.) would not occur.”

In Footnote 3 the court set out a scenario in which, if Heritage were allowed to arbitrate its claims first, “apportionment of liability could result in liability by more than one defendant but nonetheless no monetary recovery for plaintiffs. This could occur in a scenario where, for example, an arbitrator places 100 percent of the blame on the Kaiser/SCKPMG defendants and none on Heritage, while a jury (which is not bound by the findings of an arbitrator) places 100 percent of the blame on Heritage and none on the Kaiser/SCKPMG defendants. The trial court’s ruling denying Heritage’s petition to compel arbitration eliminates the possibility of such a conflicting and unjust outcome.”

This decision will not be welcomed by those providers and entities that have arbitration agreements with their patients. However, it may be useful to those physicians or facilities that do not use arbitration agreements but are in litigation with a co-defendant that does and want to keep everyone in the case for purposes of trial.