

**RECENT DECISION ON EFFECT OF ARBITRATION
AGREEMENTS ON NON-SIGNATORIES IN WRONGFUL
DEATH ACTION FOR MEDICAL MALPRACTICE**

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In Ruiz v. Podolsky (June 24, 2009) 09 C.D.O.S. 8077, Division Three of the Fourth Appellate District held that decedent's adult children could not be compelled to arbitrate their wrongful death claims pursuant to the arbitration agreement their father signed at the request of Dr. Podolsky, his orthopedic surgeon. Podolsky petitioned the trial court for an order to compel arbitration against all of the patient's heirs based on the agreement. The decedent's widow did not challenge the application of the arbitration agreement to her, but joined with her children to attempt to secure their right to take their wrongful death action to court. The trial court granted the petition to compel arbitration as to the wife, but denied the petition as to the adult children. Dr. Podolsky appealed the ruling of the trial court and argued the decedent "had the broad authority to waive the Adult Children's right to a jury trial of their independent wrongful death claims simply because [the] spouse conceded she was bound to the agreement and the wrongful death statute requires litigation of the action in one forum." The court of appeal concluded the trial court correctly ruled that the Adult Children could not be compelled to arbitrate their wrongful death claim.

The court went through a long discussion of the split in authority about which nonsignatories may be bound by an arbitration agreement. After a review of California and out-of-state authority, the appellate court concluded

"California's wrongful death statute does not create a derivative action and therefore [decedent] lacked authority (express or implied) to bind Wife or the Adult Children to the physician-patient arbitration agreement he signed simply to receive treatment for himself from Podolsky. Principles of equity and basic contract law outweigh the convenience of litigating in one forum and the public policies favoring arbitration. Accordingly, we hold the trial court correctly concluded the Adult Children cannot be compelled to arbitrate their wrongful death claims."

Interestingly, even though the wife was not legally bound by the agreement, she "invited error" on this issue and conceded she must arbitrate her claim; she did not appeal the court's order compelling her to arbitrate. The court observed that Dr. Podolsky now faces the "legal quagmire" of possibly having to try the case twice.

Though the wrongful death statute calls for “one action” to be jointly maintained by all heirs, there is no discretion to disregard the wife’s “purported” arbitration agreement with Podolsky, “despite the possibility of inconsistent results inherent in litigating the same wrongful death action in two forums.” Because the wife can be compelled to arbitrate her claims, but the children cannot, Dr. Podolsky “has waived the protections offered by the statutorily created ‘one action rule’ for wrongful death cases by filing his petition to compel arbitration, causing the lawsuit to be split into two forums.” This situation creates risks of inconsistent rulings and results that “is likely not the result Podolsky envisioned.” The court noted he has the option of waving his right to arbitrate the wife’s claims and proceed against all the heirs at trial, or to proceed in two forums, a decision which “is his, not ours.”

The heirs’ wrongful death action is an independent action, not a derivative action, and even though the mother consented to be subject to the arbitration agreement (though she needn’t have), this does not mean that Dr. Podolsky should be entitled to compel all heirs to participate in arbitration. “[T]he convenience of litigating in one forum for one party does not trump another party’s right to a jury trial of his or her own, independent action.” To do allow a party to “sweep up nonsignatory parties into arbitration for the sake of judicial convenience...would require us to ignore basic contract law principles..., ignore the fundamental right to have a jury trial, and ignore constitutional rights to due process.”

When representing a physician who had an arbitration agreement with a deceased patient, it is always important to determine the identities of all potential plaintiff/heirs in order to protect the client’s rights under the “one action rule.” In addition, once this has been done, careful consideration must be made about whether it is actually more expensive and detrimental to your client to seek to enforce an arbitration agreement against any of the heirs, since under Ruiz, it appears that non-signatory heirs will not be bound by the arbitration agreement signed by their decedent.