Don't mix cucumbers with zucchinis or you may end up in Lodi

Health-care arbitration clauses and the non-signatory heirs of a decedent in medical-negligence cases

By W. David Corrick

Most, if not all, first-year law students have had the dubious pleasure of enduring the acerbic comments and psychological terror inflicted by law school professors, if for no other reason than "it has always been done this way."

On the last day of class before first semester exams, my Torts professor walked into the classroom and nonchalantly wrote a seven-digit number on the board. He then began his usual lecture laced with a heavy dose of his "good-natured" Socratic questioning. As with every class prior, most of the student answers were met with belittling sarcasm and a fine demonstration of the professor's "wittiness." With only a minute or two left before class would be adjourned, one of my more inquisitive classmates asked the professor about the seven-digit number. (Perhaps he was worried it would resurface as a "trick question" on the test.) The professor lit up, and with a sadistic grin on his face said, "Oh, that? That's the phone number for Western Truck Driving School. Some of you may need it after you get your exam results." Pretty hysterical stuff; at least he sure thought so.

In a bold break from tradition, my Civil Procedure professor was a very kind-hearted gentleman, who treated his students with courtesy and patience. But, for some reason he never revealed to us, he had a marked dislike for the City of Lodi. Whenever he would make differentiations between similar legal concepts, he would always analogize the concepts as cucumbers and zucchinis; similar in size, color, and shape, yet distinctly different. Mixing zucchinis with cucumbers, he would say, could lead our analysis of a legal issue into the dreaded realm of "Lodi."

Enforceability of an arbitration clause

This article briefly addresses the narrow question as to the enforceability of an arbitration clause within a health-care provision contract to the non-signatory heirs of a decedent whose death is alleged to have been caused by professional medical malfeasance.[1] Historically, there has been confusion and inconsistency among California courts on this issue, which often turns on picayune factual distinctions. The decisions are so incongruous and disjointed, California Supreme Court Justice Carlos Moreno was led to remark, "A survey of the cases does not reveal a simple conflict, but rather a more complex taxonomy under varied factual circumstances." (*Ruiz v. Podolosky* (2010) 50 Cal.4th 838, 845.) The modest goal of this article is to point out the "zucchinis and cucumbers" when analyzing this issue and to assist the reader in avoiding that long and treacherous road into "Lodi".

Types of contracts for health-care provision

There are two basic types of health-care provision contracts in California: (1) health-care service plan contracts; and, (2) medical services contracts. Arbitration clauses in these contracts are regulated by separated statutory schemes.[2] The distinction between the two is straightforward.

- **Health-care service plans**

Health care service plans are defined at California Health & Safety Code section 1345(f)(1) as:

> Any person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees.[3]

The administration of health-care service plans is regulated by the Knox-Keene Health Care Service Plan Act of 1975 ("Knox-Keene").[4] Knox-Keene applies to every health maintenance organization ("HMO") that operates in California, unless the HMO is federally regulated under the Employee Retirement Income Securities Act ("ERISA"). The California Department of Managed Health Care oversees Knox-Keene compliance.[5]

- **Medical services contract**

There are many California health-care providers not subject to Knox-Keene or ERISA regulation, e.g., sole practitioners and private acute care hospitals. A health-care provision contract between those providers and the patient constitutes a medical services contract.

Validity of arbitration clauses

Before analyzing the enforceability of an arbitration clause in a health-care provision contract to non-signatory heirs, it is necessary to determine whether the arbitration clause was even enforceable as to the decedent at the time of death. There are three primary reasons an arbitration clause may be deemed unenforceable secondary to invalidity: (1) lack of statutory compliance; (2) agreement not entered into "knowingly and voluntarily"; and, (3) the agreement is no longer viable or binding.

• **Arbitration clause not code compliant**

An arbitration clause that does not comply with statutory requirements is unenforceable *ab initio*. (See, *Rosenfield v. Superior Court* (1983) 143 Cal.App.3d 198, 200) (holding arbitration clause in a health-care services contract unenforceable where the clause failed to conform to statutory requirements under Code Civ. Proc., § 1295).

Statutory requirements for medical services contract arbitration clauses

An arbitration clause in a medical services contract must comply with California Code of Civil Procedure section 1295(a)-(b), which mandates:

(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

(b) Moreover, pursuant to Code of Civil Procedure section 1295(b), immediately before the signature line of the individual contracting for medical services, the following must appear in bold red type in font no smaller than 10-point:

NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

Statutory requirements for health-care service plan arbitration clauses

Any arbitration clause set forth in a health-care service plan contract must be drafted in conformity with the requirements of Health and Safety Code section 1363.1, which provides:

Any health-care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, the right to a jury trial shall include, in clear and understandable language, a disclosure that meets all of the following conditions:

(a) The disclosure shall clearly state whether the plan uses binding arbitration to settle disputes, including specifically whether the plan uses binding arbitration to settle claims of medical malpractice.

(b) The disclosure shall appear as a separate article in the agreement issued to the employer group or individual subscriber and shall be prominently displayed on the enrollment form signed by each subscriber or enrollee.

(c) The disclosure shall clearly state whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other disputes relating to the delivery of service under the plan, or both, and shall be substantially expressed in the wording provided in subdivision (a) of section 1295 of the Code of Civil Procedure.

(d) In any contract or enrollment agreement for a health care service plan, the disclosure required by this section shall be displayed immediately before the signature line provided for the representative of the group contracting with a health care service plan and immediately before the signature line provided for the individual enrolling in the health-care service plan.

Health-care service plan contracts are specifically excluded from having to comply with Code of Civil Procedure sections 1295(a)-(b), if: (1) the plan contract complies with Health and Safety Code section 1363(a)(10), or otherwise has a procedure to notify prospective subscribers that the plan's contractual agreement contains a binding arbitration clause; and, (2) the plan's contract is drafted in accordance with Health and Safety Code section 1373(h). (Code Civ. Proc., § 1295(f).)

• **Signatory's consent to arbitrate is not made "knowingly and voluntarily"**

One of the legislative purposes in enacting Knox-Keene is to ensure that subscribers and enrollees to health care service plans "are educated and informed of the benefits and services available in order to enable a rational consumer choice in the market place." (Health & Saf. Code, § 1342(b).) (See e.g., *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 472-473 (holding summary judgment in favor of health-care service provider improper where subscriber raised a triable issue of fact as to whether provider engaged in bad faith.) A medical care services contract is not actually formed unless the parties signing the contract act voluntarily and with awareness as to the nature of the document, and have turned their attention, or *should have* turned their intention, to its provisions. (*Ramirez v. Superior Court* (1980) 103 Cal.App.3d 746, 756, fn. 3). (See also, *Engalla v. Kaiser Permanente Medical Group* (1997) 15 Cal.4th 951, 973-981 (arbitration agreement rescindable if fraudulently obtained).) Further, if the signatory dies within 30 days of signing a medical services contract, the signatory cannot be deemed to have willingly and knowingly given up the right to a jury trial, because of a "cooling off" period set

forth in Code of Civil Procedure section 1295(c). (*Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, 1468-1472.)

• **Contract no longer viable**

A valid health-care provision contract may, in essence, expire when the patient/health-care provider relationship ends. In *Cochran v. Rubens* (1996) 42 Cal.App.4th 481, the plaintiff's primary care physician ("PCP") referred her to a specialist. At the time she saw the specialist, she signed a medical services contract that contained an arbitration clause. Three years later, the plaintiff's PCP again referred her to the same specialist, whom she had not seen since her initial office visit. She did not sign a medical services contract the second time she saw the specialist. The plaintiff subsequently sued the specialist based on his care and treatment of her during their second encounter. The court found the medical services contract from three years prior was extinguished and non-binding because after the first office visit there was no indication of an anticipated on-going patient-physician relationship. (*Cochran*, *supra*, at 488.) (But see, *Regelsperger v. Siller* (2007) 40 Cal.4th 574, 576-579 (finding no need to analyze the parties' "anticipation" with respect to an on-going relationship because arbitration clause included a provision stating contract was intended to bind the parties for health care services then *and in the future*).)[6]

Scope of arbitration clauses

An arbitration agreement is not enforceable beyond the scope specifically delineated in the health-care provision contract. In other words, even if valid, an arbitration agreement is not binding beyond its own terms. The arbitration provisions must be carefully read to deduce who the contract is intended to bind, as well as the causes of action it is intended to cover. In almost all cases, the arbitration clause will be as comprehensive as possible, but its ostensible scope should still be meticulously reviewed.

Non-signatory heirs of signatory decedent

Assuming the arbitration agreement in a health-care provision contract seems to have been binding upon the decedent at the time of death, and the clause purports to bind non-signatory heirs in wrongful death actions occasioned by medical negligence, there is still room for valid argument that the clause ***is not*** enforceable against non-signatory heirs. As noted, *supra*, the case law on this issue does not serve as a model of clarity or uniformity.

• **Arbitration clause *not binding* on non-signatory heirs**

Rhodes v. California Hospital Medical Center (1978) 76 Cal.App.3d 606: Plaintiffs filed a wrongful death action against the defendant hospital, alleging that the hospital's negligence led to the death of their wife and mother. The court held that the decedent's arbitration agreements were not binding on her heirs because they were not signatories to the contract. The appellate court observed that "[n]either Mr. Rhodes nor the son have ever contracted to forego *their* rights to have *their* causes of action determined by a jury in a normal judicial proceeding." (*Rhodes*, *supra*, at 609 (Emphasis in the original.))

Weeks v. Crow (1980) 113 Cal.App.3d 350: Expectant mother signed a medical services contract that included an arbitration agreement. Her baby died two weeks after birth, and she and her husband filed a wrongful death claim in state court. Since the contract omitted any reference to the unborn child, the appellate court held the parents were not contractually obligated to arbitrate their wrongful death claim. (*Weeks*, *supra*, at 353.)

Baker v. Birnbaum (1988) 202 Cal.App.3d 288: A non-signatory spouse's loss of consortium was adjudicated outside the purview of the applicable arbitration agreement his wife executed. The court held the husband's claim was not subject to the arbitration agreement because the policy favoring arbitration does not extend to those who have not authorized anyone to act for them in executing a medical services contract. (*Baker*, *supra*, at 292.)

Buckner v. Tamarin (2002) 98 Cal.App.4th 140: Adult children of decedent who had executed a medical services contract were not required to arbitrate their wrongful death claim because they were not parties to the contract. The court noted that only under three circumstances may a non-signatory be bound to the terms of medical services contract: (1) an agency relationship exists; 2) a spousal relationship exists; and, 3) a parent binds a minor child. (*Buckner*, *supra*, at 142-43.)

• **Arbitration clause *binding* on non-signatory heirs**

Hawkins v. Superior Court (1979) 89 Cal.App.3d 413: A widow's wrongful death claim for the loss of her husband due to alleged medical malpractice was subject to mandatory binding arbitration because she was also a member of her late husband's health-care service plan. (*Hawkins*, *supra*, at 419.)

Herbert v. Superior Court (1985) 169 Cal.App.3d 718: Decedent left a wife, five minor children and three adult children as his heirs when he passed away. At the time of his death, the decedent's wife and his minor children were Kaiser health-plan members insured under the same contract as the decedent. The decedent's three adult children were not Kaiser enrollees. The heirs filed a wrongful death suit against Kaiser in state court. The heirs also asserted causes of action for fraud and negligent infliction of emotional distress ("NIED"). The appellate court quickly concluded that as Kaiser members under the same service contract as the decedent, the decedent's wife and minor children were bound to the terms of the arbitration agreement. As to the three adult children, the appellate court inferred a legislative intent that a patient who signs a contract for medical services which contains an arbitration agreement has the capacity to bind his or her heirs to that agreement.[7] The court reasoned, "Decedents are able to bind their heirs

through wills and other testamentary dispositions so the concept is not new or illogical." (*Herbert* at 725.[8])

Pietrelli v. Peacock (1993) 13 Cal.App.4th 943: Plaintiff's mother and Dr. Peacock executed a medical services contract containing an arbitration clause more than a year before the plaintiff was born. Almost eight years after he was born, plaintiff filed a medical malpractice lawsuit against the doctor for injuries he sustained at or around the time of his birth. The arbitration clause in the medical services contract purported to be applicable to any dispute between the doctor and the mother, as well as persons "born or unborn," over whom the mother had authority to bind to the agreement. Citing the "strong public policy" in support of arbitration, the authority of a parent to bind a minor to the terms of a medical services contract, and the plain language of the arbitration clause, the appellate court held that the contract was binding on the plaintiff. (*Pietrelli,* at 948.[9])

Wilson v. Kaiser Foundation Hospitals (1983) 141 Cal.App.3d 891: An infant sustained prenatal injuries, and later sought to bring a claim against his mother's obstetrician. Prior to his birth, the infant's mother had signed a health-plan services contract, which included an arbitration clause. Under the terms of the contract, any children subsequently born to the mother would automatically become plan members at birth. As a plan member, the appellate court ruled the minor plaintiff was bound to the arbitration clause. (*Wilson*, *supra*, at 899.)

• *Ruiz v. Podolosky*: An Otiose "Reconciliation" Exercise

In *Ruiz v. Podolosky* (2010) 50 Cal.4th 838, California Supreme Court sought to establish consistency and resolve the issue regarding the enforceability of arbitration clauses to a decedent's non-signatory heirs in wrongful death cases premised on alleged medical malpractice. In the end, the Court issued a very narrow holding which only applies to one type of case.

The decedent in *Ruiz* sought treatment for a broken hip from the defendant. At that time, he and defendant executed a medical services contract which provided for the arbitration of all malpractice claims. The contract further stated it was the intention of the parties that the arbitration agreement "bind all parties whose claims may arise out of or relate to treatment or service provided by the physician including any spouse or heirs of the patient and any children…" Mr. Ruiz died eight days after he signed the contract.

After Mr. Ruiz passed away, his widow and his four adult children filed a wrongful death claim against the defendant doctor in state court. Counsel for the defendant filed a petition to compel arbitration against the heirs. The trial court ruled the adult children were not subject to the arbitration agreement because they had never personally consented to arbitration. The appellate court affirmed. The Supreme Court granted review.

In its written opinion, the Court discussed the split of case authority.[10] As the contract at issue was a medical services contract, the Court correctly relied heavily on its reading and interpretation of Code of Civil Procedure section 1295.[11] The Court observed that the legislative intent behind the enactment section 1295[12] was to reduce health-care costs by promoting the arbitration of grievances. Noting the definition of "professional negligence" set forth in section 1295(g) includes negligent acts or omissions resulting in wrongful death, the Court stated, "[W]e are persuaded that section 1295 construed in light of its purpose, is designed to permit patients who sign arbitration agreements to bind their heirs in wrongful death actions." (*Ruiz*, *supra,* at 849.)

In the end, though, the Court's holding completely failed to reconcile the case law, holding only that: "[A]ll ***wrongful death claimants*** are bound by arbitration agreements ***entered into pursuant to section 1295***, at least when, as here, the language of the agreement manifests an intent to bind these claimants." (*Id*. at 841. [Emphasis added].) The Court's ruling was limited to binding wrongful death claimants who have a statutory "special relationship" with the decedent. (*Id*. at fn. 5.) In short, the Court's holding is limited to properly worded arbitration clauses set forth in ***medical services contracts***.

It is imperative to note that the holding in *Ruiz* is subject to challenge. Code of Civil Procedure section 1295(c) provides for a 30-day "cooling off" period after a patient signs a medical services contract, during which time the patient may rescind the contract by written notice. If the patient dies before the 30-day period expires, any agreement to arbitrate is unenforceable. (*Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, 1468-1472.) In this case, Mr. Ruiz died eight days after signing the contract. However, the Ruiz family never challenged the validity of the instrument under a *Rodriguez* analysis until the case went before the Supreme Court. Consequently, the Court declined to consider the argument. (*Id*. at fn. 6.[13])

• *Ruiz* holding limited to its narrow application

So far, the narrow holding in *Ruiz* has not been expanded. In *Bush v. Horizon West* (2012) 205 Cal.App.4th 924, a non-signatory daughter of a skilled nursing facility ("SNF") patient filed a state court action on her own behalf alleging NIED due to witnessing her mother's allegedly abusive treatment at the SNF. Counsel for the SNF argued *Ruiz* was controlling and the daughter's claim had to be arbitrated in accordance with the arbitration agreement executed on behalf of her mother when she entered the SNF. The appellate court found that since the complaint was not one for wrongful death secondary to medical malpractice, but rather for NIED predicated on abuse of an elder, *Ruiz* did not apply. The court stated, "Nothing in section 1295 or the arbitration agreement here compels the conclusion that…*Ruiz* applies to a case

like this, where neither medical malpractice nor wrongful death is at issue." (*Bush* at 931.[14])

Depending on facts and nature of case arbitration

Even if one *can* defeat enforceability of an arbitration provision, it does not mean one *should* do so. There are a host of advantages to arbitration, including: (1) no continuances due to courtroom unavailability; (2) typically less rigid evidentiary standards; (3) higher likelihood of recovery; (4) more relaxed atmosphere; and, (5) heightened flexibility. Also, if you are permitted to engage a party arbitrator, you will have an additional advocate for your position. Finally, there is no direct law stating MICRA applies in medical negligence actions subject to mandatory arbitration. If the health-care provision contract does not *specifically state* MICRA applies, there is room to argue it does not. (See, *Nogueiro v. Kaiser Foundation Hospitals* (1988) 203 Cal.App.3d 1192, 1194 (noting that application of MICRA limit of $250,000 award for general damages where arbitration agreement does not specifically state its application is unsettled area of law); *Morris v. Zuckerman* (1968) 69 Cal.2d 686, 691 (holding as "well established" that unless specifically required to act in conformity with rules of law, arbitrators are permitted to apply broad principles of justice and equity in reaching decisions).)

Conclusion

Aside from the narrow, non-unanimous, and suspect holding in *Ruiz*, the law pertaining to the enforceability of arbitration clauses in medical provision contracts to non-signatory heirs remains open. This is by no means intended to serve as a comprehensive treatise on the issue. However, it is hoped the information contained in this article will provide a useful skeletal framework for analyzing the issue when it arises in the reader's practice.


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Endnotes

[1] See, Code of Civil Procedure section 377.60 (identifying persons with standing to assert a wrongful death claim).
[2] Where referred to collectively these shall be designated "healthcare provision contracts".
[3] Section 1345(f)(2) pertains to health care service plans in which some or all of the care is to be provided in a foreign country.
[4] Knox-Keene is codified at California Health & Safety Code section 1340-1399.835. Knox-Keene became effective on July 1, 1976, and superseded Knox-Mills, which went into effect on September 17, 1965.
[5] Knox-Keene is also applicable to a handful of preferred provider organizations ("PPO") that operate in California. If it is unclear whether a health-care provision contract falls under the Knox-Keene aegis, one may simply call the Department of Managed Healthcare Services and ask.
[6] See, Code of Civil Procedure section 1281 (stating arbitration contracts are revocable upon the same grounds that may exist for any other type of contract).
[7] The arbitration agreement in *Herbert* specifically stated it was intended to cover all claims asserted by a member, or the member's heirs, on account of death or bodily injury arising out of the rendition of services under the master contract. (*Herbert*, *supra*, at 720.)
[8] The *Herbert* court never addressed the heirs' causes of action for fraud or NIED.
[9] In its written opinion, the *Pietrelli* court chided the *Rhodes* court for being "out of step with both the overwhelming weight of California authority and the strong public policy favoring arbitration in medical malpractice cases…" (*Id.* at fn. 1.)
[10] In its review of the case law, the Court compared and contrasted cases involving health-care service plans and cases involving medical services contracts without distinction.
[11] The *Ruiz* Court did not address Health and Safety Code section 1363.1, specifically. But, the Court did acknowledge health-care services plans and medical services contracts must comply with different statutorily-mandated notice requirements in order for an arbitration clause to be given effect.
[12] Code of Civil Procedure section 1295 is a Medical Injury Reform Compensation Act ("MICRA") statute, becoming effective on December 12, 1975.
[13] The *Ruiz* holding was not unanimous. Justice Joyce Kennard wrote a dissenting opinion setting forth the reasons she would have affirmed the appellate court's ruling.
[14] The *Bush* decision also provides some useful guidance in joining arbitral claims with non-arbitral claims in a state court proceeding to defeat mandatory contractual arbitration.