

Enforcing Arbitration Agreements: California Supreme Court Expands Enforceability of Arbitration Agreements in Healthcare Context

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When a legal dispute arises, binding arbitration is an alternative to litigation. To submit to binding arbitration, the parties must agree to waive their right to a jury trial and instead have an arbitrator make a final and binding decision regarding their dispute.

Parties may enter into an arbitration agreement before or after the dispute has arisen. Although many people favor pre-dispute arbitration agreements as a way to secure efficient and expedient resolution of disputes, others argue that they deprive consumers of important due process rights. The enforceability of pre-dispute arbitration agreements has been the subject of many legal battles and the subject of recent proposed legislation that would limit pre-dispute arbitration agreements in various contexts.

Ruiz v. Podolsky: Patients Can Bind Heirs to Arbitration of Health Care Disputes

Recently, however, the California Supreme Court issued an important decision that expands the enforceability of pre-dispute arbitration agreements in health-care-related disputes. In *Ruiz v. Podolsky*, 2010 Cal. LEXIS 8292 (Aug. 23, 2010), the court held that when a person seeking medical care contracts with a health care provider to resolve all medical malpractice claims through arbitration, that agreement applies to the resolution of wrongful death claims even when the wrongful death heirs did not sign the agreement.

The dispute in *Podolsky* arose after the patient sought medical care from a physician. Prior to receiving medical care, the physician and the patient entered into an arbitration agreement. The agreement complied with California Code of Civil Procedure Section 1295, which requires certain language and formatting in arbitration agreements pertaining to medical malpractice claims. The arbitration agreement specified that the parties intended to require the patient's spouse and heirs to arbitrate any claims, including wrongful death and loss of consortium claims, that may arise out of or relate to treatment or service provided by the physician.

After the patient died, his spouse and adult children sued the physician for wrongful death. The children argued that they should not be required to arbitrate because they never signed the arbitration agreement and their constitutional right to a jury trial could not be waived without their consent. The court disagreed and concluded that the arbitration agreement did indeed bind the adult children to arbitration.

Implications for Arbitration Agreements in Assisted Living

The language of the Supreme Court's holding in *Podolsky* limits it to arbitration agreements entered into under Section 1295, which applies to health care providers. So what does this case have to do with assisted living?

First, to the extent assisted living communities also provide health care services, perhaps in a skilled unit, those communities should take note. Under *Podolsky*, arbitration agreements entered into pursuant to the requirements of Section 1295 and using language like that used in the *Podolsky* arbitration agreement should be enforceable in wrongful death actions. Moreover, aside from the reasoning specific to MICRA and Section 1295, much of the court's reasoning, based on practical considerations such as the delay in obtaining necessary services and the potential invasion of privacy that would result if heirs were required to sign arbitration agreements, could apply to arbitration agreements entered into with assisted living providers as well.

Unless the California Supreme Court expands its holding in *Podolsky* beyond the context of Section 1295, however, assisted living communities should expect that their arbitration agreements will be enforceable only with respect to the parties who have properly signed the agreements, either personally or through a lawful agent.

Good Practices When Offering Arbitration Agreements

When trying to enforce an arbitration agreement, showing that the claimant (or someone lawfully on his behalf) has signed the agreement is only half the battle. If the agreement's terms and the manner in which the agreement was made are unconscionable, an agreement may be unenforceable. To help fend off challenges based on claims of unconscionability, there are certain steps that assisted living communities can take. In fact, CALA has supported legislation (SB 661) that would have required certain good practices whenever a resident is asked to sign an arbitration agreement upon admission. These include:

1. Clearly identify the arbitration provision. Don't bury it within an admission agreement. Rather, put it on a separate document, clearly titled.
2. States in plain and conspicuous terms in the arbitration agreement that signing the agreement

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results in a waiver of important rights, including the right to a jury trial.

3. Do not make signing an arbitration agreement a condition of admission. The agreement to arbitrate should be optional and voluntary, and the arbitration agreement itself should make this clear.
4. Encourage residents to consider carefully the decision to enter into an arbitration agreement; consider allowing a rescission period (perhaps ten days) during which the resident can back out of the agreement.

It is also important to make sure the agreement to arbitrate is mutual (requiring both parties to arbitrate disputes) and does not unfairly limit the resident's discovery or potential recovery rights. Arbitration agreements that simply transfer the venue of the dispute from the courtroom to an arbitrator's conference room, leaving all causes of action and potential recovery rights intact, are more likely to be upheld than an agreement that limits the provider's liability.

If the arbitration fees are excessive (more than court costs or more than the claim itself is worth), a court is more likely to find the agreement unconscionable. The community should consider shouldering some or all arbitration fees.

These good practices are fairly general. If you have particular questions about the terms of an arbitration agreement or your community's practices, you should seek legal advice.

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CCL Tests New Inspection Protocol

Over the summer, CCL tested a revised inspection protocol that had LPAs focusing on key indicators of compliance. This "compliance assessment protocol" includes a complete walk through where LPAs cite any areas of noncompliance they observe. Most significantly, it has LPAs focus on key health and safety risk indicators intended to predict the facility's overall propensity for compliance. If a facility is found to be out of compliance with the key indicators, a comprehensive inspection would be initiated. According to CCLD, this approach is supported by research and is currently in use in other states. CCL is convening a meeting in mid-November to present the findings of the pilot test.

CALA strongly supports efforts to increase the presence of LPAs in licensed communities. Obviously any type of annual inspection that occurs every year is better than going five years without any inspection at all. CALA will keep members informed as we work toward improvements to this process.

Encouraging Informed Consumers

Assisted Living is a popular and fast growing profession, with many different levels of care, price ranges, and services offered, which is fantastic for consumers; they can better find the option that meets their needs. Helping consumers understand the different care options benefits everyone. Consumers don't feel like they are wading through information that doesn't apply to them and providers can better connect with the consumers that need their particular care and services.

In order to help consumers understand Assisted Living, CALA is setting up a new website for them, www.CAassistedlivingsearch.org. The website will host information on what types of services Assisted Living can (and cannot) offer, information on accepted, restricted and prohibited conditions, a checklist for consumers to print and use as they shop, and a searchable database of Assisted Living providers with a detailed page of each community, complete with pictures! This valuable consumer tool encourages consumers to be informed shoppers and hopefully helps them to better understand what options Assisted Living can offer them.

How can you be sure your community's listing is updated and ready when the website is complete? Go to this website, <https://secure.dss.cahwnet.gov/cclid/securenet/RcfeWebsite/Home/Index#> and answer the RCFE questionnaire. This questionnaire is being hosted by CCL and the information will be available to several partner organizations (including CALA) that want to host the information. Every community will have a listing with CCL's basic licensing information whether or not the additional questionnaire information is provided, so be sure that your listing is as complete and attractive as you can make it. Fill out the questionnaire today! For questions about the questionnaire or the CALA consumer website, call Cassandra Opela at (916) 448-1900.