

PUBLICATION

Executed Arbitration Agreement Unenforceable for Alabama Wrongful Death Claims

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A recent federal court opinion from Alabama may impact the enforceability of arbitration agreements in wrongful death actions. Long term care facilities are well-advised to reassess their potential exposure to punitive verdicts awarded by juries.

Alabama's treatment of wrongful death actions is unique. First, punitive damages are recoverable upon a showing of simple negligence, and no other damages are recoverable (although other damages may be recoverable for a separate tort claim if it was timely filed before the decedent's death). Second, the wrongful death cause of action "is vested in the personal representative" of the decedent's estate, and neither the estate itself, nor the decedent, ever has any enforceable interest in the wrongful death action. See *Holt v. Stollenwerk*, 56 So. 912, 912-13 (Ala. 1911).

There are some positive results of these unique attributes. For example, the level of pain and suffering is technically irrelevant to the calculation of wrongful death damages, and no Medicare liens attach to a wrongful death judgment, making settlement efforts less complicated. However, the fact that only the personal representative of the decedent's estate has a vested interest in a wrongful death action raises some concerns, particularly in light of a recent Alabama federal court opinion denying a motion to compel arbitration of a wrongful death lawsuit.

A recent federal court opinion from Alabama could have implications for long term care facilities in the state. In *Entrekin v. Internal Medicine Associates of Dothan, P.A.*, the court denied a nursing home's motion to compel arbitration of a wrongful death action and forced the nursing home to litigate this claim in the courts. The nursing home based its motion to compel arbitration on an arbitration provision in the facility's admissions agreement that was executed by the deceased upon her admission. The court first explained that the arbitration provision was generally enforceable under the Federal Arbitration Act but then proceeded to deny the motion to compel arbitration.

In denying the motion, the court explained that, under Alabama law, "wrongful death claims do not belong to a decedent," and therefore that the decedent had no authority to consent to arbitration for the wrongful death claim. Accordingly, the decedent's valid signature on the otherwise enforceable arbitration agreement did not bind the personal representative of the decedent's estate to arbitrate the wrongful death claim. In contrast, any non-wrongful death tort claims filed prior to the decedent's death and which survived the death would have been subject to mandatory arbitration based on the decedent's signature, because these tort claims belonged to the decedent prior to his death.

In *Entrekin*, the court also analyzed other possible scenarios regarding the enforceability of arbitration agreements in a long term care facility's admissions packet. The court explained that if the personal representative had executed the arbitration agreement during the admissions process, that individual would likely be bound to arbitrate subsequent wrongful death claims. This result apparently would not change even if the personal representative did not sign the agreement in his or her role as personal representative. The *Entrekin* court also explained that it remains unsettled under Alabama law whether an arbitration agreement is

enforceable against a personal representative in a wrongful death action if the agreement was executed on behalf of the decedent by a family member possessing power of attorney.

In light of *Entrekin*, **long term facilities (and other medical facilities) should always require more than just the resident's signature on arbitration agreements.** At a minimum, facilities should require a family member with a demonstrated power of attorney to execute the agreement in addition to the resident, although even this may turn out to be insufficient. Better yet, if possible, facilities should determine the identity of the anticipated personal representative of the resident's estate and should require that person to sign the arbitration agreement. Of course, even this is not foolproof because the identity of the personal representative is not settled until a person dies and the person's will is probated.

While there are many hurdles to enforcing arbitration provisions in wrongful death actions, Alabama long term care facilities are well-advised to draft the best possible arbitration agreements and put in place specific procedures regarding the execution of these agreements in order to most effectively protect themselves against potential runaway verdicts awarded by Alabama juries in wrongful death lawsuits.