Arbitration Law Review

Volume 5 *Yearbook on Arbitration and Mediation* Article 18

2013

Bifurcated Proceedings in Illinois: Survivor Actions to Arbitration but Wrongful Death Claims to Litigation

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BIFURCATED PROCEEDINGS IN ILLINOIS: SURVIVOR ACTIONS TO ARBITRATION BUT WRONGFUL DEATH CLAIMS TO LITIGATION

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I. INTRODUCTION

In *Carter v. SSC Odin Operating Co., LLC*,[1] a special administrator of a former nursing home resident's estate asserted claims under the Nursing Home Care Act ("NHCA")[2] and the Wrongful Death Act ("WDA").[3] The nursing home operator filed a motion to compel arbitration that was denied by the trial court because of the agreement lacked "mutuality of obligation" and the plaintiff was a nonsignatory to the arbitration agreement in her personal capacity.[4] Eventually, the Illinois Supreme Court held that general contract principles only require consideration for a valid arbitration agreement, not "mutuality of obligation."[5] The Court also held that a wrongful-death claim was not an "asset" of resident's estate that the resident could limit via an arbitration agreement, but the special representative was bound to arbitrate survivor claims based on the NHCA.[6]

II. BACKGROUND

In 2005 and 2006, Ms. Gott entered into two separate arbitration agreements with a nursing home belonging to the defendant, SSC Odin Operation Company, LLC ("Odin").[7] Her first residency was from May 20, 2005 until July 29, 2005.[8] While being admitted, the plaintiff Ms. Carter, acting as Gott's legal representative, executed a written "Health Care Arbitration Agreement" with Odin.[9] The second residency occurred from January 12, 2006 until Gott's death on January 31, 2006.[10] Six days after admission, Gott, not Carter acting as a representative, signed the "Health Care Arbitration Agreement" with Odin.[11] Both agreements contained identical terms and conditions.[12]

The parties agreed to submit "all disputes . . . arising out of or in any way related or connected to the Admission Agreement and all matters related thereto including matters involving the Resident's stay and care provided at the Facility" where the amount

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[1] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344 (Ill. 2012).

[2] Nursing Home Care Act, 210 ILL. COMP. STAT. 45/1-101 (2013).

[3] Wrongful Death Act, 740 ILL. COMP. STAT. 180/1 (2013).

[4] *Carter*, 976 N.E.2d at 348 (citing Carter v. SSC Odin Operating Co., LLC, 885 N.E.2d 1204 (Ill. App. Ct. 2008) *rev'd*, 927 N.E.2d 1207 (Ill. 2010).

[5] *Carter*, 976 N.E.2d at 351.

[6] *Id.* at 360.

[7] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 348 (Ill. 2012).

[8] *Id.*

[9] *Id.* at 348 (citing *Carter*, 237 Ill. 2d 30 at 33, 927 N.E.2d at 1210 (2010)).

[10] *Carter*, 976 N.E. at 348.

[11] *Id.* (citing *Carter*, 927 N.E.2d at 1211).

[12] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 348 (Ill. 2012).

in controversy is at least $200,000, to "binding arbitration."[13] The agreements bound "each other and their representatives, affiliates, governing bodies, agents and employees."[14] The arbitration sought to cover any dispute whether the cause of action was based on contract, tort, or state or federal statutory rights.[15] Odin also agreed to pay the arbitrator fees, up to $5,000 of attorney's fees, and gave the resident "the right to choose the location of the arbitration."[16]

After Gott's death, Carter, acting as the special administrator of Gott's estate, brought two counts against Odin.[17] The first count alleged that Odin violated the NHCA when Gott sustained gastrointestinal bleeding, anemia, and respiratory failure during her second residency.[18] Under the NHCA, this count was considered a survival action under Illinois law.[19] The second count sought recovery under the WDA for Gott's heirs.[20]

Odin filed a motion to compel arbitration, which the trial court denied after a briefing without conducting an evidentiary hearing.[21] The trial court found that the arbitration agreements violated state public policy, lacked mutuality of obligation, involved intrastate commerce, and were not governed by the Federal Arbitration Act ("FAA").[22] The appellate court affirmed the decision, reasoning that the antiwaiver provisions in the NHCA presented a valid state law contract defense.[23] The Illinois Supreme Court reversed and remanded the case, reasoning that the anti-waiver provisions were the "functional equivalent" of anti-arbitration legislation, which is "preempted by the FAA and Supreme Court precedent."[24]

The appellate court, on remand, once again affirmed the trial court's denial of the motion to compel arbitration, holding the agreements unenforceable due to a lack of mutuality of obligation and that the plaintiff could not be compelled to arbitrate since she did not sign in her individual capacity.[25] The Illinois Supreme Court then granted the defendant's petition for leave to appeal to consider (1) the enforceability of the arbitration agreement and (2) the arbitrability of the wrongful-death claim.[26] The standard of review would be *de novo* since the issues consider "statutory construction."[27]

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[13] *Id*.
[14] *Id*. at 348.
[15] *Id*. at 349.
[16] *Id*.
[17] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 348 (Ill. 2012).
[18] *Id*.
[19] *Id*. at 348.
[20] *Id*.
[21] *Id*. at 349.
[22] 9 U.S.C. § 2 (2012); *Carter*, 976 N.E.2d at 349 (citing Carter v. SSC Odin Operating Co., 885 N.E.2d 1204 (Ill. App. Ct. 2008)).
[23] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 349 (Ill. 2012) (citing *Carter*, 885 N.E.2d at 1204).
[24] *Carter*, 976 N.E.2d at 349 (citing Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding state courts have no basis other than standard defenses to contract validity to challenge arbitration provisions)).
[25] *Carter*, 976 N.E.2d at 349 (citing Carter v. SSC Odin Operating Co., LLC, 955 N.E.2d 1233, *reh'g denied* (Sept. 16, 2011), *appeal allowed*, 963 N.E.2d 244 (Ill. 2012) and *aff'd in part, rev'd in part*, 976 N.E.2d 344)).
[26] *Carter*, 976 N.E.2d at 349.
[27] *Id*. (citing Royal Indem. Co. v. Chicago Hosp. Risk Pooling Program, 865 N.E.2d 317, 321 (Ill. App. Ct. 2007).

III. COURT'S ANALYSIS

A. Mutuality of Obligation

The Court began its analysis by recognizing that Section 2 of the FAA allows state law contract defenses to invalidate an arbitration agreement only when the defenses are generally applicable to all contracts.[28] An arbitration agreement cannot be invalidated by a state statute that only targets arbitration agreements.[29] Since Illinois state law only requires consideration for a contract to be valid, the Illinois Supreme Court refused to require mutuality of obligation for arbitration agreements.[30] The Court defined consideration as "[a]ny act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract."[31] Courts cannot inquire into the "adequacy"[32] of the consideration nor require that the "values . . . exchanged be equivalent."[33]

The Court found that the "defendant's promise to pay the arbitrators' fees; defendant's promise to pay $5,000 of Gott's attorney fees and costs in any action against defendant; and Gott's right to choose the location of the arbitration" *each* constituted sufficient consideration.[34] The Court was not persuaded by Carter's argument that the promise to pay attorney's fees was insufficient consideration since Odin was already required to pay these fees under the NHCA.[35] The Court pointed out that Carter could only recover attorney's fees under the NHCA if she prevailed, while the arbitral agreement guaranteed $5,000 toward her attorney fees despite the outcome.[36]

B. Wrongful Death Action Not an Asset of Estate that Can Be Limited by Decedent

The Court then addressed whether Carter could be compelled to arbitrate the wrongful-death claim as a nonsignatory to the arbitration agreements.[37] Odin argued that a wrongful-death action is an asset of the decedent's estate that can be limited by the decedent during her lifetime.[38] Since the decedent agreed to have "any and all disputes"

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[28] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 350 (Ill. 2012) (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 682 (1996) ("[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements")).

[29] *Carter*, 976 N.E.2d at 350 (citing *Doctor's Associates, Inc.*, 517 U.S. at 687).

[30] *Carter*, 976 N.E.2d at 353.

[31] *Id.* at 351 (quoting Steinberg v. Chicago Medical School, 371 N.E.2d 634, 639 (Ill. 1977)).

[32] *Carter*, 976 N.E.2d at 351 (quoting Gallagher v. Lenart, 874 N.E.2d 43, 64 (Ill. 2007)).

[33] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 351 (Ill. 2012) (citing Keefe v. Allied Home Mortg. Corp., 912 N.E.2d 310, 315 (Ill. App. Ct. 2009); *see also* Harris v. Green Tree Fin. Corp., 183 F.3d 173, 180 (3d Cir.1999) (observing that "state courts have concluded that an arbitration clause need not be supported by equivalent obligations")).

[34] *Carter*, 976 N.E.2d at 353 (emphasis added).

[35] *Id*.

[36] *Id.*

[37] *Id.* (nonsignatory in her personal capacity); *see generally* E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty").

[38] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 353 (Ill. 2012) .

settled by arbitration, her beneficiaries are bound by that agreement.[39] In essence, Odin argued that a wrongful-death action is derivative of the decedent's cause of action had she lived.[40] The Court was not persuaded by this argument and held that a wrongful-death action is not derivative of the decedent's estate.[41]

The Court acknowledged that a wrongful-death cause of action arises from the Illinois WDA.[42] Section 2 requires that a wrongful-death suit to be filed for "the exclusive benefit of the surviving spouse and next of kin of such deceased person."[43] The Court contrasted a wrongful-death action to a survival action, which belongs to the decedent's estate.[44] The difference being that "[a] survival action allows for recovery of damages for injury sustained by the deceased up to the time of death," while a wrongful-death action "covers the time after death and addresses the injury suffered by the next of kin due to the loss of the deceased rather than the injuries personally suffered by the deceased prior to death."[45]

Odin specifically cited WDA Section 2.1, which states "[i]n the event that the only *asset* of the deceased estate is a cause of action arising under this Act . . .,"[46] to argue that the wrongful-death claim is an "asset" of the decedent's estate that can be limited by the decedent during her lifetime.[47] After evaluating the legislative intent and history behind the "estate" language, the Court rejected this argument.[48]

The Court examined how the legislature refused to treat a wrongful-death claim like other assets under the Probate Act.[49] Unlike other assets under the Probate Act, a wrongful-death claim cannot be subject to the creditor's claims nor "chargeable with the expenses of estate administration."[50] While other assets are distributable according to a will or intestacy law, a wrongful-death claim is not subject to the Probate Act and is distributed to "each surviving spouse and next of kin . . . in proportion, determined by the court."[51] The Court also noted that the legislature has not amended the WDA to change this distribution.[52]

The Court agreed with the reasoning found in *In Re Estate of Savio*;[53] specifically that, the purpose of the term "asset" is to "facilitate the filing and prosecution of a

[39] *Id.*
[40] *Id.*
[41] *Id.* at 354.
[42] *Id.*
[43] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 354 (Ill. 2012) (quoting 740 ILL. COMP. STAT.180/2 (2006)).
[44] *Carter*, 976 N.E.2d at 354 (quoting 755 ILL. COMP. STAT. 5/27–6 (2006)); *see also* Vincent v. Alden–Park Strathmoor, Inc., 948 N.E.2d 610 (Ill. 2011).
[45] *Carter*, 976 N.E.2d at 353 (quoting Wyness v. Armstrong World Indus., Inc., 546 N.E.2d 568 (Ill. 1989)).
[46] 740 ILL. COMP. STAT. 180/2.1 (2006) (emphasis added).
[47] *Carter*, 976 N.E.2d at 353.
[48] *Id.* at 353-54.
[49] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 355 (Ill. 2012) (citing 755 ILL. COMP. STAT. 5/18–14 (2006)).
[50] *Id.*
[51] *Id.*
[52] *Id.* at 356.
[53] *In re* Estate of Savio, 902 N.E.2d 1113, 1119 (Ill. App. Ct. 2009).

wrongful-death claim," but not to "allow the deceased to control the forum and manner in which a wrongful-death claim . . . is determined."[54]

The Court further supported its conclusion by analyzing the legislative history.[55] The Court cited Representative Beatty to conclude that the legislature intended the term "asset" to "'make it more convenient' to bring a wrongful-death action, and 'cut the red tape' by permitting a court to appoint a special administrator who could prosecute the action without opening an estate."[56]

C. Survivor Actions Go to Arbitration; Wrongful Death Claims to Court

Although a claim under the WDA is considered "derivative"[57] because the personal representative can only bring a claim if the decedent had a right of action at the time of their death,[58] the Illinois Supreme Court refused to let the action be limited by an arbitration agreement.[59]

Generally, a beneficiary's right to sue depends on what causes of action the decedent had at the time of their death.[60] Odin argued that "just as a decedent's settlement of a personal injury action constitutes a complete bar to a wrongful-death action based on the same occurrence . . . Gott's agreement to arbitrate . . . limits the wrongful-death action in the same manner."[61] The Court was not persuaded by this argument and found that "the derivative nature of a wrongful-death action does not mean that she is subject to any and all contractual limitations—such as an agreement to arbitrate—that are applicable to the decedent."[62] The Court concluded that the plaintiff was "a nonparty to the arbitration agreements" and could not be made to arbitrate the wrongful death action.[63]

Generally, contract law only compels parties to arbitrate if they were signatories to the arbitration agreement.[64] Since the plaintiff only signed the first arbitration agreement as Gott's legal representative, she is only required to arbitrate claims where

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[54] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 357 (Ill. 2012).

[55] *Id.*

[56] *Id.* (citing 80th Ill. Gen. Assem., House Proceedings, May 3, 1977, at 142 (statement of Rep. Beatty)).

[57] *Carter*, 976 N.E.2d at 357 (citing Varelis v. Northwestern Mem'l Hosp., 657 N.E.2d 997 (Ill. 1995)).

[58] *Carter*, 976 N.E.2d at 357 (quoting Biddy v. Blue Bird Air Serv., 30 N.E.2d 14, 18 (Ill. 1940) ("the deceased had no right of action at the time of his or her death, then the deceased's personal representative has no right of action under the Wrongful Death Act")).

[59] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 359 (Ill. 2012).

[60] *Id.* (citing Mooney v. Chicago, 88 N.E. 194, 196 (Ill. 1909) (beneficiary could not file a wrongful death claim since decedent released his employer from all liability after a settlement for his personal injury action)).

[61] *Carter*, 976 N.E.2d at 358.

[62] *Id.* at 359; *see also* Bybee v. Abdulla, 189 P.3d 40, 46 (Utah 2008) (although decedent is "master of his own claim," he does not have power to bind beneficiaries to arbitration).

[63] *Carter*, 976 N.E.2d at 359; *see also* Finney v. Nat'l Healthcare Corp., 193 S.W.3d 393, 395 (Mo. Ct. App. 2006) (holding that a wrongful-death action does not belong to the decedent or decedent's estate and thus beneficiary does not "stand in shoes of decedent").

[64] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 359 (Ill. 2012); *see* Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 331 (7th Cir.1995); Vukusich v. Comprehensive Accounting Corp., 150 Ill.App.3d 634, 640 (1986)).

she acts in Gott's place.[65] The Court concluded that the plaintiff must arbitrate the survivor action filed under the NHCA since she is acting in decedent's stead.[66] However, the wrongful-death cause of action belongs to the next of kin and not the decedent's estate, thus the plaintiff was not required to arbitrate that claim.[67]

The Court distinguished the present case from a recent United States Supreme Court decision, *Marmet Health Center, Inc. v. Brown.*[68] In *Marmet*, a family member of the decedent signed an arbitration agreement and later brought suits for negligence.[69] The West Virginia Supreme Court refused to enforce the arbitration agreement due to the public policy against pre-dispute personal injury or wrongful-death arbitration agreements.[70] The United States Supreme Court reversed, finding that the "FAA's text includes no exception for personal injury or wrongful-death claims . . . and the prohibition . . . is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA."[71] The Illinois Supreme Court distinguished its holding from *Marmet* since its decision was not dependent on "a categorical anti-arbitration rule," but basic "common law principles governing all contracts."[72]

IV. SIGNIFICANCE

A. Mutuality of Obligation Not Required, Only Consideration Needed

The Illinois Supreme Court did not require mutuality of obligation for arbitration agreements, only that each party gives the other proper consideration.[73] It will not, however, evaluate the adequacy of consideration.[74] The Court defined consideration as "any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract."[75] The Court also concluded that contractual promises to pay for the arbitrator's fees, partial payment for attorney's fees, and the right to choose the location of arbitration were *each* individually sufficient

[65] *Carter*, 976 N.E.2d at 360.
[66] *Id.*
[67] *Id.*
[68] *Id.* (citing Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012)).
[69] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 360 (Ill. 2012) (citing *Marmet Health Care Ctr., Inc.*, 132 S.Ct. at 1204).
[70] Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011) *cert. granted, judgment vacated sub nom.*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012).
[71] *Carter*, 976 N.E.2d at 360 (citing *Marmet Health Care Ctr., Inc*., 132 S. Ct. at 1204).
[72] *Id.* (citing *Marmet Health Care Ctr., Inc*., 132 S. Ct. at 1204).
[73] *Id.* (citing Armstrong Paint & Varnish Works v. Cont'l Can Co., 133 N.E. 711, 714 (Ill. 1921) ("any other consideration for the contract mutuality of obligation is not essential")).
[74] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 353 (Ill. 2012); *see also* Gallagher v. Lenart, 874 N.E.2d 43, 64 (Ill. 2007); Ryan v. Hamilton, 68 N.E. 781, 782 (Ill. 1903) ("adequacy of the consideration is within the exclusive dominion of the parties where they contract freely and without fraud").
[75] *Carter*, 976 N.E.2d at 353; *see also* Steinberg v. Chicago Med. Sch., 371 N.E.2d 634, 639 (Ill. 1977) ([a]ny act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract").

consideration.[76] The court implied that the right to choose location alone would be sufficient consideration for the weaker party's agreement to arbitrate.[77]

By only requiring consideration by both parties as opposed to mutuality of obligation, the Illinois Supreme Court increased the likelihood that arbitration provisions would be enforced by courts. This ruling also continues the trend of enforcing adhesive arbitration agreements.[78] Consideration sets a lower bar that is more easily met than mutuality of obligation. Courts, being quite familiar with general principles of contract law, will quickly and proficiently be able to apply those standards to arbitration provisions.

When drafting arbitration agreements, practitioners should include provisions that clearly benefit the other party to their own detriment. Case law indicates that courts seem to favor agreements wherein the stronger party agrees to bear the cost of arbitration, especially where the weaker party enters the agreement under adhesive circumstances.[79] Although the Illinois Supreme Court stated that the right to choose the arbitration location alone was sufficient consideration, practitioners should be aware that some courts would likely rule such provisions unconscionable.[80]

B. Third-Party Beneficiaries Cannot Be Compelled to Arbitrate Wrongful Death Claims Since Claims are Not Derivative of Estate

In Illinois, healthcare facilities are unable to compel third-party beneficiaries to arbitrate wrongful-death claims even if the decedent agreed to bind their "representatives."[81] The Illinois Supreme Court's holding makes it much more difficult for healthcare facilities to arbitrate wrongful-death claims. To ensure arbitrability, a healthcare provider would need to seek out the signature of the future personal representative of the decedent or the decedent's potential heirs. As one court points out, this requirement is unrealistic and impractical since potential heirs "are not even identified until the time of death," may not "be available at time required," or "refuse to

[76] *Carter*, 976 N.E.2d at 353.

[77] *Id.* (defendant's promise to pay the arbitrators' fees, attorney's fees, and Gott's right to choose the location of the arbitration, *each* constitute a benefit to Gott and a detriment to defendant).

[78] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1742 (2011) (striking down California judicial precedent, permits adhesive arbitration agreements featuring class action waivers in consumer settings).

[79] *See* Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 91-92 (2000) (holding that the party seeking invalidation of an arbitration agreement because it would be "prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs" has caused variety of responses among lower courts); *see also* Scovill v. WSYX/ABC, 425 F.3d 1012 (6th Cir. 2005) (refused to enforce the "loser pays" cost-shifting provision); *but see* Parilla v. IAP Worldwide Servs., VI, Inc., 368 F.3d 269 (3d Cir. 2004) (a provision that allowed employer to be reimbursed for arbitrator's fees and expenses by employee not deemed unconscionable).

[80] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 353 (Ill. 2012).

[81] *Id.*

sign."[82] Furthermore, state and federal patient privacy statutes prevent health facilities from requiring the disclosure of sensitive medical information.[83]

Whether a third-party beneficiary can be compelled to arbitrate is highly dependent on whether that particular state classifies a wrongful-death action as a derivative right or an independent third-party right. The majority of states have ruled that third-party beneficiaries can be compelled to arbitrate. These states include: Alabama,[84] California,[85] Indiana,[86] Mississippi,[87] and Texas.[88] A minority of states including Kentucky,[89] Missouri,[90] Ohio,[91] and Washington[92] refuse to compel arbitration for non-signatory beneficiaries. A handful of states refused to compel arbitration on the basis of agency law.[93] The Florida Supreme Court recently granted certiorari in *Laizure v. Avante at Leesburg, Inc.* to decide this issue.[94]

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[82] Herbert v. Superior Court, 169 Cal. App. 3d 718 (Cal. Ct. App. 1985).

[83] *See generally* Health Ins. Portability and Accountability Act, Pub. L No. 104–191, 110 Stat. 1936 (codified as amended in scattered sections of 42 U.S.C. § 29 (2006)); CAL. FAM. CODE § 6922 (West 2012) (parental consent not required for minors seeking specific medical treatment).

[84] *See* Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661, 665 (Ala. 2004) (executor and administratrix of estates of nursing home residents bound by arbitration provisions since they "stand in the shoes of the decedent," therefore have the same powers and restrictions as decedent); see *also* Entrekin v. Internal Med. Assocs. of Dothan, P.A., 689 F.3d 1248, 1250 (11th Cir. 2012) ("Under Alabama law, executor . . . required to arbitrate her wrongful death claim . . . even though executor did not personally sign agreement since resident was bound by agreement during her life").

[85] *See* Ruiz v. Podolsky, 237 P.3d 584, 594-95 (Cal. 2010) (compelled arbitration for all wrongful death claimants since broad arbitration agreement included "any spouses or heirs . . . and any children" and health care facilities' "reasonable contractual expectations" would be defeated otherwise).

[86] *See* Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 422 (Ind. Ct. App. 2004) (third-party beneficiaries compelled to arbitrate because state statute "only allows a personal representative to maintain a cause of action 'if the decedent, if alive, might have maintained'").

[87] *See* Trinity Mission Health & Rehab. of Clinton v. Estate of Scott, 19 So. 3d 735, 740 (Miss. Ct. App. 2008) (compelled arbitration, finding that wrongful-death action is derivative, thus beneficiary must stand in the position of decedent. Since decedent's claims "would have been subject to arbitration," so must beneficiaries').

[88] *See In re* Labatt Food Serv., L.P., 279 S.W.3d 640, 644 (Tex. 2009) (compelled arbitration since under state statute, "wrongful death beneficiaries may pursue a cause of action…only if the individual injured would have been entitled to bring an action for the injury if the individual had lived").

[89] *See* Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599 (Ky. 2012) (refused to compel arbitration because beneficiaries' claim is not "derived through or on behalf of the Resident").

[90] *See* Lawrence v. Beverly Manor, 273 S.W.3d 525, 527 (Mo. 2009) (refused to compel arbitration because "[w]rongful death statute creates a new cause of action . . . does not revive a cause of action belonging to the deceased; the right of action thus created is neither a transmitted right nor a survival right").

[91] *See* Peters v. Columbus Steel Castings Co., 2006-Ohio-382 aff'd, 2007-Ohio-4787, 115 Ohio St. 3d 134, 138, 873 N.E.2d 1258, 1262 (refused to compel arbitration since "survival claims and wrongful-death claims are distinct claims that belong to separate individuals").

[92] *See* Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1256 (Wash. Ct. App. 2010) (refused to compel arbitration since wrongful death statutes "create new causes of action for the benefit of specific surviving relatives," thus not derivative).

[93] *See* Munn v. Haymount Rehab. & Nursing Ctr., Inc., 704 S.E.2d 290, 295 (N.C. Ct. App. 2010) (refused to compel arbitration on grounds that beneficiary lacked agency to enter the decedent into arbitration agreement).

[94] *See* Laizure v. Avante at Leesburg, Inc., 51 So. 3d 465 (Fla. 2010) ; *see also* Laizure v. Avante at Leesburg, Inc., 44 So. 3d 1254 (Fla. Dist. Ct. App. 2010) (holding that wrongful death claim was arbitrable

V. CRITIQUE

A. Bifurcation of Claims Creates an Ineffective Procedure Causing Higher Costs and Disparate Outcomes

This ruling places a heavy burden on the court system and on the parties involved by requiring two separate adjudicative proceedings based on practically identical facts. In Illinois, survival claims, such as claims under the NHCA, are subject to arbitration. Wrongful-death claims, however, are not. With this separation, the Illinois Supreme Court invites disparate outcomes, multiple "bites at the same apple," and raises costs for all parties involved. This undermines the efficacy of arbitration.

Both the survival claim and the wrongful-death claim concern the same tortious events. In spite of this reality, the *Carter* decision forces healthcare facilities and beneficiaries into two separate proceedings[95] based on similar, if not identical, facts with the possibility of drastically different outcomes. This outcome is despised by the legal system and should be avoided.[96] This bifurcated procedure is quite costly, with the healthcare provider bearing the brunt of the costs. Using the instant case as a model, if Carter sought recovery for both claims, Odin would be responsible for any arbitration fees, up to $5,000 in attorney's fees for Carter related to the arbitration, their own attorney fees for arbitration, and their own attorney fees and court costs for litigation. Furthermore, if Carter prevails in litigation, Odin would also be responsible for Carter's attorney fees under the NHCA.[97] This assessment does not include the cost of expert witnesses or economic waste of witnesses wasting valuable time and money testifying on the same essential facts in two different proceedings. It is clear that the beneficiaries now have considerable bargaining power with the threat of costly court proceedings to force healthcare facilities into settlements.

Even with the split proceeding option, beneficiaries may agree to post-dispute arbitration since the healthcare facilities usually agree to bear the cost of arbitration. Healthcare facilities should offer incentives to persuade the beneficiary to agree to post-dispute arbitration such as paying the arbitration fees or covering some attorney costs.[98] This will cause the arbitration proceeding to be more costly for the healthcare facilities than if all disputes went to arbitration due to a pre-dispute agreement.

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because within scope of arbitration provision and "replaced the personal injury claim" that patient could of brought).

[95] Unless both parties agree to a post-dispute arbitration agreement, which is a rarity. *See generally* David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 7 (2003) (Employment law context: post-dispute voluntary arbitration is . . . according to the evidence carefully examined herein . . . extremely rare).

[96] *See* FED. R. CIV. P. 23 (which allows for class action certification to avoid inconsistent or varying adjudications).

[97] Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 353 (Ill. 2012) (citing 210 ILL. COMP. STAT. 45/3-602 (2013) (licensee shall pay the actual damages and costs and attorney's fees to a facility resident whose rights, as specified in Part 1 of Article II of this Act, are violated)).

[98] *Carter*, 976 N.E.2d at 349 (enticed beneficiary to arbitrate by offering to pay arbitrator's fees, cover partial attorney costs, and allow beneficiary the right to choose arbitration location).

Since reviewing courts must be highly deferential toward arbitral awards,[99] bifurcated proceedings create a very real possibility of a court speaking out of both sides of its mouth. Suppose the court denies recovery for the wrongful-death claim yet the arbitrator finds for the beneficiary in the survivor claim. The court will likely have to affirm the arbitral award, even though it stands in direct opposition to its own finding.

This ruling also undermines the express intent of the parties involved and the "bargained-for" exchange. The arbitration agreement expressly sought to bind the patient and her "successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives, including the personal representative or executor of her estate."[100] By ignoring the express intent of the parties, the Court undermines one of the core tenants of arbitration, that it is a voluntarily agreement entered into by both parties seeking an efficient adjudication of their dispute.[101]

The most efficient and economical procedure would have required both the wrongful-death and survivor claims to be decided by one adjudicator, the arbitrator. Yet the Illinois Supreme Court has chosen bifurcated proceedings for tortious claims resting on essentially the same facts. While expanding the policy favoring arbitration by only requiring consideration for contract validity, the Court simultaneously narrowed the scope of arbitration by bifurcating wrongful-death claims from arbitration.

[99] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1742 (2011).
[100] *Carter*, 976 N.E.2d at 353.
[101] *Id.*