ARE ARBITRATION OBLIGATIONS HEREDITABLE?: A 50-STATE SURVEY OF THE NATURE OF WRONGFUL DEATH CLAIMS

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INTRODUCTION

It is a basic principle of contract law that contracts are not enforceable against those who are not parties to the agreement.[1]

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[1] *See, e.g.*, Michael R. Gray & Jason M. Murray, *Covenants Not to Compete and Nonsignatories: Enjoining Unfair Conspiracies*, 25 FRANCHISE L.J. 107, 107 (2006);

However, despite this basic legal rule, many states still enforce contracts against non-parties when someone who contracts with a nursing home to stay there, later passes away in their care. Many of these contracts include an arbitration clause. If this patient dies due to negligence of the nursing home, generally two types of claims that arise: survival claims and wrongful death claims. Generally, a survival statute allows for a decedent's ongoing litigation to continue.[2] More commonly, survival statutes allow for the estate to sue for an injury to the decedent that died before being able to bring litigation.[3]

Most importantly, survival statutes do not create new claims, they simply allow existing or potential claims to be brought despite the plaintiff's death. Rephrased another way, the statutes are just mechanisms allowing lawsuits to exist even though the potential plaintiff died. Thus, since the cause of action originally belonged to the decedent, it preserves the rights and liabilities that belonged to the decedent at the time of death. This includes the agreements to arbitrate claims, as the claims belonged to the decedent, and recovery for these claims goes to the decedent's estate. However, it is the other type of claim, wrongful death, where many states seem to enforce arbitration clauses in cases where they should be unenforceable.

Wrongful death claims, as opposed to survival statutes, do not continue the decedent's right to sue, but instead create a whole new right to sue for a third party.[4] Thus, the claims never belong to the decedent like they do in survival claims. Instead, wrongful death claims entitle the decedent's heirs to sue the nursing home for the injury caused to them by the decedent's death.[5] Generally this includes damages for grief, sorrow, loss of financial support, loss of consortium, and other similar types of injury.[6] Therefore, for all intents and purposes, the cause of action is completely separate from the decedent, as the focus is not on the injury done to the

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Carapellotti v. Breisch & Crowley, 119 N.E.3d 961, 966 (Ohio App. 7th Dist. 2018); *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

[2] *See* Frank Andreano, *Understanding Wrongful Death and Survival Actions*, 103 ILL. BAR J. 30, 31 (2015).

[3] *See id.*

[4] *See id.*

[5] *Id.*

[6] *See id.*

decedent, but the injury caused by the decedent's death to the heir. The claim is not brought for the injury done to the decedent, but instead for the damage the decedent's death caused the heir. The benefits of these cause of actions usually belong solely to the heirs, with many states having specific clauses that explicitly state the damages are to never enter the estate or pay for the decedent's debts.[7]

The key difference between the two is that survival statutes continue already existing claims, whereas wrongful death statutes create new claims that belong to a third party, the heir, to the contract with the arbitration clause. In cases where a decedent signs a contract agreeing to arbitrate all claims against a nursing home arising from any alleged injury, states are split on whether that contract should be enforced against the heir who possesses the wrongful death claim. In other words, an issue arises on whether to enforce the claim against a non-signing third party to the contract, because doing so creates a potential constitutional violation, specifically the Seventh Amendment right to a jury trial.

In total, twenty states enforce arbitration clauses in the wrongful death context, nineteen of which do so incorrectly.[8] The one state whose wrongful death statute makes it correct to enforce arbitration is Iowa, whose statute, unlike every other state's, gives the recovery for wrongful death to the estate.[9] Further, another fourteen states do not enforce arbitration clauses in the wrongful death context.[10] Additionally, there is Pennsylvania which enforces the agreements when the estate brings the claim and does not when the heirs do.[11] The remaining states are undecided on the issue. Iowa, the fourteen states favoring nonenforcement, and Pennsylvania each represent solutions to the nineteen states who enforce arbitration clauses in wrongful death cases, and would allow them to remedy any potential constitutional violations.

Overall, this article will focus less on the individual policy merits of enforcing the arbitration clauses in this context and more

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[7] *See infra* Section III.

[8] *See infra* Table 1.

[9] *See, e.g.*, Roth v. Evangelical Lutheran Good Samaritan Soc'y, 886 N.W.2d 601 (Iowa 2016).

[10] *See infra* Table 1.

[11] *See infra* discussion Section II.

so discuss the arguments surrounding this issue. There is a solid policy argument for enforcing the agreements in the wrongful death context, but also to arbitrate claims in general, as can be seen by the passage of the Federal Arbitration Act ("FAA"), which is a congressional mandate making arbitration the preferred method for resolving claims.[12] This is because enforcing the agreements lowers the cost of litigation and keeps the price of liability insurance for nursing homes, and thus the cost of nursing care for the consumer, down. However, instead of focusing on policy, this article argues that due to the procedural nature of wrongful death lawsuits, courts are creating Seventh Amendment violations in enforcing these agreements.[13] This article will illustrate why they enforce these arbitration clauses under the current construction of many wrongful death statutes violates many plaintiffs' Seventh Amendment rights. This article argues that if states want to enforce these agreements and avoid Seventh Amendment issues, they must amend their statutes to match those in Iowa, otherwise they need to split the claims like Pennsylvania or not enforce the arbitration clauses in wrongful death.

First, this article will outline the Seventh Amendment Right to a jury trial and provide an ancillary discussion around the FAA and other Supreme Court precedents that must be addressed before examining the issue. In Section II, this article will lay out a 50-state survey on the issue, dividing the states into four categories: the states correctly enforcing arbitration agreements in the wrongful death context; the states not enforcing arbitration in this context; the states incorrectly enforcing arbitration in this context; and the states undecided on the issue. Further, after Section II, Table 1 then lists each state in alphabetical order, how their state ruled on the issue if they have, and notes relevant precedents. This table is for those wishing to quickly find the information for practice purposes. Section III will examine the wrongful death statutes of each state, highlighting three characteristics to compare statutes

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[12] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); *see also* 9 U.S.C. § 4.

[13] U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

in states enforcing arbitration clauses with those that do not. This section will then utilize this information to look at the statutes of the undecided states and make a determination on how some of those states would rule on this issue if it were to come before their court. Lastly, this article will conclude with an example of how states incorrectly enforcing these clauses may fix the constitutional issue they have created.

I. THE SEVENTH AMENDMENT AND SUPREME COURT PRECEDENTS

The Seventh Amendment right to a jury trial is one of the few rights found in the bill of rights yet to be incorporated against the states,[14] but every state except Louisiana and Colorado has some form of a right to a civil jury trial enshrined in their constitution.[15] However, Colorado's rules of civil procedure requires a jury trial only in "proceedings that are legal in nature, not equitable."[16] Further, based on Colorado law,[17] and the fact the state's wrongful death statute talks about the jury,[18] it is clear the claims are legal in nature. Louisiana's lack of a right to a civil jury trial is not at issue here because Louisiana is among the states that do not enforce arbitration clauses in wrongful death suits.[19]

Returning to the issue, it has long been understood that one may contract away their constitutional rights.[20] If not, arbitration clauses would not exist at all. However, one cannot contract away the rights of another just as one cannot bind another to a contract without their consent.[21] States that have a wrongful death claim

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[14] *See* Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 838 (2014).

[15] *Id.* at 812.

[16] COLO. R. CIV. P. 38; s*ee also* M.G. Dyess, Inc. v. MarkWest Liberty Midstream & Res., L.L.C., 522 P.3d 204, 208 (Colo. App. 2022) (quoting Mason v. Farm Credit of S. Colo., ACA, 419 P.3d 975, 979 (Colo. 2018)).

[17] *M.G. Dyess, Inc.*, 522 P.3d at 208 ("Actions seeking an award of monetary damages are generally legal, while actions seeking to employ the coercive powers of the court are generally equitable.").

[18] COLO. REV. STAT. ANN. § 13-21-203(1)(a) (West 2014) ("and in every such action the jury may give such damages as they may deem fair and just . . .").

[19] *See infra* Table 1; *see also* Ciaccio v. Cazayoux, 519 So.2d 799 (La. Ct. App. 1987).

[20] *See* Barney v. Schmeider, 76 U.S. 248 (1869).

[21] 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001) ("Third persons who are not parties to an arbitration agreement generally are not bound by the

that belongs to the heirs but still enforce these arbitration clauses are doing just that. They allow the decedent to contract away a right that does not belong to them, and, in doing so, the states are violating a wrongful death beneficiary's right to a jury trial. If states wish to avoid Seventh Amendment issues, they need to either hold these clauses unenforceable or rework their wrongful death statutes to give the claim to the estate and not the heirs, such as Iowa has done.[22]

However, there are some complications to the argument created by Supreme Court precedent, primarily because of the FAA. First is *Marmet Health Care Center., Inc. v. Brown*.[23] In this case the Supreme Court held "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[24] Basically, since the FAA preempts any state ban on arbitration, and "[t]he statute's text includes no exception for personal-injury or wrongful-death claims[,]" thus states cannot statutorily ban it.[25] However, the Supreme Court held that on remand the Supreme Court of West Virginia was to consider the arbitration clause "under state common-law principles that are not specific to arbitration and pre-empted by the FAA."[26] Thus the question becomes what state common-law principles are not pre-empted by the FAA.

In *Kindred Nursing Centers. Ltd. v. Clark*,[27] the court held that states cannot undercut arbitration clauses solely because such

agreement or any resulting award."). However, this principle is not absolute and there are possible exceptions to this rule, but since these exceptions should be viewed on a case-by-case basis they are outside the purview of this article. For discussion surrounding possible exceptions to this rule, *see* John R. Schleppenbach, *Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents*, 22 ELDER L.J. 141, 154 (2014) ("Non-signatories may be bound to arbitrate if: they have assumed the contract from a signatory; if they are principals of a signatory corporation and the corporate veil can be pierced; if they are alter egos of a signatory; if they are parties to an agreement that incorporates the arbitration agreement by reference; if they are third-party beneficiaries of the arbitration agreement; or based on theories of agency, waiver, or estoppel.").

[22] *See infra* Section II, Subsection A.

[23] 565 U.S. 530 (2012).

[24] *Id.* at 533 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011)).

[25] *Id.* at 532.

[26] *Id.* at 534.

[27] 197 L. Ed. 2d 806 (2017).

agreements are in effect waivers of a right to a jury trial.[28] In a sense, this opinion re-emphasizes the power of the FAA, and that "states rejecting arbitration agreements for failing to provide the right to a jury trial undercuts the entire purpose the FAA . . . ."[29] Thus, states cannot simply statutorily say that arbitration clauses are insufficient because they are waiving a constitutional right to a jury trial. The FAA prevents such an argument.

However, there appears to be one avenue for displacing these arbitration clauses: contractual principles. Contract principles are "state common-law principles that are not specific to arbitration" and thus not preempted by the FAA.[30] The contract principle argued in this paper is one already acknowledged by the Supreme Court in *First Options of Chicago, Inc. v. Kaplan*.[31] The court held that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification . . .) should apply ordinary state-law principles that govern the formation of contracts."[32] In *Kaplan*, the court ruled that under the formation of contract principles at play, First Options could not show the Kaplans clearly agreed to arbitrate the issue at hand.[33] Thus, the "dispute was subject to independent review by the courts."[34]

Analogously here, courts should reject these arbitration clauses on simple contract principles.[35] One cannot be required to relinquish something simply because of a contract he or she did not sign. The Supreme Court has consistently said state law principles governing contract formation may apply, and this is the avenue the inconsistent logic of enforcing arbitration clauses in wrongful death should be attacked. Unless the individual cases demonstrate some

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[28] Courtney Dyer, *Aging Out Arbitration for Wrongful Death Suits in Nursing Homes*, 20 PEPP. DISP. RESOL L.J. 42, 49 (2020).

[29] *Id.*

[30] Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 534 (2012).

[31] 514 U.S. 938 (1995).

[32] *Id.* at 944.

[33] *Id.* at 946.

[34] *Id.* at 947.

[35] *See* Dyer, *supra* note 28, at 50 (discussing a state-level Alabama case illustrating the FAA cannot prevent courts from invalidating arbitration clauses on basic contract principles.).

other exception to the requirement that a person signs the contract, the contract should not be enforced.

As will be illustrated later, enforcement of these clauses is logically inconsistent, and while it is clear a Seventh Amendment right to a jury trial cannot be used to argue they should not be enforced, the fact remains that enforcing them violates those rights. Simply put, the courts should use the contract formation principles to stop enforcing these agreements in the name of protecting that right. Any avenue possible should be used to protect those rights, and the only way to achieve a broad rule preventing enforcement is to argue these clauses violate common law principles of contract formation. This invalidates arbitration clauses on a ground that is not focused just on arbitration, as it would invalidate releases or any other limitations put on wrongful death claims by contracts signed by the decedent. This is the way courts can clean up the issue logically while also dodging the boogeyman that is the FAA.

II. 50-STATE SURVEY ON ENFORCING WRONGFUL DEATH

There are multiple nuances among states regarding their enforceability of arbitration clauses in a wrongful death lawsuit. There are multiple ways the states can be divided. This section of the article will do so in two ways, first, it will divide the states into logically consistent, as in state's whose treatment of damages in wrongful death lawsuits matches their treatment of arbitration clauses, and those whose policy on enforcing arbitration clauses in wrongful death runs inconsistently with their statute. Second, for ease of use in practice, this article will provide the 50-state survey in a table.

A. Logically Consistent States: Enforcement

Key among the states favoring enforcement is Iowa,[36] which is one of two logically consistent states that at least occasionally enforce these agreements. The majority of the logically consistent states do not enforce arbitration clauses. A case from the Supreme Court of Iowa highlights a key difference in how many courts view these claims. The state tackles the issue of enforceability in *Roth v.*

[36] Roth v. Evangelical Lutheran Good Samaritan Soc., 886 N.W.2d 601 (Iowa 2016).

Evangelical Lutheran Good Samaritan Society,[37] a case where a federal district court certified two questions to the Supreme Court of Iowa.[38]

The relevant question to this paper is the first, "Does Iowa Code section 613.15 require that adult children's loss-of-parental-consortium claims be arbitrated when the deceased parent's estate's claims are otherwise subject to arbitration?"[39] In November 2013, 79-year-old Cletus Roth entered a nursing facility.[40] Cletus's son, as power of attorney, signed an admission agreement for Cletus which included an arbitration clause.[41] Cletus died in August 2015, and his children sued the nursing home on five counts, including wrongful death.[42]

The Supreme Court of Iowa tackled the issue by first outlining their wrongful death statutes. The statute differentiates between two types of damages and this distinction is key in the outcome of the case.[43] There are the normal wrongful death damages, which unlike every other state except for New Hampshire,[44] Iowa explicitly states belongs to the estate.[45] However, New Hampshire has not ruled on this issue, thus Iowa is the only state that has ruled on the arbitration issue that gives damages to the estates. Iowa also prescribes other damages "for loss of services and support of a deceased spouse, parent, or child,"[46] which belong exclusively to the surviving heirs.[47] The statute essentially describes the loss of consortium claims as a type of damages separate from the rest of wrongful death.[48]

The claim brought under Section 613.15, is a loss of consortium claim.[49] The court highlights that this claim, while usually brought

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[37] *Roth*, 886 N.W.2d at 601.

[38] *Id.* at 603.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 604 (signing the arbitration clause was not a condition of entry or continued stay in the facility.).

[42] *Id.*

[43] IOWA CODE ANN. § 633.336 (West 2023).

[44] *See infra* Section III.

[45] *Roth*, 886 N.W.2d at 608.

[46] IOWA CODE ANN. § 633.336 (West 2023).

[47] *Roth*, 886 N.W.2d at 608.

[48] *Id.* at 614-15.

[49] *Id.* at 606.

by the estate, belongs to the heirs.[50] This is key because in *Roth*, the court held that, while they generally do require normal wrongful death cases,[51] the loss-of-consortium-type wrongful death claims are not required to be arbitrated.[52]

The court highlights the key difference is whom the claims belong to and notes that, regarding normal wrongful death damages, "[t]he right to recover wrongful-death damages in Iowa is vested exclusively in the estate representative, and the recovery belongs to the estate."[53] However, for consortium damages and claims, the court likened the claim to that of other states: "where the wrongful-death claim belongs to the survivors but is brought by the personal representative, courts regularly hold that the decedent's arbitration agreement does not lead to arbitration of the wrongful-death case."[54]

So, in a sense the Supreme Court of Iowa emphasis on whom the claim belongs to, noting that when the claim belongs to the estate and the damages from the claim belong to the estate, the lawsuits are subject to arbitration signed by the decedent.[55] However, when neither the damages nor the claim belong to the estate, the claims are no longer subject to an arbitration agreement signed by the decedent.[56]

This is the logically consistent position, and one of the only states with such a position that enforces these arbitration agreements. The only other state that takes such a position is Pennsylvania.[57] This is seen in two cases: *Pisano v. Extendicare Homes, Inc.*,[58] holding the arbitration agreements are unenforceable in wrongful death and *MacPherson v. Magee*

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[50] *Id.* at 610.

[51] *Id.* at 608 ("We agree with the district court that when a personal representative brings a wrongful-death action against a party with whom the decedent entered into a binding arbitration agreement, the case is subject to arbitration.").

[52] *Id.* at 613 ("Nonetheless, we do not find the Roth children's consortium claims subject to arbitration under the facts certified to us. These claims belong to the adult children, and they never personally agreed to arbitrate.").

[53] *Id.* at 608 (emphasis omitted).

[54] *Id.* at 614 (emphasis omitted).

[55] *See id.*

[56] *See id.*

[57] *See* MacPherson v. Magee Mem'l Hosp. for Convalescence, 2015 PA Super 248, 128 A.3d 1209 (2015).

[58] 2013 PA Super 232, 77 A.3d 651, 663 (2013).

Memorial Hospital for Convalescence,[59] holding they are enforceable only when the claim is brought by the personal representative. Thus, when combining the two, a basic rule is set that when the claim is brought by the heirs and they are to receive the damages, the arbitration agreements are unenforceable. However, when the claim is brought by the personal representative of the estate and the damages go to the estate, the agreements are enforceable. Thus, like Iowa, whether the arbitration agreement is enforceable depends on where the damages are going. In *Pisano*, the Supreme Court of Pennsylvania held wrongful death claims belong solely to the heirs[60] because a nursing facility's arbitration agreement is "between it and Decedent alone[,]" the heir in this case "does not have an agreement with [the facility] to arbitrate."[61] Thus, compelling arbitration "would operate against principles of Pennsylvania contract law and the [Federal Arbitration Act]" as well as "infringe upon wrongful death claimants' constitutional rights."[62]

However, as already noted, the arbitration agreement is enforceable in cases where the claims are brought by the estate. This occurs when there are no wrongful death beneficiaries designated by statute, and thus, the plaintiff is unable to identify "any individuals who would be entitled to recover damages under that provision."[63] This is the case in *MacPherson*. In this situation under the wrongful death statute in Pennsylvania, the claim is being brought by the decedent's estate "solely for the benefit of the estate . . . ."[64] In this case, the damages do not belong to a wrongful death beneficiary but instead the estate.[65] The Supreme Court of Pennsylvania says this distinguishes *Pisano* from *MacPherson*,[66] noting that under *Pisano* the agreements are only enforceable in cases where there are "wrongful death claims brought on behalf of

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[59] 2015 PA Super 248, 128 A.3d 1209, 1226-27 (2015).

[60] *Pisano*, 77 A.3d at 657.

[61] *Id.* at 661.

[62] *Id.* at 661-62 (noting that right to a civil jury trial is also enshrined in the Pennsylvania Constitution).

[63] *MacPherson*, 128 A.3d at 1226.

[64] *Id.*

[65] *Id.*

[66] *Id.*

the beneficiaries . . . ."[67] Therefore, like Iowa, Pennsylvania has a different rule depending on the details of the damages. Both states differentiate their rules based on where the damages go, and in doing so, they are remaining logically consistent between their policies on enforcement and their statutes. As will be discussed later, these two states should serve as models for the rest of the country to tackle this issue.

Further, as will be illustrated below, in *Pisano*, the Supreme Court of Pennsylvania differentiates between the legal definitions for derivative claims. This is important since many of the inconsistent states argue for enforcement of these arbitration clauses because they argue their claims are derivative.[68] Further, it appears that whether the claims are derivative or not is the differentiating factor on whether states enforce the agreements or not.[69] With almost all the states favoring enforcement holding the claims are derivative, and all the states disfavoring enforcement holding the claims are not.[70] The *Pisano* court notes that corporate law derivative actions are ones "where a corporation suffers loss because of the acts of officers, directors, or others [,] . . . the stockholder does not have a direct cause of action for such damages, but has a derivative cause of action on behalf of the corporation to recover the loss for the benefit of the corporation[,]" and thus "[t]he shareholder's cause of action, therefore, is derived from the corporation's right to bring suit."[71] In insurance law, a derivative action refers to subrogation, where "a subrogee stands in the shoes of the subrogor and can only recover damages when his subrogor has a legally cognizable cause of action against a third party."[72] Thus, again, the right to bring suit is derived from the subrogor's right to bring suit, and in both cases, "the party bringing suit is limited to the rights of the party from whom the action derives."[73]

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[67] *MacPherson*, 128 A.3d at 1226.

[68] *See infra* Section II, Subsection C.

[69] *See infra* Section III.

[70] *See id.*

[71] *Pisano*, 77 A.3d at 659 (quoting Weston v. Northampton Personal Care, Inc., 62 A.3d 947, 1009 (Pa. Super. Ct. 2013)).

[72] *Id.* (quoting Universal Underwriters Ins. Co. v. A. Richard Kacin, Inc., 916 A.2d 686, 693 (Pa. Super. Ct. 2007)) (internal quotations omitted).

[73] *Id.*

The court, however, correctly differentiates those two cases from a derivative claim in a tort action. "A derivative action in tort law, however, refers to the **injury** from which the claimant derives a cause of action."[74] The court notes that in tort law, the injured spouse's rights do not contain a claimant's spouse's rights like they would in the other two areas.[75] The court examines the Black's Law Dictionary definition of the word, noting that the dictionary gives two definitions:

> 1. A suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary; [especially,] a suit asserted by a shareholder on the corporation's behalf against a third party. . . .
>
> 2. A lawsuit arising from an injury to another person, such as a husband's action for loss of consortium arising from an injury to his wife caused by a third person.[76]

The court highlights that attaching the rights of the decedent to the heirs in wrongful death suits is applying the first definition, the corporate definition, when it is the second that is applicable in tort claims.[77]

Overall, this is an important distinction to remember when the inconsistent states favoring enforcement are addressed later. These courts hinge their argument on the fact that wrongful death claims are derivative. However, as shown above by the court in *Pisano*, this use of the word derivative is not in line with the definition of the word in the tort context. Instead, these courts misuse the word, invoking its corporate or insurance context where it is not applicable. The injury may be derivative, but so long as the damages bypass the estate and go straight to the heirs, the claim can never be derivative.

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[74] *Pisano*, 77 A.3d at 659. (emphasis in original).

[75] *Id.*

[76] *Id.* (quoting *Derivative Action,* BLACK'S LAW DICTIONARY, 455 (7th ed. 1999)) (alteration in original).

[77] *Id.* at 660.

B. Logically Consistent States: Non-Enforcement

The rest of the logically consistent states do not enforce arbitration agreements. Naturally, not all states are explicit on this issue, this section will explain the general logic of states that explicitly do not enforce these agreements and then will address the states that are not as explicit.

In cases where states explicitly rule against enforcement, the states find the claims are not derivative, and thus, the rights, liabilities, damages, or some other aspect of the wrongful death claim does not pass from the decedent to the wrongful death beneficiaries.[78] Thus, in Utah, for example, when the surviving spouse alleged the negligent care of her husband's physician caused his suicide, the arbitration agreement signed by her husband was held unenforceable.[79] The spouse made two arguments: she cannot be forced to arbitrate under a contract she did not sign and she has a constitutional right to pursue her claim in court because the injury is to the heirs and about the injury sustained by the patient.[80] Further, the Supreme Court of Utah found the spouse was not a third-party beneficiary.[81] This case hits on the key arguments against enforcing arbitration clauses, both of which will be further explored later.

Oklahoma relied on Utah's precedent in eventually reaching the same decision.[82] Oklahoma focused on some key factors. First, they noted explicitly that "[c]onsent to arbitrate is an essential component of an enforceable arbitration agreement."[83] Thus, just as in Utah, wrongful death beneficiaries are not bound to arbitrate based on an agreement they did not sign.[84] The court explicitly described that their wrongful death statute creates a new cause of action that is based on the loss of the deceased spouse due to their death, not because of the actual injury resulting in death, and that recovery under this statute goes to the heirs, not the estate.[85] The

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[78] *See infra* Section III.

[79] Boler v. Sec. Health Care, L.L.C., 336 P.3d 468, 473 (Okla. 2014) (citing Bybee v. Abdulla, 189 P.3d 40 (Utah 2008)).

[80] *Id.*

[81] *Id.*

[82] *Id.* at 477.

[83] *Id.*

[84] *See Boler*, 336 P.3d at 477.

[85] *Id.*

fact the Supreme Court of Oklahoma noted these parts of their wrongful death statute to support why they ruled the agreements were unenforceable is important because these are all traits of wrongful death statutes in other states that do enforce the agreements, as will be highlighted later.[86]

Other states that explicitly fall in line with Utah and Oklahoma are Arizona,[87] Delaware,[88] Illinois,[89] Kentucky,[90] Maryland,[91] Missouri,[92] Ohio,[93] and Washington.[94] First, among the states that are not explicit, but it is highly likely they hold these agreements are unenforceable, is Louisiana. In *Ciaccio v. Cazayoux*,[95] a mother gave birth to twins, the first of which lived twenty-one days and the second only a few moments.[96] Both parents filed wrongful death actions.[97] In this case, the mother signed an arbitration agreement with the defendants, but the father did not.[98] The court held that the mother was bound to the arbitration agreement and could be forced to arbitrate the claim, but the father was not.[99] The court noted that the father was not bound by the agreement because he "did not sign the arbitration agreement, nor did anyone sign the agreement on his behalf."[100] Thus, while a bit murkier than others setting an explicit rule regarding wrongful death in general, this case seems to clearly set a rule that if the party is not a signatory of the arbitration agreement, they cannot have it enforced against them.

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[86] *See infra* Section III.

[87] Bernardo v. Windsor Palm Valley LLC, No. 1 CA-CV 19-0197, 2020 WL 428748 (Ariz. Ct. App. Jan. 28, 2020).

[88] Skinner v. Peninsula Healthcare Servs., LLC, No. N20C-09-178 FJJ, 2021 WL 778324 (Del. Super. Ct. Mar. 1, 2021).

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

[90] Ping v. Beverly Enters., Inc., 376 S.W.3d 581 (Ky. 2012).

[91] FutureCare NorthPoint, LLC v. Peeler, 143 A.3d 191 (Md. Ct. Spec. App. 2016).

[92] Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (en banc).

[93] Peters v. Columbus Steel Castings Co., 115 Ohio St.3d 134, 2007-Ohio-0507, 873 N.E.2d 1258; *see also* Wolcott v. Summerville at Outlook Manor, L.L.C., 61 N.E.3d 853 (Ohio Ct. App. 2016).

[94] Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 155 Wash. App. 919 (Wash. Ct. App. 2010).

[95] 519 So. 2d 799 (La. Ct. App. 1987).

[96] *Id.* at 800.

[97] *Id.*

[98] *Id.* at 802-04.

[99] *Id.* at 804.

[100] *Id.*

Further, there is South Dakota, which is very close to being explicit. In *Petersen v. Kemper*,[101] the contractual clause at issue is not an arbitration clause but a release of all liability.[102] The court stated:

> It is the settled rule of this state that a cause of action for injuries to the person of another, resulting from negligence or other wrongful act, does not survive the death of the injured person, and that a release of damages therefor, signed by the injured person, does not bar an action brought by the widow under the wrongful death statute.[103]

So, this appears to explicitly state that wrongful death in South Dakota works as in other states, where the cause of action is new and cannot be limited by the decedent's contracts. The reason this is not as assured as the other states is: the case was decided in 1945, this portion has only been cited twice since,[104] and the case is not talking strictly about arbitration clauses. However, seeing as a release of liability is a harsher limitation on a claim than an arbitration clause, the case likely still applies.

Similar to South Dakota and Delaware, there is New Jersey, where the case that addresses the issue involves a release agreement rather than an arbitration clause.[105] This case highlights much of the logic for not enforcing these agreements. "An exculpatory release agreement, like any contract, can only bind the individuals who signed it[,]" and "[t]he release agreement here was signed by decedent and defendants[,]" thus "[i]t can therefore only bind these parties."[106] Further, "[d]ecedent's unilateral decision to contractually waive his right of recovery does not preclude his heirs, who were not parties to the agreement and received no benefit in exchange for such a waiver, from instituting and prosecuting a

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[101] 70 S.D. 427 (S.D. 1945).

[102] *Id.* at 431.

[103] *Id.* (citing Rowe v. Richards, 35 S.D. 201 (S.D. 1915) and Ulvig v. McKennan Hosp., 56 S.D. 509 (S.D. 1930)).

[104] The citations are from the same case at different stages in 1949 and 1950. *See* Simons v. Kidd, 73 S.D. 280, 284 (S.D. 1950); Simons v. Kidd, 73 S.D. 41, 44 (S.D. 1949).

[105] *See* Gershon v. Regency Diving Ctr., Inc., 845 A.2d 720 (N.J. Super. Ct. App. Div. 2004).

[106] *Id.* at 726-27.

wrongful death action."[107] The court in New Jersey noted that enforcing such a release of liability would go against "the public policy underpinning the Wrongful Death Act" which requires the court to "narrowly construe any attempt to contractually limit or, as in this case, outright preclude recovery."[108] This opinion highlights another reason it is logically inconsistent that such agreements be unenforceable. The public policy surrounding wrongful death that differentiates it from survival claims is to allow the heirs to recover for the damages they suffer due to their loved one's death without having to worry about any obligations their loved one made. Thus, the damages bypass the estate and go straight to the heirs. Therefore, enforcing these agreements when the damages bypass the heir clearly goes against the goal of these statutes, which is for the heirs to recover for the injury caused to them by their loved one's death.

C. The Logically Inconsistent: States Enforcing Agreements

These states are all logically inconsistent because they enforce the arbitration agreements despite the fact that all or most of the damages awarded in a wrongful death lawsuit bypasses the estate and go straight to the heirs.[109] In addition to the situations where agreements are enforced in Iowa and Pennsylvania, there are nineteen states that enforce arbitration clauses in wrongful death despite damages belonging to the heirs. The states with explicit rulings, which is the majority, are: Alabama;[110] Arkansas;[111] California;[112] Colorado;[113] Florida;[114] Georgia:[115] Indiana;[116]

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[107] *Gershon*, 845 A.2d at 727.
[108] *Id.*
[109] *See infra* Section III.
[110] Ball Healthcare Servs., Inc. v. Flennory, 371 So. 3d 239 (Ala. 2022).
[111] GGNSC Holdings, LLC v. Lamb, 487 S.W.3d 348 (Ark. 2016).
[112] Ruiz v. Podolsky, 237 P.3d 584 (Cal. 2010).
[113] Allen v. Pacheco, 71 P.3d 375 (Colo. 2003).
[114] Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752 (Fla. 2013).
[115] United Health Servs. of Georgia, Inc. v. Norton, 797 S.E.2d 825 (Ga. 2017).
[116] Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411 (Ind. Ct. App. 2004).

Massachusetts;[117] Michigan;[118] Minnesota;[119] Mississippi;[120] New Mexico;[121] North Carolina;[122] Texas;[123] West Virginia;[124] and Wyoming.[125]

Oregon is a state that appears to enforce these clauses, though there is no explicit case law on it. However, in *Storm v. McClung*,[126] the Supreme Court of Oregon addressed whether the statutory limitations that would have been placed on the decedent's claim under Oregon's worker compensation law applies to a subsequent wrongful death claim, and they made it clear they would enforce such agreements.[127] The court ruled that "the wrongful death statute [of Oregon] places a decedent's personal representative in the decedent's shoes, imputing to the personal representative whatever rights, and limitations to those rights, that the decedent possessed."[128] This language is similar to that used in the other cases favoring enforcement of arbitration clauses.[129] Thus, it appears Oregon would or does enforce such clauses.

Likewise, Wisconsin made it clear they would enforce arbitration clauses in wrongful-death claims when they addressed the enforceability of releases in *Ruppa v. American States Insurance Co.*[130] In responding to a plaintiff's argument that a release is "totally ineffective with respect to her action because the

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[117] GGNSC Admin. Servs., LLC v. Schrader, 140 N.E.3d 397 (Mass. 2020).

[118] Ballard v. Sw. Detroit Hosp., 327 N.W.2d 370 (Mich. Ct. App. 1982).

[119] Schultz v. GGNSC St. Paul Lake Ridge LLC, 310 F. Supp. 3d 985 (D. Minn. 2018).

[120] Trinity Mission Health & Rehab. of Clinton v. Est. of Scott ex rel. Johnson, 19 So. 3d 735 (Miss. Ct. App. 2008).

[121] Estate of Krahmer *ex rel.* Peck v. Laurel Healthcare Providers, LLC, 315 P.3d 298, 302 (N.M. Ct. App. 2013).

[122] Wilkerson *ex rel.* Est. of Wilkerson v. Nelson, 395 F. Supp. 2d 281, 288 (M.D.N.C. 2005).

[123] *In re* Labatt Food Serv., L.P., 279 S.W.3d 640, 649 (Tex. 2009).

[124] Stonerise Healthcare, LLC v. Oates, No. 19-0215, 2020 WL 3259625 (W. Va. June 16, 2020).

[125] Kindred Healthcare Operating, Inc. v. Boyd, 403 P.3d 1014, 1025 (Wyo. 2017). Though *Boyd* does not directly assess the issue, the Supreme Court of Wyoming examines multiple issues in deciding to enforce an arbitration clause signed by power of attorney on behalf of the decedent. *Id.* Thus, it is clear these clauses are enforceable in Wyoming. *See id.*

[126] 47 P.3d 476 (Or. 2002).

[127] *See id.* at 482-83.

[128] *Id.*

[129] *See generally* sources cited *supra* Section II, Subsection A.

[130] 284 N.W.2d 318, 321-22 (Wis. 1979).

decedent had no capacity to bind his beneficiaries to any agreement affecting their rights under the wrongful death statute[,]"[131] the Supreme Court of Wisconsin held that to the extent a release signed by the decedent was effective, the beneficiaries' wrongful-death claim is limited by that release.[132]

Regarding New York, there is no explicit or clear case law on the issue. However, it can be determined they enforce these clauses by examining cases surrounding arbitration or releases of liability in wrongful death cases. Thus, because New York does not address the issue, they likely do not see it as one. For example, there are two dueling cases: *Gayle v. Regeis Care Center, LLC* [133] and *Nesmith v. Monahemi*.[134] *Gayle* discussed the enforceability of an arbitration clause and *Nesmith* discussed the change of venue clause.[135] While both cases concern the apparent authority of a power of attorney, they reach different conclusions on whether to enforce the clause.[136] Despite both being wrongful death lawsuits, neither case mentions the possibility that a decedent's contract could not bind the beneficiaries.[137] It is clear from reading both cases that if there was apparent authority, then the clauses would be enforced, even though the contracts were signed on behalf of the decedents, not the beneficiaries.[138]

Now, since it is clear which states are inconsistent due to their enforcement of these clauses, it follows that this article should show why that is. To do so, one must only look to Florida, as *Laizure v. Avante at Leesburg, Inc.*[139] generally explains the logic of these cases very well. In ruling that enforcement favors wrongful death statutes, the court acknowledges that "Florida's Wrongful Death

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131 *Ruppra*, 284 N.W.2d at 325.

132 *Id.* at 322. *See* Christ v. Exxon Mobil Corp., 866 N.W.2d 602, 609 (Wis. 2015) ("the person's right of action depends not only upon the death of another person but also upon that other person's entitlement to maintain an action and recover if his death had not occurred.") and Niese v. Skip Barber Racing Sch., 642 N.W.2d 645, 646 (Wis. Ct. App. 2002) ("[i]n *Ruppa*, our supreme court held that a sufficient waiver of liability signed by one spouse may affect a beneficiary's rights under the wrongful death statute.").

133 143 N.Y.S.3d 343 (N.Y. App. Div. 2021).

134 167 N.Y.S.3d 345 (N.Y. Sup. Ct. 2022).

135 *See Gayle*, 143 N.Y.S.3d at 344; *see also Nesmith*, 167 N.Y.S.3d at 346-47.

136 *Compare Gayle*, 143 N.Y.S.3d at 344, *with Nesmith*, 167 N.Y.S.3d at 346-47.

137 *See Gayle*, 143 N.Y.S.3d at 344; *Nesmith*, 167 N.Y.S.3d at 346-47.

138 *See Gayle*, 143 N.Y.S.3d at 344; *Nesmith*, 167 N.Y.S.3d at 346-47.

139 109 So. 3d 752 (Fla. 2013).

Act has long [been] characterized . . . as creating a new and distinct right of action from the right of action the decedent had prior to death[.]"[140] However, the court noted that Florida's wrongful death statute is derivative because they rely on a wrong committed on the decedent and that heirs cannot recover in a situation where the decedent would not be able to had they survived.[141] The court noted that a wrongful death claim is barred when a decedent files a personal injury action and fully recovers before death since "[a]t the moment of his death [the injured party] had no right of action against the tortfeasor because his cause of action had already been litigated, proved and satisfied."[142] Defining the wrongful death action as derivative without any extensive discussion on where the damages go is the primary focus of these cases, just as in *Laizure*.[143] In discussing the issue, the court in *Laizure* never addresses or discusses how damages in Florida bypass the estate and go straight to the heirs.[144] Instead, they rule that "[t]he estate and heirs stand in the shoes of the decedent for purposes of whether the defendant is liable and are bound by the decedent's actions and contracts with respect to defenses and releases."[145]

Thus, what these states are saying is these claims are derivative for all purposes except for damages. That is what makes these states logically inconsistent. A claim cannot truly be derivative unless the damages are themselves. The entire point of suits and claims is to seek some form of recovery. The recovery is the centerpiece of what a claim is. Under these sets of cases, the courts are essentially saying the recovery is irrelevant to the issue. To them, it does not matter that damages bypass the decedent entirely and go to the heirs. While some states do split the types of wrongful death damages, with some going to the estate and others

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[140] *Laizure*, 109 So. 3d at 759 (quoting Toombs v. Alamo Rent–A–Car, Inc., 833 So.2d 109, 111 (Fla. 2002)) (alterations in original) (internal quotations omitted).

[141] *Id.* at 760.

[142] *Id.* (quoting Variety Children's Hosp. v. Perkins, 445 So.2d 1010, 1011-12 (Fla. 1983)) (alterations in original).

[143] *See generally id.*

[144] *Compare Laizure*, 109 So. 3d 752, *with* Scott v. Est. of Myers, 871 So. 2d 947, 948-49 (Fla. Dist. Ct. App. 2004) ("Proceeds from a wrongful death action are not for the benefit of the estate, and are not subject to estate claims.").

[145] *Laizure*, 109 So. 3d at 762.

going straight to the heirs,[146] the consistent position is not to enforce the clauses in all situations, which is what these states do. It is to do as Iowa and Pennsylvania do and enforce it for some and then not enforce it for others. Alternatively, the other solution is to change the statutes so wrongful death claims attach to the estates. Otherwise, you have statutes that explicitly state wrongful death damages cannot go to the debts (or synonymously liabilities) of the decedent; however, the claim that damages are recovered under is bound by the contractual liabilities and limitations of the decedent.

Further, this does not even discuss the issue of binding third parties to a contract they did not sign. The court in *Laizure* explicitly noted "that a wrongful death action belongs to the survivors of the decedent . . . ."[147] These courts are forcing third parties to relinquish their constitutional right to a jury trial, as well as the power to select the forum for litigating their claim without them ever signing away these rights. These courts are saying they own these claims, the damages belong exclusively to them, but a third party has the ability to impose liabilities on their claims and damages without their consent. It is logically inconsistent on every front and why either these courts need to reverse course or change their wrongful death statutes to where the damages flow to the estate like in Iowa.

D. The Undecided States

While, as illustrated above, most states have decided one way or the other, there remain some that are undecided. The 50-state survey revealed there are sixteen states[148] where there appears to be no case law on the issue or the case law on similar issues is not close enough to determine the issue one way or the other. However, there are two other undecided states for which the issue is currently on appeal or the lower courts are split on the issue. These two states illustrate this is an unsettled issue, and one that is not immune to challenges.

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[146] *See infra* Section III.

[147] *Laizure*, 109 So. 3d 752, 761 (Fla. 2013) (quoting *Laizure v. Avante at Leesburg, Inc.*, 44 So. 3d 1254, 1258 (Fla. Dist. Ct. App. 2010)).

[148] Author Note: Alaska; Connecticut; Hawaii; Idaho; Maine; Montana; Nebraska; Nevada; New Hampshire; North Dakota; Rhode Island; South Carolina; and Vermont.

The latter is happening in Virginia, where the lack of a higher court decision is creating competing decisions on whether to enforce these agreements or not. Virginia's appellate courts are yet to decide on the issue, and this has led to competing trial court decisions in *Bohlen v. Capital Senior Living, Inc.*[149] and *Stevens v. Medical Facilities of America XXXII (32) Ltd. P'ship*.[150]

Bohlen and *Stevens* are both trial court cases addressing the enforceability of arbitration clauses in wrongful death cases that come to different conclusions. The first, *Stevens*, was decided in 2019 in the Nelson Circuit Court in the 24th Judicial Circuit of Virginia and held that since "the wrongful death action never vested in the decedent, it cannot be waived by the decedent nor anyone signing on the decedent's behalf regardless of their capacity prior to the decedent's death."[151] Thus, because the wrongful death action is "an independent, non-derivative right of action, the wrongful death beneficiaries are not bound to arbitrate by an arbitration addendum."[152]

The second, *Bohlen*, was decided after *Stevens* in 2020 in the Chesapeake Circuit Court in the 1st Judicial Circuit of Virginia and held the arbitration clauses are enforceable.[153] *Bohlen* cites appellate cases from other states as well as cases from other trial courts within Virginia.[154] Further, the court examined Virginia's wrongful death statute, holding it is derivative in nature, and thus held that the "construction of Virginia's wrongful death statute by the Supreme Court [of Virginia] is consistent with courts of other states, interpreting similarly worded wrongful death statutes, which have held that arbitration contracted by a decedent binds the statutory beneficiaries in wrongful death actions."[155] Overall, the courts in Virginia appear to be split and will remain that way until a superior court decides the issue. Until they do, this court should

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149 No. CL19-2408, 2020 WL 8996681 (Va. Cir. Ct. Jan. 31, 2020).
150 No. CL17000208-00, 2019 WL 3417035 (Va. Cir. Ct. June 27, 2019).
151 *Stevens*, 2019 WL 3417035 at *7.
152 *Id.*
153 *Bohlen*, 2020 WL 8996681 at *3.
154 *Id.* at *2.
155 *Id.*

remain in the undecided category. However, it should be noted other trial courts in Virginia have enforced these agreements.[156]

At the time of writing, the other undecided state is Tennessee. Tennessee belonged in the decided camp for decades, as the state has enforced the agreements in the past.[157] There is an argument they still belong there, as that is still the current Supreme Court precedent. However, in *Williams v. Smyrna Residential, LLC*,[158] the Tennessee Court of Appeals overturned precedent and ruled that arbitration agreements are unenforceable.[159] Some trial courts have chosen to follow the new precedent from the Court of Appeals. Thus, there is indecision in the state in practice, putting it in the undecided camp. The court based its opinion on a recent Tennessee Supreme Court case involving wrongful death but not arbitration.[160] The court in *Williams* held that the Tennessee Supreme Court case "clarified Tennessee wrongful death jurisprudence."[161] The court focused on the part of the case holding that a surviving spouse pursuing a wrongful death claim "was not representing the legal interests of either the decedent or her estate[,]" and that they assert their "own right of action for [their] own benefit and for the benefit of the other statutory beneficiaries who share in any recovery."[162] Thus the court held that despite "over 100 years of Tennessee case law[,]" the court is "not at liberty to ignore the most recent instruction from the Tennessee Supreme Court on the matter . . . no matter the longevity of the preceding interpretation."[163]

However, there are two major issues that put this case squarely in the undecided category. First, the portion of *Williams*

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[156] *See* Harmon v. Birdmont Health Care, No.CL10000067-00, 2013 WL 12412171 (Va. Cir. Ct. Feb 11, 2013); Culler v. Johnson, No. CL14-1196, 2014 WL 12857869 (Va. Cir. Ct. Nov. 21, 2014).

[157] *See* Benton v. Vanderbilt Univ., 137 S.W.3d 614 (Tenn. 2004); Tenn. Med. Ass'n v. BlueCross BlueShield of Tenn., Inc., 229 S.W.3d 304 (Tenn. Ct. App. 2007); Philpot v. Tennessee Health Mgmt., Inc., 279 S.W.3d 573, 575 (Tenn. Ct. App. 2007); Mitchell v. Kindred Healthcare Operating, Inc., 349 S.W.3d 492, 495, 501 (Tenn. Ct. App. 2008).

[158] 2022 WL 1052429 (Tenn. Ct. App. Apr. 8, 2022), *perm. app. granted*, (Tenn. Sept. 29, 2022). This case was the inspiration for writing this article.

[159] *Id.* at *9 .

[160] *Id.* at *8 (citing Beard v. Branson, 528 S.W.3d 487 (Tenn. 2017)).

[161] *Id.* at *9.

[162] *Id.* (quoting *Beard*, 528 S.W.3d at 503-04) (alterations in original).

[163] *Id.*

where this issue is addressed is dicta as the court had already found the arbitration agreement unenforceable on other grounds.[164] Second, the Supreme Court of Tennessee granted an appeal on the case in September of 2022 and thus it appears likely they will decide the issue one way or the other.

Lastly, there are also states like Kansas, which have come close to ruling on the issue but failed to reach the merits. In *McNally v. Beverly Enterprises, Inc.*,[165] the Court of Appeals of Kansas did not address the merits of the case and left it open for a later decision. In *McNally*, a man fell twice and died at a rehabilitation center, his beneficiaries filed a wrongful death action.[166] In the case, the decedent and the center were both parties to an agreement to arbitrate all claims, disputes, and controversies arising out of his stay with the center.[167] The reason the court never reached the merits of enforcing arbitration in wrongful death cases is because the signature line for the resident was left blank; however, his wife signed under the "authorized representative" section.[168] The district court denied arbitration for two reasons: first, that the wife lacked authority to bind the decedent to the agreement, and second, that "the heirs at law in a wrongful death action are not bound by an arbitration agreement to which neither the decedent nor the wrongful death claimants were a party."[169] The court held that the trial court did not err in denying arbitration because the wife lacked authority to sign the agreement for the decedent, so not even the decedent could be forced to arbitrate.[170] However, because the trial court cited it being a wrongful death claim among the reasons for denying arbitration and because the court did affirm that decision while also noting they are not going to listen to the defendants' request to "follow other jurisdictions in holding that wrongful death heirs are bound by the decedent's agreement to arbitrate[,]" there is an argument that Kansas tilts

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164 *Williams*, 2022 WL 1052429, at *7.

165 *See* McNally v. Beverly Enters., Inc., No. 98,124, 2008 WL 4140635 (Kan. Ct. App. 2008).

166 *Id.* at *1.

167 *Id.*

168 *Id.*

169 *Id.* at *2.

170 *Id.* at *6.

towards non-enforcement.[171] However, again, the court left the issue open for a future decision.

Overall, regardless of how the other states turned out, looking at these three states alone illustrate that enforcement of arbitration clauses in wrongful death is an unsettled issue. It is not one of these legal principles that is so set in stone it cannot ever be overturned. Thus, advocacy for rulings consistent with wrongful death statutes should continue.

Table 1

State	**Enforce Arbitration in Wrongful Death?**	**Case**
Alabama	Yes	*Ball Healthcare Services, Inc. v. Flennory*, 2022 WL 3572584 (Ala. Aug. 19, 2022)
Alaska	Undecided	N/A
Arizona	No	*Bernardo v. Windsor Palm Valley LLC*, 2020 WL 428748 (Ariz. App. 1st Div. Jan. 28, 2020)
Arkansas	Yes	*GGNSC Holdings, LLC v. Lamb By and Through Williams*, 487 S.W.3d 348 (Ark. 2016)
California	Yes	*Ruiz v. Podolsky,* 237 P.3d 584 (Cal. 2010)
Colorado	Yes	*Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003)
Connecticut	Undecided	N/A
Delaware	No	*Skinner v. Peninsula Healthcare Services*, LLC, 2021 WL 778324 (Del. Super. Ct. Mar. 1, 2021)

[171] *McNally*, 2008 WL 4140635, at *6.

Florida	Yes	*Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752 (Fla. 2013)
Georgia	Yes	*United Health Services of Georgia, Inc. v. Norton*, 797 S.E.2d 825 (Ga. 2017)
Hawaii	Undecided	N/A
Idaho	Undecided	N/A
Illinois	No	*Carter v. SSC Odin Operating Co., L.L.C.*, 976 N.E.2d 344 (Ill. 2012)
Indiana	Yes	*Sanford v. Castleton Health Care Center, L.L.C.*, 813 N.E.2d 411 (Ind. Ct. App. 2004)
Iowa	Yes, for normal wrongful death damages, no for loss of consortium.	*Roth v. Evangelical Lutheran Good Samaritan Society*, 886 N.W.2d 601 (Iowa 2016)
Kansas	Undecided	N/A
Kentucky	No	*Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012)
Louisiana	No	*Ciaccio v. Cazayoux*, 519 So. 2d 799 (La. App. Cir. 1987)[172]
Maine	Undecided	N/A
Maryland	No	*FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191 (Md. Ct. Spec. App. 2016)
Massachusetts	Yes	*GGNSC Administrative Services, LLC v. Schrader*, 140 N.E.3d 397 (Mass. 2020)

[172] This case does not explicitly address the issue. *See supra* Section II, Subsection B.

Michigan	Yes	*Ballard v. S.W. Detroit Hospital*, 327 N.W.2d 370 (Mich. Ct. App. 1982)
Minnesota	Yes	*Schultz for Schultz v. GGNSC St. Paul Lake Ridge LLC*, 310 F. Supp. 3d 985 (D. Minn. 2018)
Mississippi	Yes	*Trinity Mission Health & Rehab. of Clinton v. Est. of Scott ex rel. Johnson*, 19 So. 3d 735 (Miss. Ct. App. 2008)
Missouri	No	*Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009)
Montana	Undecided	N/A
Nebraska	Undecided	N/A
Nevada	Undecided	N/A
New Hampshire	Undecided	N/A
New Jersey	No	*Chavis v. Norwood Terrace Health Center, LLC*, 2021 WL 1749969 (N.J. Super. Ct. App. Div. May 4, 2021)[173]
New Mexico	Yes	*Estate of Krahmer ex rel. Peck v. Laurel Healthcare Providers, LLC*, 315 P.3d 298 (N.M. Ct. App., 2013)
New York	Yes	*Gayle v. Regeis Care Center., LLC*, 143 N.Y.S.3d 343 (N.Y. App. Div. 1st Dept. 2021) and *Nesmith v. Monahemi*, 167 N.Y.S.3d 345 (N.Y. Sup. Ct. 2022)[174]
North Carolina	Yes	*Wilkerson ex rel. Estate of Wilkerson v. Nelson*, 395 F.

[173] This case does not explicitly address the issue. *See supra* Section II, Subsection B.

[174] These cases do not explicitly address the issue. *See supra* Section II, Subsection CIII.

		Supp. 2d 281 (M.D.N.C. 2005); *see also DiDonato v. Wortman*, 320 N.C. 423 (N.C., 1987)
North Dakota	Undecided	N/A
Ohio	No	*Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258 (Ohio 2007); see also *Wolcott v. Summerville at Outlook Manor*, LLC, 61 N.E.3d 853 (Ohio Ct. App. 10th Dist. 2016).
Oklahoma	No	*Boler v. Security Health Care, L.L.C.*, 336 P.3d 468 (Okla. 2014)
Oregon	Yes	*Storm v. McClung*, 47 P.3d 476 (Or. 2002)[175]
Pennsylvania	No if the claim brought by statutory beneficiaries, yes if the claim brought by the estate.	*Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651 (Pa. Super. Ct. 2013) and *MacPherson v. Magee Memorial Hospital for Convalescence*, 128 A.3d 1209 (Pa. Super. Ct. 2015)
Rhode Island	Undecided	N/A
South Carolina	Undecided	N/A
South Dakota	No	*Petersen v. Kemper*, 70 S.D. 427, 18 N.W.2d 294 (S.D. 1945)[176]
Tennessee	Undecided as issue is currently on appeal.	*Williams v. Smyrna Residential, LLC*, 2022 WL 1052429 (Tenn. Ct. App. Apr. 8, 2022), *perm. app. granted*, (Tenn., Sept. 29, 2022)

[175] This case does not explicitly address the issue. *See supra* Section II, Subsection C.
[176] This case does not explicitly address the issue. *See supra* Section II, Subsection B.

Texas	Yes	*In re Labatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009)
Utah	No	*Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008)
Vermont	Undecided	N/A
Virginia	Undecided but trial courts are split.	*Bohlen v. Cap. Senior Living, Inc.*, 104 Va. Cir. 178 (Va. Cir. Ct. 2020) (enforcing) and *Stevens v. Medical Facilities of America XXXII (32) Ltd. Partnership*, 98 Va. Cir. 376 (Va. Cir. Ct. 2019) (against enforcing)
Washington	No	*Woodall v. Avalon Care Center-Fed. Way, LLC*, 155 Wash. App. 919 (Wash. Ct. App. 1st Div. 2010)
West Virginia	Yes	*Stonerise Healthcare, LLC v. Oates*, 2020 WL 3259625 (W. Va. June 16, 2020)
Wisconsin	Yes	*Ruppa v. American States Insurance Co.*, 91 Wis. 2d 628 (Wis. 1979)[177]
Wyoming	Yes	*Kindred Healthcare Operating, Inc. v. Boyd*, 403 P.3d 1014 (Wyo. 2017)

III. SURVEY OF STATES: EXAMINING THE WRONGFUL DEATH STATUTES OF STATES THAT HAVE RULED ON THE ISSUE

Before there can be an accurate guess of how the states that have not ruled on this issue would or should rule, there needs to be an examination of each state's wrongful death statute. The goal of this examination is to compare the way the statutes are set up in

[177] These cases do not explicitly address the issue. *See supra* Section II, Part Subsection C.

states that enforce arbitration clauses and those that do not enforce arbitration clauses to determine which side the undecided states' statutes more closely follow.

There are three things to look at in each case that appear determinative on this issue based on cases on the issue. Naturally, the first is where the proceeds go. This article argues this alone should be determinative. The claim should belong to whoever receives the damages, and if the damages are to bypass the estate and flow straight to the heirs, the claims should not be bound to agreements that would bind the estate. If one is not receiving damages resulting from the claim, the claim does not truly belong to them. Thus, for these reasons damages bypassing the estate favor nonenforcement; however, as mentioned already, many courts still enforce arbitration clauses even when the damages bypass the estate.[178] They justify doing so with the second characteristic to look at, whether a state's wrongful death claim is derivative or independent of the underlying tort.

The definition of a derivative claim has been discussed at length already.[179] Because the claim arises out of the same injury as a cause of action that would be brought by the decedent, the limitations to which the decedent subjects themself trickle down to the derivative claims. Simply put, due to the focus placed on this characteristic in states favoring enforcement, this is the second most important characteristic of these statutes that can give some idea of how the undecided states should rule.

The third characteristic is not nearly as important as the others, almost to the point it was not included. It is whether the estate or its personal representative is bringing the wrongful death lawsuit or if the heirs are the ones bringing the suit. Some states allow only one or the other. Some allow both. Some only allow for the estate to bring the suit if there are no heirs. There are a couple of different scenarios, and the potential importance of this characteristic is clear on its face, whoever brings the claim has a strong argument it belongs to them and thus a strong argument as to whether any limitations that would apply to the estate also apply to them. Should the heirs bring the lawsuit, the limitations, like a

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[178] *See supra* Section II, Subsection C.

[179] *See supra* Section II, Subsection A.

requirement to arbitrate, should not apply, but as mentioned, should the estate bring the lawsuit, the limitations should apply.

The first category is the states that enforce arbitration clauses in wrongful death. Among the twenty states that outright enforce arbitration clauses, twelve require that all damages go exclusively to the benefit of the heirs or only pass to the estate if there are no heirs.[180] One, Iowa, gives the proceeds to the estate and not the heirs.[181] The remaining seven states primarily give almost all damages to the heirs exclusively with some very specific types of damages going directly to paying for expenses such as funeral and medical costs.[182] Regarding the characteristic of whether the claims are derivative or not, sixteen hold wrongful death claims are

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[180] Alabama (ALA. CODE § 6-5-410(c) (2014)); Arkansas (ARK. CODE ANN. § 16-62-102 (2023)); California (Monschke v. Timber Ridge Assisted Living, LLC, 197 Cal. Rptr. 3d 921, 924 (Cal. Dist. Ct. App. 2016)); Colorado (Campbell v. Shankle, 680 P.2d 1352, 1354 (Colo. App. 1984)); Georgia (GA. CODE ANN. § 51-4-2 (2023)); Massachusetts (Booten v. United States, 95 F. Supp. 2d 37, 43 (D. Mass. 2000)); Minnesota (MINN. STAT. ANN. § 573.02 subd.1 (West 2023)); New Mexico (N.M. STAT. ANN. § 41-2-3 (2023)); New York (N.Y. EST. POWERS & TRUSTS LAW § 5-4.4 (McKinney 2023)); Oregon (Anderson v. Clough, 230 P.2d 204, 210 (Or. 1951)); Texas (TEX. CIV. PRAC. & REM. CODE ANN. § 71.004(a) (2023)); and Wyoming (WYO. STAT. ANN. § 1-38-102(b) (2023)).

[181] Roth v. Evangelical Lutheran Good Samaritan Soc., 886 N.W.2d 601, 608 (Iowa 2016).

[182] Florida (Scott v. Est. of Myers, 871 So. 2d 947, 949 (Fla. Dist. Ct. App. 2004); FLA. STAT. § 768.21); Indiana (IND. CODE § 34-23-1-1); Michigan (MICH. COMP. LAWS § 600.2922(d)); Mississippi (MISS. CODE ANN. § 11-7-13 (2023); Willing v. Estate of Benz, 958 So. 2d 1240, 1257 n. 15 (Miss. Ct. App. 2007)); North Carolina (N.C. GEN. STAT. § 28A-18-2(a)), West Virginia (W. VA. CODE § 55-7-6(b)-(c) (2023)); and Wisconsin (WIS. STAT. § 895.04(2)-(5) (2023)).

derivative.[183] Four states, Alabama,[184] California,[185] Georgia,[186] and Indiana,[187] appear to hold the claims are not derivative, but they still enforce the arbitration clauses. Lastly, regarding who brings the suit, the personal representative of the estate or the decedent brings the lawsuit in eleven of the states enforcing arbitration.[188] Arkansas[189] and Georgia[190] have the personal representative bring the suit first, and then the heirs if there is no

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[183] Arkansas (Wooley v. Planter's Cotton Oil Mill, Inc., 209 S.W.3d 409, 413 (Ark. Ct. App. 2005)); Colorado (DeCicco v. Trinidad Area Health Ass'n, 573 P.2d 559, 561-62 (Colo. App. 1977)); Florida (Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 760-62 (Fla. 2013)); Iowa (*see* Roth v. Evangelical Lutheran Good Samaritan Soc., 886 N.W.2d 601 (Iowa 2016)); Massachusetts (Laramie v. Philip Morris USA Inc., 173 N.E.3d 731, 742 (Mass. 2021)); Michigan (Denney v. Kent County Rd. Commn., 896 N.W.2d 808, 814 (Mich. Ct. App. 2016)); Minnesota (Schultz for Schultz v. GGNSC St. Paul Lake Ridge LLC, 310 F. Supp. 3d 985, 989 (D. Minn. 2018)); Mississippi (Carter v. Mississippi Dept. of Corrections, 860 So. 2d 1187, 1192 (Miss. 2003)); New Mexico (THI of New Mexico at Vida Encantada, LLC v. Lovato, 848 F. Supp. 2d 1309, 1328 (D.N.M. 2012)); New York (Halucha v. Jockey Club, 220 N.Y.S.2d 567, 569 (N.Y. Sup. Ct. 1961)); North Carolina (Taylor v. Norfolk S. Ry. Co., 86 F. Supp. 3d 448, 457 (M.D.N.C. 2015)); Oregon (Hobart v. Holt, 194 P.3d 820, 827 (Or. Ct. App. 2008)); Texas (Potharaju v. Jaising Mar., Ltd., 193 F. Supp. 2d 913, 917 (E.D. Tex. 2002)); West Virginia (Davis v. Foley, 457 S.E.2d 532, 537 (W. Va. 1995)); Wisconsin (Ruppa v. Am. States Ins. Co., 284 N.W.2d 318, 325 (Wis. 1979)); and Wyoming (Farmers Ins. Exch. v. Dahlheimer, 3 P.3d 820, 824 (Wyo. 2000)).

[184] Breed v. Atlanta, B. & C.R. Co., 4 So. 2d 315, 317 (Ala. 1941) ("The right of action which the statute gives is a new right, not derivative nor the right of succession to the person slain.").

[185] Monschke v. Timber Ridge Assisted Living, LLC, 197 Cal. Rptr. 3d 921, 924 (Cal. Dist. Ct. App. 2016) ("Unlike some jurisdictions wherein wrongful death actions are derivative, Code of Civil Procedure section 377.60 'creates a new cause of action in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained had he survived.") (quoting Horwich v. Super. Ct., 21 Cal. 4th 272, 283 (Cal. 1999)) (emphasis omitted).

[186] Parrish v. St. Joseph's/Candler Health Sys., Inc., 874 S.E.2d 413, 417 n.1 (Ga. Ct. App. 2022).

[187] Fisk v. United States, 657 F.2d 167, 170 (7th Cir. 1981) (quoting Pickens' Est. v. Pickens, 263 N.E.2d 151, 156 (Ind. 1970)).

[188] Alabama (ALA. CODE § 6-5-410(a) (2023)), Florida (FLA. STAT. § 768.20 (2023)), Indiana (IND. CODE § 34-23-1-1 (2023)), Roth v. Evangelical Lutheran Good Samaritan Soc., 886 N.W.2d 601, 602 (Iowa 2016)); Massachusetts (MASS. GEN. LAWS ch.. 229, § 2 (2023)); Michigan (MICH. COMP. LAWS § 600.2922 (2023)); New Mexico (N.M. STAT. ANN. § 41-2-3 (2023)); New York (N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 2023)); North Carolina (N.C. GEN. STAT. § 28A-18-2(a) (2013)); West Virginia (W. VA. CODE § 55-7-6(a) (2023)); and Wyoming (WYO. STAT. ANN. § 1-38-102(a) (2023)).

[189] ARK. CODE ANN. § 16-62-102(b) (2013).

[190] GA. CODE ANN. §§ 51-4-2 & 51-4-5 (2023).

personal representative. Minnesota appoints a trustee after a petition is filed by the beneficiaries to bring the suit.[191] California,[192] Wisconsin,[193] Mississippi,[194] and Oregon[195] allow for either the personal representative or the heirs to bring the suit. Texas[196] and Colorado[197] require the suit to be brought by heirs for at least some specified period after which it can then be brought by the personal representative.

Regarding the thirteen states that do not enforce the arbitration clauses, eleven pass the proceeds exclusively to the heirs with none going to the estate.[198] The remaining three states, Kentucky,[199] Ohio[200] and Oklahoma,[201] give the money exclusively to the heirs except for costs for burial expenses and medical expenses. Regarding whether the claim is derivative or not, eight hold the claim is explicitly not derivative,[202] and two more states,

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[191] MINN. STAT. § 573.02 (2023).

[192] CAL. CIV. PROC. CODE § 377.60 (West 2023).

[193] WIS. STAT. § 895.04(1) (2023).

[194] MISS. CODE. ANN. § 11-7-13 (2023).

[195] OR. REV. STAT. § 30.020(1) (2023).

[196] TEX. CIV. PRAC. & REM. CODE ANN. § 71.004(b)-(c) (West 2023) (allows only the heirs to bring the suit within three calendar months of the death, after that the personal representative of the estate may bring the suit).

[197] COLO. REV. STAT. § 13-21-201(1) (2009) (requires that the spouse bring the suit for the first year unless there is no spouse or the spouse approves of other heirs or the personal representative brings the claim). Then in the second year the statute allows either the other heirs or the personal representative to bring the claim. *Id.*

[198] Arizona (ARIZ. REV. STAT. ANN. § 12-613 (2023)); Delaware (DEL. CODE ANN. tit. 10, § 3724(a)-(c) (2023)); Illinois (740 ILL. COMP. STAT. 180/2 § 2(b) (2023)); Louisiana (Davis v. State Farm Mut. Ins. Co., 208 So. 2d 412, 413 (La. Ct. App. 1968)); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 3-904(c) (2023)); Missouri (Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W.2d 205, 211 (Mo. 1934)); New Jersey (N.J. STAT. ANN. § 2A:31-4 (West 2008)); South Dakota (S.D. CODIFIED LAWS § 21-5-8 (1984)); Utah (Est. of Faucheaux v. City of Provo, 449 P.3d 112, 119 (Utah 2019)); and Washington (WASH. REV. CODE § 4.20.020(1) (2019)).

[199] KY. REV. STAT. ANN. § 411.130(2) (West 2023) (allows the proceeds to pass to the estate only if the decedent leaves no heirs).

[200] OHIO REV. CODE ANN. § 2125.03 (LexisNexis 2023).

[201] OKLA. STAT. tit. 12, § 1053(B) (2023).

[202] Arizona (Halenar v. Super. Ct. in and for Maricopa Cty. 504 P.2d 928, 930 (Ariz. 1972)); Kentucky (Ping v. Beverly Enter. Inc., 376 S.W.3d 581,598-99 (Ky. 2012)); Louisiana (Walker v. State Farm Mut. Auto. Ins., No.37,063-CA (La. App. 2 Cir. 12/19/03); 850 So. 2d 882, 890); Maryland (Eagan v. Calhoun, 698 A.2d 1097, 1102 (Md. 1997)), Montana (Fisher v. Missoula White Pine Sash Co., 518 P.2d 795 (Mont. 1974)), Ohio (Bramberger v. Toledo Hosp., 897 F. Supp. 2d 587, 593 (N.D. Ohio 2012)), South

Oklahoma[203] and Washington,[204] hold the claim is only derivative in the very narrow sense that it arises out of the same injury and is not derivative for all other intents and purposes. Three states hold that the wrongful death claims are derivative.[205] These states allow for the claim to be brought only by the heirs.[206] Delaware[207] and Utah[208] allow either the personal representative or the heirs to bring the claim. Arizona allows either the personal representative or the heirs to bring the claim on behalf of all the heirs, however if no heirs survive, the estate may bring the claim.[209] Then there are the remaining seven states that require the claim be brought by the personal representative of the decedent or the estate.[210] Lastly, there is Pennsylvania, which is in its own category, because it enforces arbitration depending on who brings the claim and requires the proceeds go exclusively to the heirs.[211] However, Pennsylvania holds the claims are not derivative of the decedent's rights when brought by the heir, but are derivative when brought by a personal representative.[212] The commonwealth only allows the

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Dakota (Simons v. Kidd, 42 N.W.2d 307, 308 (S.D. 1950)), and Utah (Francis v. S. Pac. Co., 162 F.2d 813, 816 (10th Cir. 1947)).

[203] Boler v. Sec. Health Care, L.L.C., 336 P.3d 468, 472 (Okla. 2014).

[204] Deggs v. Asbestos Corp., 381 P.3d 32, 35 (Wash. 2016).

[205] Delaware (Essick v. Barksdale, 882 F. Supp. 365, 371 (D. Del. 1995)); Illinois (Carter v. SSC Odin Operating Co., LLC, 976 N.E.2d 344, 358 (Ill. 2012)); and New Jersey (Smith v. Whitaker, 734 A.2d 243, 249 (N.J. 1999)).

[206] Louisiana (LA. CIV. CODE ANN. art. 2315.2 (2023)), Maryland (Munger v. U.S., 116 F. Supp. 2d 672, 675 (D. Md. 2000)), and Missouri (MO. REV. STAT. § 537.080 (2023) (however the statute does provide for the appointment of a plaintiff ad litem if there are not any heirs.)).

[207] There are cases in Delaware with both the personal representative and the heirs as plaintiffs. *See* Luff v. Hawkins, 551 A.2d 437 (Del. Super. Ct. 1988) and Taylor v. Riggin, 40 Del. 149, 7 A.2d 903 (Del. Super. Ct. 1939).

[208] UTAH CODE ANN. § 78B-3-106(1) (LexisNexis 2023).

[209] ARIZ. REV. STAT. ANN. § 12-612(a) (2023).

[210] Illinois (740 ILL. COMP. STAT. 180/2 § 2(a) (2023)), Kentucky (KY. REV. STAT. ANN. § 411.130(1) (West 2023)), New Jersey (N.J. STAT. ANN. § 2A:31-2(a) (West 2023)), Ohio (OHIO REV. CODE ANN. § 2125.02(A)(1) (LexisNexis 2023)), Oklahoma (OKLA. STAT. tit. 12, § 1053(A) (2023)), South Dakota (S.D. CODIFIED LAWS § 21-5-5 (2023)), and Washington (WASH. REV. CODE § 4.20.010(1) (2013)).

[211] *See* 42 PA. STAT. AND CONS. STAT. § 8301(b) (West 2023).

[212] Pisano v. Extendicare Homes, Inc., 2013 PA Super 232, 77 A.3d 651, 660 (2013); MacPherson v. Magee Meml. Hosp. for Convalescence, 2015 PA Super 248, 128 A.3d 1209, 1226 (2015).

personal representative to bring the claim if there are no heirs, otherwise the heirs should bring the claims.[213]

Overall, the states that enforce the arbitration agreements generally give the proceeds directly to the heirs, overwhelmingly hold the lawsuits are derivative, and generally require the claims be brought by the personal representative. On the other hand, states that do not enforce arbitration agreements in wrongful death cases require all or the majority of damages to bypass the estate and go to the heirs.[214] Additionally, these states generally hold that the claims are not derivative and appear split on who must bring the claim.[215]

Thus, to the courts, it appears that the issue turns on whether the wrongful death claim is derivative or not. As already stated, the real difference is how these, but states define derivative differently.[216] States enforcing the agreements focus on the original injury, whereas those that do not enforce the agreements focus on the ownership of the claim. Instead, courts should focus on is where the damages go because this is the true indicator of whether a claim is derivative or not. The claim originates with whomever owns or is entitled to recovery is the one whom the claim originates with, regardless of the injury. In most states, the wrongful death claims are not for the injury done to the decedent or the harm caused to the decedent, but instead are for the harm the injury to the decedent caused the heir.

Thus, since recovery belongs to the heirs, the claims do too. Remember back to the discussion of the difference between survival statutes and wrongful death statutes,[217] a survival statute is a derivative claim because the damages truly derive from the harm done to the decedent. However, when the claim focuses on the harm done to the heir by the decedent's death, as opposed to the harm to the decedent done by the injury, the claims should not be considered derivative. Thus, while the issue turns on whether the claims are

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[213] 42 PA. STAT. AND CONS. STAT. § 8301(d) (2023).

[214] Author Note: States that do not enforce arbitration agreements do this unanimously.

[215] Author Note: Though it should be noted that a lower percentage of states favoring non-enforcement hold the claims are not derivative than the states enforcing the arbitration agreements that hold the claims are derivative.

[216] *See supra* Section II.

[217] *See supra* Introduction.

derivative or not by whatever definition that state chooses to use, the claims should turn on where the damages flow, as that should be the deciding factor on if a claim is derivative.

Including Tennessee and Virginia, sixteen states appear to have no precedent on whether arbitration clauses are enforceable in wrongful death claims. Five states do not have clear precedent on whether the claims are even derivative or not: Idaho, Maine, Nebraska, Nevada, and New Hampshire. Further, Tennessee and Virginia likely both fall into the undecided on derivative category. In Virginia, the cases conflict, while the issue is on appeal in Tennessee.[218] Four states appear to hold that the claims are not derivative: Alaska,[219] Montana,[220] North Dakota,[221] and South Carolina.[222] Thus, the remaining five states hold the wrongful death claims are derivative, which are Connecticut,[223] Hawaii,[224] Kansas,[225] Rhode Island,[226] and Vermont.[227] Thus, whenever these courts finally rule on the issue, it is likely the ones who find the wrongful death claim to be derivative will favor enforcing the arbitration clauses and the ones who find the claims are not derivative will disfavor enforcement. Of the undecided states, the closest to reaching a decision is Kansas,[228] as explained earlier, but for the other four, there is no way to determine how the states would rule based on the precedent at hand as the derivative factor appears to be the clear determining factor, even though it should not be.

So, while it is difficult to determine how these four states would rule, it is clear that all four of these states should rule in favor of not enforcing the arbitration clauses, just as should all sixteen undecided states. This is because in all the undecided states, the damages primarily flow to the heirs. Of the sixteen

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[218] *See supra* Section II, Subsection D.

[219] *In re* Est. of Maldonado, 117 P.3d 720, 726 (Alaska 2005).

[220] Fisher v. Missoula White Pine Sash Co., 518 P.2d 795, 797 (Mont. 1974) (superseded by statute on other grounds as stated in Butori v. Bruce Metcalf Sportsman 66, 740 P.2d 1126 (1987)).

[221] Sheets v. Graco, Inc., 292 N.W.2d 63, 67 (N.D. 1980).

[222] *In re* Mayo's Est., 38 S.E. 634, 637 (S.C. 1901).

[223] Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 294 (Conn. 2019).

[224] *In re* Hawaii Fed. Asbestos Cases, 854 F. Supp. 702, 711-12 (D. Haw. 1994).

[225] Frost v. ADT, L.L.C., 947 F.3d 1261, 1271 (10th Cir. 2020).

[226] Malinou v. Miriam Hosp., 24 A.3d 497, 511 (R.I. 2011).

[227] Trepanier v. Getting Organized, Inc., 583 A.2d 583, 270-71 (Vt. 1990).

[228] *See supra* Section II, Subsection D.

undecided states, ten require the damages to flow exclusively to the heirs.[229] Five states distribute funds primarily to the heirs with some caveats for damages for burial, medical, hospital, and funeral fees.[230] New Hampshire which joins Iowa as the only state that distributes wrongful death proceeds to the estate.[231] Thus, it is clear all sixteen of these states should not enforce these arbitration clauses. The money flows to the heirs in all these states, thus, they all should not enforce the arbitration clauses.

Regarding who brings the claim, in nine states the personal representative brings the claim.[232] In Virginia, the claim is brought first by the personal representatives and then the heirs if there are no personal representatives or in very specific scenarios.[233] Four of the undecided states allow either to bring the claim.[234] Lastly, Kansas requires the claims to be brought by the heirs,[235] and North Dakota only allows the personal representative to bring the suit if there are no heirs, otherwise the heirs bring it.[236]

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[229] Alaska (ALASKA STAT. § 09.55.580(a) (2023)); Connecticut (Harris v. Barone, 158 A.2d 855, 856 (Conn. 1960)); Idaho (Farm Bureau Mut. Ins. Co. of Idaho v. Eisenman, 286 P.3d 185, 189 (Idaho 2012)); Kansas (KAN. STAT. ANN. § 60-1905 (2023)); Montana (Hern v. Safeco Ins. Co. of Illinois, 125 P.3d 597, 606 (Mont. 2005)); Nebraska (NEB. REV. STAT. § 30-810 (2023); North Dakota (N.D. CENT. CODE § 32-21-04 (2023)); South Carolina (S.C. CODE ANN. § 15-51-40 (2023)); Tennessee (Memphis St. Ry. Co. v. Cooper, 313 S.W.2d 444, 448 (Tenn. 1958)); and Vermont (VT. STAT. ANN. tit. 14, § 1492(b) (2023)).

[230] Hawaii (HAW. REV. STAT. § 663-3(a) (2023)); Maine (ME. STAT. tit. 18-C, § 2-807(2) (2019)); Nevada (NEV. REV. STAT. § 41.085(2) (2023)); Rhode Island (10 R.I. GEN. LAWS § 10-7-10 (2023)); and Virginia (O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1348 (E.D. Va. 1981)).

[231] N.H. REV. STAT. ANN. § 556:14 (2023).

[232] Alaska (ALASKA STAT. ANN. § 09.55.580(a) (2023)); Connecticut (CONN. GEN. STAT. § 52-555(a) (2023)); Maine (ME. STAT. tit. 18-C, § 2-807(2) (2019)); Montana (MONT. CODE ANN. § 27-1-513 (2023)); Nebraska (NEB. REV. STAT. § 30-810 (2023)); New Hampshire (N.H. REV. STAT. ANN. § 556:10 (2023)); Rhode Island (10 R.I. GEN. LAWS § 10-7-2 (2023)); South Carolina (S.C. CODE ANN. § 15-51-20 (2023)); and Vermont (VT. STAT. ANN. tit. 14, § 1492(a) (2021)).

[233] Virginia (VA. CODE ANN. § 8.01-50(C) (2023) (there is a narrow exception to this rule in the case of a wrongful death claim where the decedent is a fetus. In those cases, the suit is brought by and in the name of the mother).

[234] Hawaii (HAW. REV. STAT. § 663-3(a) (2023)); Idaho (IDAHO CODE § 5-311(1) (2023)); Nevada (NEV. REV. STAT. § 41.085 (2023)) (specifically the statute provides for separate claims for the heirs and the personal representative seeking different types of damages); and Tennessee (TENN. CODE ANN. § 20-5-107(a) (2023)).

[235] KAN. STAT. ANN. § 60-1902 (2023).

[236] N.D. CENT. CODE § 32-21-0 (2023).

Overall, the undecided states are split on whether the claim is derivative and whether the damages bypass the estate. The majority have the personal representative bring the claim. Thus, the undecided states that have not been previously discussed,[237] and that more closely align with the states that favor arbitration are Connecticut, Hawaii, Rhode Island, and Vermont. The states more closely aligned with the states disfavoring arbitration are Alaska, Montana, North Dakota, and South Carolina. The remaining states have too little precedent on the issue to make a good-faith judgment as to which side they lean, however, since all of them but New Hampshire bypass the estate in awarding the proceeds, they all should favor non-enforcement. New Hampshire should join Iowa in enforcing the clause and could serve as another example of how states can fix their wrongful death statutes and still enforce arbitration.

CONCLUSION

Overall, it is clear many states remain very inconsistent with regard to the intersection of their wrongful death statute and arbitration clauses. The solution to reach a consistent position, the position the vast majority of states should take is to not enforce these clauses. In the alternative, they should amend their Wrongful Death Statutes to ensure damages do not bypass the estate and instead go to the estate and allow the claims to belong to the estate. Basically, to follow the model laid out by Iowa generally and Pennsylvania when the estate brings the claim.

Thus, for the reasons outlined in this article, in states where the damages bypass the estate, which is essentially all of them except for Iowa and New Hampshire, arbitration agreements should not be enforced in wrongful death claims because these claims do not belong to the estate and they never belonged to the decedent. Thus, the limitations placed on claims by the decedent should be irrelevant in these claims. In these states, by enforcing the agreements, people's right to a civil jury trial is being violated. It is long overdue for these states to correct course and either change the nature of their wrongful death statutes or not enforce these agreements.

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[237] Author Note: Kansas, Tennessee, and Virginia.