



## Limits on the Enforceability of Agreements to Arbitrate Injury Claims

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Fifty years ago, pre-injury arbitration agreements were unenforceable in most states. Basically, this was because courts believed that the right to have claims resolved in court was a fundamental constitutional right that could not be waived before a claim arose. But in the 1970's, that view began to change. The federal government and the states enacted laws making arbitration agreement provisions enforceable. The enforceability of arbitration clauses has since then been upheld in all manner of contracts, most controversially in the securities industry and the consumer goods market.

Recent case law, though, has shown some limits on the enforceability of arbitration clauses, notably in cases involving claims against nursing homes and claims for wrongful death. Two Kentucky cases have held that an executor bringing a wrongful death claim against a nursing home is not bound by an arbitration clause included in the contract that was signed when the decedent was admitted to the nursing home (*Ping v. Beverly Enterprises*; *Richmond Health v. Nichols*).

Kentucky courts have also become very strict in their interpretation of nursing home arbitration clauses signed under powers of attorney, e.g., where the nursing home contracts had been signed by one holding the power of attorney for an elderly person. In various cases, the courts have held that arbitration clauses included in such contracts were unenforceable where:

- (a) The power of attorney was just a general power (*GGNCS Stanford v. Rowe*);
- (b) The power of attorney only granted the power to make healthcare decisions (*Ping v. Beverly Enterprises*);
- (c) The power of attorney granted the power to make contracts, but did not expressly grant the power to waive constitutional rights (*Extendicare Homes v. Whisman*); and

- (d) The contract with the arbitration clause did not comply with technical Kentucky requirements for positioning the arbitration clause above the signature (*Dixon v. Daymar Colleges Group*).

The lessons are that arbitration clauses may not be enforceable in all types of cases and that an arbitration clause signed under a power of attorney will not be enforced unless it explicitly grants the power to consent to arbitration.