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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RANDALL SOUDEN, Plaintiff and Respondent, v. PACIFICARE LIFE AND HEALTH INSURANCE COMPANY, Defendant and Appellant.	B278004 (Los Angeles County Super. Ct. No. BC498816)

APPEAL from an order of the Superior Court of Los Angeles County, John P. Doyle, Judge. Affirmed.

Hinshaw & Culbertson and Edward A. Stumpp; Law Offices of Hall R. Marston and Hall R. Marston; Sedgwick, Edward A. Stumpp and Hall R. Marston for Defendant and Appellant.

Kabateck Brown Kellner, Brian S. Kabateck, Anastasia K. Mazzella and Nicholas R. Moreno for Plaintiff and Respondent.

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Randall Souden sued PacifiCare Life and Health Insurance Company for wrongful death, alleging his domestic partner, Robert Carey-Hogue, died after PacifiCare refused in bad faith to pay for life-saving medical treatment. PacifiCare petitioned to compel arbitration of the wrongful death claim based on an arbitration provision in Carey-Hogue's health care services contract. The court denied the petition, concluding PacifiCare had waived its right to arbitrate by participating in litigation with Souden and Carey-Hogue prior to Carey-Hogue's death. On appeal PacifiCare contends the court erred in considering the prior litigation in conducting its waiver analysis, an issue we need not decide. Because Souden had not agreed to arbitrate his individual wrongful death claim with PacifiCare and no statutory exception to mutual assent exists that would require Souden, as a nonsignatory to Carey-Hogue's arbitration agreement, to arbitrate his wrongful death claim, we affirm the order denying PacifiCare's petition to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Parties*

In February 2004 Souden and Carey-Hogue applied for individual preferred provider health care services plans (PPO's) with PacifiCare. Souden and Carey-Hogue were HIV positive; Carey-Hogue had AIDS. Both men disclosed their diagnoses to PacifiCare in their respective membership applications, and PacifiCare agreed to enroll each of them in individual PPO plans. Although Souden and Carey-Hogue moved to Missouri in 2004 to be close to ailing parents, they lived in California part of the year, where they obtained specialized medical treatment. In 2009 Souden and Carey-Hogue registered their domestic partnership

with the California Secretary of State in accordance with Family Code section 297.

2. *PacifiCare's Missouri Lawsuit*

In 2007 PacifiCare stopped paying medical benefits to both Souden and Carey-Hogue while it continued to accept their premiums for each of their PPO policies. In June 2008 PacifiCare filed a lawsuit in Missouri seeking to rescind Souden's and Carey-Hogue's individual PPO plans on the ground they were procured by fraud. PacifiCare alleged Souden and Carey-Hogue had intentionally misrepresented Los Angeles, California as their home residence when, in fact, they lived in Kansas City, Missouri. Souden and Carey-Hogue initially filed counterclaims in the Missouri action for breach of contract, then voluntarily dismissed their claims prior to trial. Following a bench trial, the Missouri trial court found the couple maintained residences in both states and thus did not commit fraud. On February 2, 2010 the court issued a judgment in favor of Souden and Carey-Hogue and ordered PacifiCare to pay medical benefits to both men. PacifiCare appealed. In 2012 the Missouri appellate court affirmed the judgment. (*Golden Rule Ins. Co. v. R.S.* (Mo. App. 2012) 368 S.W.3d 327, 339 (*Souden I*).)

3. *Souden and Carey-Hogue's California Lawsuit*

On June 4, 2009, the day after dismissing their counterclaims in the Missouri action, Souden and Carey-Hogue sued PacifiCare in Los Angeles Superior Court alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing and unfair business practices. The trial court sustained PacifiCare's demurrer to their complaint without leave to amend, finding that Souden and Carey-Hogue's

claims were barred under principles of res judicata (claim preclusion) because, as compulsory counterclaims under Missouri law, they were required to be asserted in *Souden I.* Our Division Eight colleagues affirmed the judgment on appeal. (*R.S. v. PacifiCare Life & Health Ins. Co.* (2011) 194 Cal.App.4th 192, 195, 203 (*Souden II*).)

4. *Souden's Lawsuit for Wrongful Death and Survivor Damages After Carey-Hogue's Death*

Carey-Hogue died in 2011. On January 9, 2013 Souden filed the instant lawsuit against PacifiCare for wrongful death (Code Civ. Proc., § 377.60) and sought damages in a derivative claim as Carey-Hogue's survivor (Code Civ. Proc., § 377.30). The trial court sustained PacifiCare's demurrer without leave to amend, finding both of Souden's claims were barred by res judicata, and entered judgment in favor of PacifiCare. We reversed the judgment on appeal. Because Souden's wrongful death cause of action seeking damages for loss of consortium asserted a different primary right from that alleged in *Souden I* and *Souden II,* we held the trial court erred in sustaining PacifiCare's demurrer to that claim on claim preclusion grounds. (*R.S. v. PacifiCare Life and Health Insurance Company* (Apr. 27, 2015, B254235) [nonpub. opn.] (*Souden III*).) We remanded the matter to the trial court with directions to vacate its order sustaining PacifiCare's demurrer without leave to amend and to enter a new order overruling the demurrer with respect to Souden's wrongful death claim and sustaining the demurrer without leave to amend with respect to Souden's survivor claim. (*Ibid.*)

5. *PacifiCare's Petition To Compel Arbitration of Souden's Wrongful Death Claim*

On December 23, 2015 PacifiCare petitioned to compel arbitration of Souden's wrongful death claim. PacifiCare alleged Carey-Hogue's 2004 application for health benefits contained an arbitration provision requiring PacifiCare and Carey-Hogue to arbitrate all disputes between them, including all non-ERISA[1] claims relating to the delivery of services under the PPO plan.[2] PacifiCare asserted Souden's wrongful death action, based on PacifiCare's alleged bad faith failure to pay benefits to Carey-Houge and/or his medical providers, fell squarely within the scope of the arbitration agreement.

Souden opposed the petition to compel arbitration on two grounds. Because he was not a signatory to Carey-Hogue's arbitration agreement, he argued he was not bound by it. In any event, he asserted, PacifiCare had waived any right it might otherwise have to arbitrate by litigating essentially the same

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[1] "ERISA" is an acronym for the Employee Retirement Income Security Act of 1974. (29 U.S.C. § 1001 et seq.)

[2] Paragraph 10 of the health insurance application Carey-Hogue signed provided, "**I AGREE AND UNDERSTAND THAT ANY AND ALL DISPUTES, INCLUDING CLAIMS RELATING TO THE DELIVERY OF SERVICES UNDER THE PLAN AND CLAIMS OF MEDICAL PRACTICE . . . EXCEPT FOR CLAIMS SUBJECT TO ERISA, BETWEEN MYSELF AND MY DEPENDENTS ENROLLED IN THE PLAN (INCLUDING ANY HEIRS OR ASSIGNS) AND PACIFICARE OF CALIFORNIA OR ANY OF ITS PARENTS, SUBSIDIARIES OR AFFILIATES SHALL BE DETERMINED BY SUBMISSION TO BINDING ARBITRATION.**"

issue in multiple actions in two different states over a period of seven years.

The trial court assumed, without deciding, that the arbitration agreement was enforceable against Souden, a nonsignatory to the agreement, but found PacifiCare had nonetheless waived its right to arbitration. The court rejected PacifiCare's characterization of the dispute as having been only briefly litigated in the instant action. "PacifiCare's conduct consisted of substantive challenges to the parties' insurance policies through the Missouri action and to Souden and Carey-Hogue's claims through the demurrers in the California state actions, all of which were subject to appellate litigation. This litigation history has spanned from June 2008 to October 2015, during which time period PacifiCare has offered no evidence of any action taken that is consistent with its intent to invoke arbitration. Where PacifiCare has used the litigation process from June 2008 to October 2015 to substantively challenge the insurance policies and claims of Souden and Carey-Hogue arising thereunder, the [c]ourt concludes that any benefits of arbitration have been lost, resulting in prejudice."

DISCUSSION

1. *Standard of Review*

We review the trial court's interpretation of an arbitration agreement de novo when, as here, that interpretation does not depend on conflicting extrinsic evidence. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*); *DMS Services LLC, v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352 (*DMS Services*).) Our de novo review includes assessing the scope of an arbitration provision (*RN Solution, Inc. v. Catholic Healthcare West* (2008)

165 Cal.App.4th 1511, 1522; *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684), as well as determining whether and to what extent nonsignatories may be compelled to arbitrate. (*Marenco v. DirecTV LLC* (2015) 233 Cal.App.4th 1409, 1416 (*Marenco*); *DMS Services,* at p. 1352.)

The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence an agreement to arbitrate a dispute exists; the party opposing arbitration bears the burden of proving any defense, such as waiver of the right to arbitrate. (*Pinnacle, supra*, 55 Cal.4th at p. 236; *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1128; see *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195, fn. 4 [in the arbitration context, under both California and federal law the term waiver is used "'as a shorthand statement for the conclusion that a contractual right to arbitration has been lost'"]; *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315 [same]; see also *Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1042 [waiver in the arbitration context does not require a voluntary relinquishment of the right to arbitrate, and a party may waive the right without any intent to do so].)

2. *The Court Properly Denied PacifiCare's Petition To Compel Arbitration*

a. *Governing law*

Arbitration is a matter of contract. (*American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, 233 [133 S.Ct. 2304, 186 L.Ed.2d 417]; *Pinnacle, supra,* 55 Cal.4th at p. 236.) While it is well-recognized that federal and state public policies favor arbitration (*Epic Systems Corp. v. Lewis* (2018) __ U.S. __ [138 S.Ct. 1612, 1621, 200 L.Ed.2d 889] [federal public policy

favors arbitration]; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 375 [state public policy favoring arbitration]), "'there is no policy compelling persons to accept arbitration of controversies [that] they have not agreed to arbitrate.'" (*Bouton v. USAA Casualty Ins. Co.* (2008) 43 Cal.4th 1190, 1199; accord, *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.)

Because an agreement to arbitrate requires mutual assent, generally """one must be a party to an arbitration agreement to be bound by it or invoke it."""" (*Marenco, supra,* 233 Cal.App.4th at p. 1416; accord, *Molecular Analytical v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 707-708.) There are, however, exceptions to this requirement. (See *Pinnacle, supra*, 55 Cal.4th at p. 240 ["As we have previously recognized, however, various legal theories allow for delegated authority to consent. Not only do common law principles such as fiduciary duty and agency permit enforcement of arbitration agreements against nonsignatory third parties, but the Legislature can also provide for the reasonable delegation of authority to consent."]; *DMS Services, supra,* 205 Cal.App.4th at p. 1353 [citing agency, alter-ego and third party beneficiary exceptions to mutual assent requirement to arbitration].)

b. *Code of Civil Procedure section 1295 binds wrongful death plaintiffs in medical malpractice cases to a decedent's agreement to arbitrate*

Code of Civil Procedure section 1295 (section 1295), enacted as part of the Medical Injury Compensation Reform Act of 1975 (MICRA), governs agreements between a patient and his or her health care provider to resolve professional negligence claims through binding arbitration. Subdivision (g)(2) of section 1295

defines "professional negligence" to include a negligent act or omission to act by a health care provider in rendering health care services and expressly includes claims for personal injury and wrongful death.

In *Ruiz v. Podolsky* (2010) 50 Cal.4th 838 (*Ruiz*) the Supreme Court resolved a three-decades-old controversy and held an agreement between patient and health care provider to resolve all medical malpractice claims through binding arbitration in accordance with section 1295 also obligated the patient's nonsignatory heirs to arbitrate their wrongful death claims arising from the provider's professional negligence. The *Ruiz* Court began its analysis by recognizing the difference between a wrongful death claim and a survivor claim—the former is individual to the loss of consortium and pecuniary injury suffered by the surviving plaintiff while the latter is derivative of the decedent's own losses. (*Ruiz,* at p. 844 ["'[u]nlike 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 pecuniary injury suffered by a loss of a relative, and distinct from any the deceased may have maintained had he survived"'"]; *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 283 [same].) Ordinarily a plaintiff pursuing his or her own claim, rather than a derivative claim on behalf of the decedent, would not be bound by the decedent's agreement to arbitrate. However, the *Ruiz* Court found permitting nonsignatory wrongful death claimants to sue in court would frustrate the purpose of section 1295, as part of MICRA, "'to encourage and facilitate arbitration of medical malpractice disputes'" and thereby further "MICRA's goal of reducing costs in the resolution of malpractice claims and

therefore malpractice insurance premiums." (*Ruiz,* at p. 844.) Construed in light of its purpose, the Supreme Court explained, section 1295 "intends to give patients and health care providers the option of entering into an agreement that will resolve all medical malpractice claims, including wrongful death claims, by arbitration. Requiring that wrongful death claimants be bound by arbitration agreements only when they themselves have been signatory to them effectively forecloses that option for practical and public policy reasons." (*Ruiz,* at p. 851.) "Because the Legislature contemplated the inclusion of wrongful death claims within the arbitration agreements drafted pursuant to section 1295, but obviously could not have intended that the patient's heirs be signatories to these arbitration agreements," the Court concluded "the Legislature intended to permit patients to bind any heirs pursuing wrongful death actions to these agreements." (*Ruiz,* at p. 851.) Accordingly, the Court held, the decedent's wife and adult children, plaintiffs in *Ruiz*, were required to arbitrate their wrongful death claim based on the health care provider's professional negligence. (*Id.* at p. 853.)

c. *Neither* Ruiz *nor section 1295 applies in this nonmedical malpractice case for wrongful death; accordingly, Souden was not bound by Carey-Hogue's agreement to arbitrate*

PacifiCare argues *Ruiz* controls Souden's wrongful death lawsuit. While acknowledging section 1295, by its terms, does not apply to health care service plans such as PacifiCare, which is licensed under a separate statutory scheme (see § 1295, subd. (f)),[3] it argues its licensure is immaterial because there is a

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[3] Section 1295, subdivision (f), provides that section 1295's arbitration disclosure requirements for medical services "shall

substantially similar arbitration provision governing health care service plans in Health and Safety Code section 1363.1. That provision, like section 1295, authorizes arbitration to resolve disputes provided certain disclosure requirements are satisfied. (See Health & Saf. Code, § 1363.1, subd. (c) ["[t]he disclosure shall clearly state whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other disputes relating to the delivery of service under the plan, or both, and shall be substantially expressed in the wording provided in subdivision (a) of Section 1295 of the Code of Civil Procedure"].)

Insisting that Health and Safety Code section 1363.1 and Code of Civil Procedure section 1295 are effectively identical, PacifiCare contends there is no principled reason to distinguish between the wrongful death complaint in *Ruiz* and the wrongful death cause of action in Souden's lawsuit. PacifiCare is mistaken. As discussed, arbitration is generally a matter of mutual assent. The legislative exception to the requirement of mutual assent to arbitrate for wrongful death plaintiffs in medical malpractices cases created by MICRA and set forth in section 1295 is entirely absent from Health and Safety Code section 1363.1. That omission is significant. If section 1295 had not expressly included wrongful death claims within its ambit, it is unlikely the Supreme Court in *Ruiz* would have concluded the

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not apply to any health care service plan contract offered by an organization . . . licensed pursuant to Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code, which contains an arbitration agreement if the plan complies with paragraph (10) of section 1363 of the Health and Safety Code . . . ."

Legislature intended to create a statutory exception to the mutual assent requirement for arbitration in medical malpractice wrongful death cases. (See *Ruiz, supra,* 50 Cal.4th at pp. 850-851 [analyzing policy justifications for including wrongful death provision in section 1295].)

Other appellate courts have rejected similar efforts to extend *Ruiz* to circumstances not involving section 1295 or medical malpractice. In *Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, a widow and her children filed a wrongful death action against a hospital for negligence and elder abuse unrelated to medical malpractice. The hospital petitioned to arbitrate the dispute, relying on the decedent's agreement to arbitrate controversies arising out of his hospital stay. The wrongful death plaintiffs opposed the petition, arguing that as nonsignatories to the agreement, they had not agreed to arbitrate their individual wrongful death claim and, because their claim was rooted in elder abuse, not in medical malpractice, section 1295 and the exception to mutual assent articulated in *Ruiz* were inapplicable. The *Avila* court agreed. Absent a claim of professional negligence by a health care provider, section 1295 did not apply, and, therefore, neither did *Ruiz*. (*Avila,* at p. 842 [because the primary basis for the wrongful death cause of action was elder abuse, and not professional negligence as defined by MICRA, "section 1295 does not apply and neither does *Ruiz*'s exception to the general rule that one who has not consented cannot be compelled to arbitrate"].)

Similarly, in *Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 684-685 (*Daniels*), the court rejected a residential care facility's attempt to extend *Ruiz,* by analogy, to arbitration agreements that were not governed by section 1295

and did not involve medical malpractice. In *Daniels* the daughter of the deceased resident of a residential care facility for the elderly brought an action against the facility asserting a survivor claim for elder abuse and an individual wrongful death claim. The daughter argued in the trial court and on appeal that, as a nonsignatory to the arbitration agreement the decedent had signed, she was not bound to arbitrate her own wrongful death claim. The *Daniels* court agreed, citing two independent grounds.

First, the *Daniels* court noted the arbitration provision in the decedent's agreement was directed solely to "'your' claims" and did "not mention or allude to wrongful death or other third party claims. [I]n context, the statement that the arbitration clause 'binds all parties to the Agreement and their spouse, heirs, representatives, executors, administrators, successors, and assigns as applicable,' means only that the clause is binding on persons who would assert survivor claims on behalf of [the decedent]." (*Daniels, supra,* 212 Cal.App.4th at p. 683.) "More generally," the court held, "we disagree that *Ruiz* should be extended to arbitration agreements not governed by section 1295 or that are entered into with a person other than a health care provider for claims other than medical malpractice." (*Ibid.*) Finding no "statutory analog" to section 1295 applicable to the plaintiffs' wrongful death claim based on elder abuse, the court held the wrongful death plaintiffs, nonsignatories to the decedent's arbitration agreement with the hospital, could not be compelled to arbitrate their dispute.[4]

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[4] The court also upheld the trial court's ruling denying arbitration of the daughter's survivor claim based on possibility of conflicting rulings if the daughter's survivor claim was subject

Here, as PacifiCare correctly observes, the arbitration agreement Carey-Hogue signed governs "any and all [non-ERISA] disputes" between Carey-Hogue, his heirs and assigns, on the one hand, and PacifiCare and its successors-in-interest, on the other hand. The breadth of that arbitration clause, in contrast to *Daniels,* would cover claims other than the decedent's own medical malpractice claims. Nonetheless, the exception to mutual assent recognized in *Ruiz* for professional negligence claims against health care providers does not apply in this bad faith breach of contract action against a health care service plan. (See *Bush v. Horizon West* (2012) 205 Cal.App.4th 924, 930 [plaintiff seeking damages for intentional infliction of emotional distress arising out of elder abuse not bound by victim's arbitration agreement; *Ruiz* does not govern in this case involving neither medical malpractice nor wrongful death].)

PacifiCare attempts to distinguish the persuasive reasoning of *Avila* and *Daniels* by arguing the statutory analog to section 1295, absent in those cases, can be found in Health and Safety Code section 1363.1. However, as discussed, Health and Safety Code section 1363.1 does not mention wrongful death claims, nor is it irrational for the Legislature to have authorized arbitration of wrongful death claims based on professional negligence even without the consent of the wrongful death plaintiff and not to have created a similar exception to mutual

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to arbitration and her wrongful death claim was not. (*Daniels, supra,* 212 Cal.App.4th at p. 686.)

assent in cases not involving the medical malpractice insurance crisis addressed in MICRA.[5]

PacifiCare insists the same basic policy justification for binding wrongful death plaintiffs to a decedent's arbitration agreement in medical malpractice cases involving health care providers also exist in nonmedical malpractice cases involving health care service contracts—reducing litigation costs, thereby reducing plan premiums. That purpose, PacifiCare argues, would be frustrated if a plan member's heirs could sue in court for wrongful death. As the *Ruiz* Court observed, "'[I]t is obviously unrealistic to require the signatures of all the heirs [to an arbitration agreement], since they are not even identified until

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[5] MICRA was a response to a perceived crisis regarding the availability of medical malpractice insurance. " ' The problem . . . arose when the insurance companies which issued virtually all of the medical malpractice insurance policies in California determined that the costs of affording such coverage were so high that they would no longer continue to provide such coverage as they had in the past. Some of the insurers withdrew from the medical malpractice field entirely, while others raised the premiums which they charged to doctors and hospitals to what were frequently referred to as 'skyrocketing' rates. As a consequence, many doctors decided either to stop providing medical care with respect to certain high risk procedures or treatment, to terminate their practice in this state altogether, or to 'go bare,' i.e., to practice without malpractice insurance. The result was that in parts of the state medical care was not fully available, and patients who were treated by uninsured doctors faced the prospect of obtaining only unenforceable judgments if they should suffer serious injury as a result of malpractice.'" (*Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 577-578.)

the time of death, or they might not be available when their signatures are required. Furthermore, if they refused to sign they should not be in a position possibly to delay medical treatment to the party in need.'" (*Ruiz, supra,* 50 Cal.4th at p. 850.) In addition, requiring patients to obtain signatures of heirs would risk disclosure of confidential medical information. (*Id.* at p. 851.)

PacifiCare urges *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718, 725-726, decided more than two decades before *Ruiz,* is analogous. In that case the decedent's widow, five minor children and three adult children filed a wrongful death action alleging medical malpractice. The trial court enforced the arbitration clause in decedent's health care services plan against the decedent's spouse and minor children, all of whom were members of decedent's health care services plan, but not against the decedent's adult children, who were not members of the plan and had not agreed to arbitration. The court of appeal reversed in part, holding the adult, nonsignatory heirs were also bound by the decedent's arbitration agreement. In reaching its decision the court emphasized policy and pragmatism: To allow the nonsignatory heirs to proceed in court would result in splitting the litigation into different tribunals, undermining the established legislative policy that a single cause of action exists in the heirs for the wrongful death of a decedent. (*Id.* at p. 725.) In addition, the court observed, the health care service provider's contractual expectancy of arbitration would be defeated if, despite its agreement with the decedent to arbitrate disputes, it were nonetheless compelled to litigate wrongful death claims by the decedent's heirs in court. (*Ibid.*)

The *Herbert* court also cited section 1295 for additional justification. While recognizing section 1295 was "inapplicable to so-called 'health care service plans'" such as Herbert's, the court suggested section 1295 nonetheless evidenced a broader legislative intent that nonsignatory heirs in a wrongful death action involving medical malpractice are bound by the decedent's agreement to arbitrate. (*Herbert v. Superior Court, supra,* 169 Cal.App.3d at p. 727; see *Ruiz, supra,* 50 Cal.4th at p. 846 ["[a]lso critical to the *Herbert* court's determination was the enactment of section 1295, providing for arbitration of 'professional negligence' claims, including wrongful death"].)

While the *Ruiz* Court cited *Herbert* in its historical discussion of the controversy then existing in the courts of appeal regarding the extent to which nonsignatory heirs were obligated to arbitrate wrongful death claims (*Ruiz, supra,* 50 Cal.4th at p. 850), it did not approve of the holding of *Herbert* in contexts not involving medical malpractice. We have serious doubts about the soundness of *Herbert's* reliance on section 1295, as well as that decision's continued vitality following the enactment of section 1363.1 (see Stats. 1994, ch. 653, § 3) and the Supreme Court's decision in *Ruiz* in 2010. Nonetheless, we need not reach that question. Souden's wrongful death cause of action is rooted not in medical malpractice but in bad faith breach of contract. Neither section 1295 nor *Ruiz* (nor *Herbert,* for that matter) controls. (See *Avila v. Southern California Specialty Care, Inc., supra,* 20 Cal.App.5th at pp. 843-845; *Daniels, supra,* 212 Cal.App.4th at p. 685.)

The Legislature may at some future time create an exception to the requirement of mutual assent for arbitration of wrongful death claims against health care service plans in cases

not involving medical malpractice similar to the exception set forth in section 1295. Until then, we are bound by the well-settled principle that a party who has not consented to arbitration cannot be compelled to arbitrate his or her own, nonderivative cause of action. The trial court did not err in denying PacifiCare's petition to compel arbitration of Souden's wrongful death claim.

DISPOSITION

The order denying PacifiCare's petition to compel arbitration is affirmed. Souden is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.