

ARBITRATION**ARIZONA COURTS CONTINUE TO FAVOR ARBITRATION***by Denise H. Troy*

In *Gullett v. Kindred Nursing Centers West*, ___ Ariz. ___, 758 Ariz. Adv. Rep. 12 (App. 2017), the Arizona Court of Appeals ruled that an arbitration agreement between a patient and a convalescent hospital was enforceable over a challenge that it was unfairly one-sided. Mr. Gullett signed an arbitration agreement at the time of his admission to Hacienda Care and Rehabilitation Center. He died approximately one month later. His son brought suit alleging that Hacienda had violated Arizona's Adult Protective Services Act, and caused his father's death. Kindred, the parent of Hacienda, moved to compel arbitration. The son objected, arguing that the arbitration agreement was unenforceable, claiming the agreement contained provisions that unfairly benefited Kindred, and denied the son rights he would have in a lawsuit. The son specifically asserted that the agreement: substantially limited discovery; the arbitration administrator identified in the agreement lacked neutrality; and the agreement did not impose mutual obligations on each of the parties. The Court of Appeals disagreed.

The arbitration agreement allowed the parties to take six lay and two expert witness depositions. It also allowed limited written discovery. The parties could agree to more discovery or the arbitrator could order additional discovery, if deemed "necessary and proper." Stating that arbitration limits on discovery are only unfair if the permitted amount of discovery is so low and the showing of a need for more discovery is so high that the claimant's ability to vindicate his or her right is impeded, the Court found that the amount of discovery permitted in the Kindred arbitration agreement was fair, and did not render the agreement unenforceable.

The agreement also provided that the parties might use the services of a particular arbitration administration service. However, the agreement allowed the parties to choose a different administration service, and also allowed them to select the arbitrators. Because the agreement sought to use truly neutral arbitrators, the court found that this was not fundamentally unfair.

Finally, as to the lack of mutuality, the son argued that Kindred had no real claims against a former patient and so was not giving up any rights. The Court of Appeals disagreed stating that both parties were required to arbitrate all claims, not just medical malpractice claims. If Kindred had a claim against a patient, for example, one for non-payment, it would also be required to arbitrate, rendering the provision mutual.

Gullett makes clear that arbitration is still favored in Arizona. For an arbitration provision to be enforceable, especially in a consumer

transaction, it should allow sufficient discovery, or, at a minimum, permit the arbitrator to set fair discovery parameters; ensure that the manner of selecting an arbitrator results in the arbitrator being truly neutral; and requires both sides to arbitrate their disputes. These issues should be taken into consideration when preparing arbitration provisions in contracts.

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