Arkansas Association of Defense Counsel

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***Courtyard Gardens v. Arnold* – Supreme Court Holds Arbitration Agreement Enforceable Despite Unavailability of National Arbitration Forum under the Federal Arbitration Act**

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In *Courtyard Gardens Health and Rehabilitation, LLC v. Arnold*, 2016 Ark. 62 (Feb. 18, 2016), the Arkansas Supreme Court upheld an arbitration agreement in a nursing home negligence case, reversing Judge McCallum's decision that the agreement was impossible to perform. Justice Danielson, along with Justice Wynne and Special Justice Ryan Allen, dissented from Justice Baker's majority opinion.

Factual and Procedural Background. The underlying case was filed by Appellee Malinda Arnold as personal representative of the Estate of Jessie James Bullock and as attorney-in-fact of Annie Bullock against long-term care facility Courtyard Gardens. The Bullocks were admitted to Courtyard Gardens in 2009 by their daughter, Linda Gulley, who had power of attorney. Ms. Gulley entered an Admission Agreement and optional Arbitration Agreement on each parent's behalf. The Arbitration Agreement, in relevant part, provides:

> It is understood and agreed by [the parties] that any and all claims, disputes and controversies (hereafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, ("NAF") which is hereby incorporated into this Agreement, and not by a lawsuit or resort to court process. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.
> …
> In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the Agreement shall remain effective.
> …
> **THE PARTIES UNDERSTAND AND AGREE THAT THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES, AND THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECIION OR AWARD OF DAMAGES.**

Mr. Bullock remained a resident of Courtyard until April 10, 2012, and passed away on April 15, 2012

at the hospital in Arkadelphia. Mrs. Bullock remained a resident until she was discharged on December 7, 2012. On July 25, 2013, Malinda Arnold (the Bullocks' other daughter), filed a Complaint against Courtyard Gardens and others, asserting causes of action for negligence, medical malpractice, violations of the Long-Term Care Facility Residents' Rights Act, breach of the provider agreement, and violations of the Arkansas Deceptive Trade Practices Act, all arising from care and treatment provided to Mr. and Mrs. Bullock during their respective residencies at Courtyard. On August 27, 2013, Courtyard filed a timely answer reserving the right to enforce any applicable arbitration agreement after conducting an initial investigation to determine whether a valid arbitration agreement existed.

On December 23, 2013, Courtyard filed a motion to compel arbitration, arguing that the arbitration agreement was valid and encompassed Arnold's claims. In response, Arnold argued the agreement was unenforceable based on impossibility of performance, among other defenses. With respect to impossibility, Arnold argued that the arbitration agreement was impossible to perform because the agreement selected the National Arbitration Forum ("NAF") to serve as arbitrator, and the NAF is unavailable to arbitrate the parties' dispute due to a consent decree it entered with the Minnesota Attorney General to no longer arbitrate consumer disputes. The parties agreed that the Federal Arbitration Act ("FAA") governed the agreement and that the agreement encompassed Arnold's claims.

After a hearing, the circuit court denied the motion to compel arbitration in a written order. The circuit court held that the parties entered a valid arbitration agreement and that the agreement was not unconscionable, but was impossible to perform due to the unavailability of the NAF. With respect to impossibility, the circuit court held: "The Arbitration Agreement is impossible to perform because it incorporates the [NAF] Code of Procedure. Rule 1 of the NAF Code requires the NAF to serve as arbitrator of any disputes between the Plaintiff and Defendants. As such, the NAF Code is an integral term of the Arbitration Agreement. Because the NAF is no longer in business and is unavailable to serve as arbitrator over this dispute, the Agreement is impossible to perform." Courtyard filed its Notice of Appeal on September 26, 2014, pursuant to Arkansas Rule of Appellate Procedure—Civil 2(a)(12).

Supreme Court Analysis and Rationale. Before the Supreme Court, Courtyard argued that the circuit court erred in holding the arbitration agreement was impossible to perform. In its analysis, the Arkansas Supreme Court began with setting out the general framework for assessing the validity and enforceability of arbitration agreements governed by the FAA. First, Congress enacted the FAA to "overcome judicial resistance to arbitration." (citing *Regional Care of Jacksonville, LLC v. Henry*, 2014 Ark. 361, at 6). When the FAA governs, it supplies both a procedural framework and federal substantive law regarding arbitration, as well as implicates the national policy favoring arbitration when the parties contract for that mode of dispute resolution. (citing *Preston v. Ferrer*, 552 U.S. 346, 349 (2008)). Second, courts look to state contract law to determine the validity and enforceability of agreements to arbitrate.

Under that framework, the Court considered whether Arnold had proven, as the circuit court held, that the arbitration agreement was impossible to perform because the NAF was unavailable to arbitrate the parties' dispute. More specifically, Arnold contended that because the arbitration agreement incorporates the NAF Code and the NAF Code Rule 1(A) provides it may only be "administered" by the NAF, the agreement effectively selects the NAF as arbitrator. The Court discussed the "exceedingly difficult standard" used to determine whether the defense of impossibility of performance is satisfied:

> The burden of proving impossibility of performance, its nature and extent and causative effect rests upon the party alleging it. He must show that he took virtually every action within his power to perform his duty under the contract. It must be shown that the thing to be done cannot be

> effected by any means. Resolution of the question requires an examination into the conduct of the party pleading the defense in order to determine the presence or absence of fault on his part in failing [to] perform.

(citing *Frigillana v. Frigillana,* 266 Ark. 296, 302-03, 584 S.W.2d 30, 33 (1979)). The Court held Arnold "clearly failed to satisfy her burden of proving impossibility of performance" and "failed to demonstrate that the agreement to arbitrate 'cannot be effected by any means.'" The Court pointed to a severance provision in the NAF Code, which qualified Rule 1(A) and indicated the Code could be utilized without the NAF's involvement. The Court further pointed to NAF Code Rule 48(D), which provided that the parties may seek "legal and other remedies in accord with applicable law" if denied the opportunity to arbitrate before the NAF. Section 5 of the FAA, which provides for appointment of a substitute arbitrator in the event the parties' designated arbitrator is not available, constituted such "applicable law" and required appointment of a substitute arbitrator in place of the NAF.

In addition, the Court analyzed the unavailability of the NAF under the framework invoked by the majority of courts across the country in addressing the unavailability of arbitral forums in arbitration agreements—the integral-ancillary distinction. As the Court recognized, many courts addressing whether a substitute arbitrator can be appointed pursuant to Section 5 of the FAA have applied the framework set out in *Brown v. ITT Consumer-Financial Corp.*, 211 F.3d 1217 (11th Cir. 2000). The *Brown* Court focused on whether the reference to the arbitral forum named in the agreement was integral to the parties' decision to arbitrate or merely an ancillary concern.

Applying this test, the Court held that the NAF term in the agreement was merely a logistical concern and that Section 5 of the FAA applied. In support of this holding, the Court explained: 1) the "binding arbitration" language did not mandate the claims be arbitrated with the NAF, rather the language required that arbitration be the only means of resolving claims; 2) the mandatory language of "shall" applied to arbitration generally, not the NAF or a specific arbitrator; 3) the agreement required the use of the NAF's Code of Procedure, not that the NAF was required to conduct the arbitration; and 4) the agreement contained a severability clause, which further evidenced the parties' intent to arbitrate even if part of the agreement was unenforceable. In sum, the Court concluded that "[b]ased on the intention of the parties as expressed in the arbitration agreement, and in order to give effect to the arbitration requirement, *the sole purpose of the parties' agreement*, we hold that the NAF term is merely an ancillary logistical concern and is severable. (emphasis added).

Based on Section 5 of the FAA, the severability provisions in both the arbitration agreement and the NAF Code, and the intent of the parties as demonstrated in the agreement, the Court held that the NAF's unavailability did not render the agreement unenforceable, and reversed the circuit court's decision to the contrary. The case was remanded with instructions that it be compelled to arbitration.

The thanks of the AADC go out to Samantha Blassingame Leflar for writing this article.

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