

## Critics claim arbitration in medical cases limits rights

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Henderson resident Sandy Runkle visited a new doctor recently and, understandably, missed a few signatures on the voluminous intake paperwork.

But the mistake she had made that caused her the most concern was something she initially signed: A document stating that any dispute arising from her association with the doctor would be submitted to binding arbitration, which in many cases prohibits people from suing in court.

She crossed out her signature, making it clear she would not agree to binding arbitration, and said she was told she would have to find another doctor.

"People just sign these things," Runkle said. "They're not aware they're giving up their civil rights.

"It's my legal right. It's my constitutional right. It's one of our basic rights. I don't want it taken from me."

Runkle said she was told that the Dr. Dipak Desai case, in which thousands of Southern Nevadans had to be tested for hepatitis C and HIV because of unsanitary practices, was behind the binding arbitration push, but that claim is disputed by other doctors and insurance regulators.

And while binding arbitration agreements have become embedded in nearly every facet of consumer society, their use in medicine remains controversial.

Arbitration diverts disputes out of the courtroom and into a private process that has its merit when done fairly. Arbitration can be faster and cheaper than a lawsuit, and since it's "binding," it usually avoids the purgatory of seemingly endless appeals.

Arbitration clauses were an issue in Southern Nevada about a decade ago when doctors increasingly turned to the agreements to stave off skyrocketing insurance premiums. Now, a wave of lawsuits has started because of the 2008 Desai case, where nine hepatitis C infections were linked to his clinics.

Runkle said she was told by Desert Gastroenterology, the practice she walked away from, that the Desai case was driving up rates and making binding arbitration clauses necessary. A representative of the practice refused to comment for this story. Desert Gastroenterology was not affiliated with Desai.

Despite the awfulness of that high-profile case, malpractice rates are not increasing overall, according to doctors and insurance regulators.

And voter-approved tort reform enacted in 2004 appears to be keeping the medical malpractice insurance market stable.

"There are a couple of malpractice insurance companies that require their doctors to do binding arbitration, or else they penalize them with higher premiums," said Jake Sunderland, spokesman for the Nevada Insurance Commission.

Sunderland said the insurance commission's data doesn't show a rate spike.

"Rates have been steady or even a little down over the last three years," he said. "As a whole, the market is very competitive and healthy."

But that's the big picture, he said. An individual practice's experience may vary.

"Maybe these doctors are exposed to more risk," he said. "Maybe they need to shop around for insurance."

Dr. Mitchell Forman, a rheumatologist and dean of the medical school at Touro University Nevada, also isn't aware of increases.

"As far as I know, they have not," said Forman, who doesn't use binding arbitration agreements in his practice. "They've been pretty stable."

He also doubted that the Desai case would be used to judge other doctors.

"This Desai case is crazy. So bizarre. So ridiculous," he said. "Everything about that case is the antithesis of good medical care."

## **SIGN HERE**

The American Arbitration Association, the world's largest arbitration trade organization, has studied the use of binding arbitration clauses for medical services and said they shouldn't be a prerequisite for receiving medical care.

"Notwithstanding that, there are lots of doctors who do it, there are lots of hospitals that do it, and courts in general will enforce these," said Jean Sternlight, a law professor at the University of Nevada, Las Vegas and director of the Saltman Center for Conflict Resolution.

"They're especially common in institutions. The bigger the institution, the more likely they are to have them."

**Large entities like health maintenance organizations use binding arbitration agreements, as do the "vast majority" of nursing homes, said Paul Bland, an attorney for the public interest law firm Public Justice who frequently challenges arbitration clauses in court.**

**But, "they just have not caught on among doctors," he said.**

**"In my experience, very few individual doctors use the clauses. Most doctors feel that it would be harmful to their relationship with the patients."**

Forman agreed.

"My observation and discussion with a variety of people ... I would say that this, in fact, is not common," he said. "Whether it's increasing in frequency, I have no knowledge."

## **LEVEL PLAYING FIELD**

Courts have generally allowed arbitration agreements to stand unless they are obviously slanted against the consumer, as the Nevada Supreme Court found in two cases with significance in the state.

Both involved home construction defects.

The court tossed out binding arbitration clauses that were in the contracts buyers signed because the clauses were buried in legalese and contained misleading language about what the clause meant and the potentially high costs of arbitration.

"They have actually been one of the courts that are the least enthusiastic about these kinds of clauses," Sternlight said, and justices "are willing to strike down arbitration clauses in some circumstances."

**Bland, the Public Justice attorney, has found other courts willing to void anti-consumer binding arbitration clauses, too.**

**The offending clause might require the customer to travel extensively to attend the arbitration, or bear steep expenses, or be presented in such a way that it's impossible for the customer to know what's being agreed to.**

**"It happens so frequently that I win a lot of cases," Bland said.**

Some states have tried to carve out exceptions.

Oklahoma wanted to ban arbitration from nursing home cases, and Georgia officials tried to prohibit arbitration requirements for malpractice claims, for example. But courts voided those efforts.

In 2009, a measure adding more disclosure and reporting requirements to Nevada's arbitration law passed the state Legislature but was vetoed by then-Gov. Jim Gibbons. His veto was not overridden by the Senate.

As long as arbitration clauses establish a level playing field between a consumer and a business, they are likely to be upheld, said Sternlight, even in medical cases.

"If a person signs a binding arbitration agreement, they can certainly go to court and try to say the arbitration clause is void," she said. "Whether the court would accept that argument is up for grabs.

"I remain unconvinced that the court would go so far as to hold unconscionable all arbitration imposed by doctors on their patients."

Runkle said she had been a patient of Desai's and had to get tested after the problems at his clinic were announced.

That didn't fuel her opposition to binding arbitration, since she always had objected to its use in real estate contracts; but the fact that people were harmed at the doctor's office reinforced it.

Runkle said she has found a doctor who doesn't require a binding arbitration pledge but still is miffed that she had to take the extra step.

"Maybe, when push comes to shove, it won't matter. I'm sure nothing's going to happen," she said, saying she does not intend to file a lawsuit.

"It just reminds me of the importance of not giving up your rights in case of things you don't even suspect could happen. You can't be throwing away your right to a court hearing."