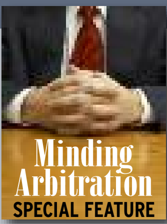


MARK E. LASSITER is a partner in the Tempe, Ariz., law firm Davis Miles PLLC, PLLC, where he practices in the areas of Alternative Dispute Resolution (ADR), business, real estate and construction law and heads the firm's Commercial Litigation and Dispute Resolution Department. He is regarded as an expert on Arizona arbitration law, and he developed and chairs the annual Arizona State Bar CLE program "Private Arbitration Update," now in its 10th year. He is a past Co-chair of the Legislative Affairs Subcommittee of the Alternative Dispute Resolution Section of the State Bar of Arizona, which worked to pass Arizona's Revised Uniform Arbitration Act. He is also an arbitrator on the Commercial, Construction and Large and Complex Case arbitration panels of the American Arbitration Association and is the primary author of the popular Internet-based video CLE program "Arbitration Boot Camp," which trains lawyers how to handle a private arbitration matter. His may be contacted at mlassiter@davismiles.com and (480) 218-4455.

Arizona's New Revised Uniform Arbitration Act

BY MARK E. LASSITER

On April 23, 2010, Arizona Gov. Jan Brewer signed into law HB2430, Arizona's adaptation of the Revised Uniform Arbitration Act (the RUAA)[1]—the most sweeping reform of Arizona arbitration law in almost a half century.

Thus culminated nine years of effort by the State Bar of Arizona and its Alternative Dispute Resolution (ADR) Section members to bring Arizona's arbitration statutes into the 21st century and conform them to modern arbitration trends, industry practices and significant court decisions during the last 48 years.

With its passage, Arizona becomes the 14th state (together with the District of Columbia) to adopt the RUAA,[2] a "uniform law" adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2000. Generally, the RUAA revises NCCUSL's Uniform Arbitration Act (UAA) of 1956, adopted in 49 jurisdictions. Arizona substantially enacted the UAA in 1962[3]—but that law was not thereafter sig-

Gov. Jan Brewer signs into law the new Revised Uniform Arbitration Act, April 23, 2010. **Pictured L to R:** Ruth Franklin, then-Chair of the State Bar ADR Section; Mark Lassiter, attorney (and author of this article); Richard Fincher, ADR professional; Governor Brewer; Kathleen Lundgren, Administrator of State Bar Government Relations; Mark Bolton, attorney; Rep. Adam Driggs, attorney and legislator (R-District 22); and Ernest Modzelewski, attorney and ADR Section legislative liaison.

nificantly amended or modified until the recent passage of the RUAA.

"Arbitration" (also known as "commercial," "private" or "contract" arbitration) is the referral of a dispute to one or more persons (called "arbitrators") for a final and legally binding determination of the dispute (called an "award"), which may thereafter become the judgment of a civil court. Neither the RUAA nor the discussion in this article applies to so-called "judicial," "compulsory [court] arbitration," or "court annexed," non-binding arbitration, such as that required by the Arizona Rules of Civil Procedure.[4] This article highlights the major and unique features of Arizona's RUAA, the Arizona case law that is now effectively "overruled" by it, and how it will change the landscape of Arizona arbitration law and practice in the future—for better or for worse.

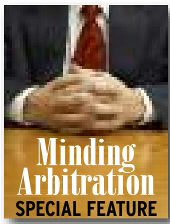
When the RUAA Applies

When applicable, the RUAA resolves arbitration process ambiguities by statutorily "filling in the gaps" with statutory clarity about such things as definitions of arbitration terms, lawful arbitration agreement provisions, an arbitrator's duties and powers, court interaction with (and enforcement of) the arbitration proceeding, and the conversion of an arbitration award to a judgment in a court of law.

Procedurally, the RUAA applies to an "agreement to arbitrate" made on or after Jan. 1, 2011.[5] After January 1, the RUAA governs an agreement to arbitrate "whenever made,"[6] so if Arizona arbitration law governs the parties' agreement to arbitrate, the RUAA will effectively "amend," by operation of law, all then existing agreements to arbitrate. The parties to an agreement to arbitrate or arbitration proceeding may agree that the RUAA applies to their dispute before Jan. 1, 2011,[7] if they do so in a "record," which is now defined in the RUAA along with other terms.[8]

Substantively, two additional factors affect whether the RUAA applies to any given agreement to arbitrate.

First, the RUAA applies when the



Federal Arbitration Act (9 U.S.C. §§ 1 et seq.—the "FAA") does not. Generally, the FAA applies to any "contract evidencing a transaction involving commerce,"[9] which under interpretations of the United States Supreme Court makes the FAA applicable to virtually every kind of contract. Hence, if an agreement to arbitrate is silent as to which substantive arbitration law—the FAA, RUAA or UAA—applies, then the normal "default" is to the FAA. Lawyers desiring the RUAA to apply to their clients' agreements to arbitrate need to make this provision express, as the FAA has not been substantially updated since it was first adopted in 1925 and does not address many modern-day arbitration issues finally addressed in the RUAA.

Second, unlike any other jurisdiction that has adopted the RUAA, Arizona now has the unique distinction of having two different, simultaneously operative arbitration statutes: one, Arizona's old UAA, for disputes involving employment, insurance companies, national banking interests and self-regulating securities organizations[10]; and a second, the RUAA, for all other disputes.

This curious anomaly is the unique result of a Faustian compromise with the lobbyists for insurance companies, labor, national banks and national securities interests, who generally opposed passage of the RUAA in Arizona. After several years of unsuccessfully trying to pass the RUAA over these industries' various objections, it was decided to simply "carve them out" of the effects of the RUAA and to provide that they would continue to be governed by Arizona's old UAA. Generally, all of these "carved out" industries' disputes would be governed by the FAA anyway—assuming the absence of a specific provision requiring Arizona's UAA to govern any of their agreements to arbitrate, which this author has never seen.

Hence, instead of having a normal state of affairs whereby the "new-and-improved" RUAA simply replaced the old UAA altogether, Arizona now has a surreal "two-headed giant" for its arbitration scheme. This brings to mind Otto von Bismarck's famous quote: "Laws are like sausages; it is better not to see them being made."

Instead of having a normal state of affairs whereby the "new-and-improved" RUAA simply replaced the old UAA altogether, Arizona now has a surreal "two-headed giant" for its arbitration scheme.

The effect of this schizophrenic state of affairs is that the RUAA effectively overrules several existing Arizona state court arbitration appellate decisions for most arbitrable disputes, but not for those "carved out" from its effect. What's more, in adopting the RUAA the Arizona Legislature effectively found that certain provisions in agreements to arbitrate are unwaivable before a dispute arises—essentially finding that pre-dispute waivers of these "unwaivable" provisions are unconscionable.[11] However, nothing on the face of Arizona's old UAA prevents such pre-dispute waivers of these otherwise "unwaivable" provisions.

This is sure to wreak havoc on the "reasonable expectations" of consumers and generate a lot of litigation in the future about the enforceability of agreements to arbitrate involving such "carved out" disputes.

Interim Remedies[12]

One of the historically difficult areas of arbitration law and practice is the ability of parties to an arbitration proceeding to obtain quick, emergency relief (e.g., an injunction or a provisional remedy). Generally, an arbitration proceeding is a poor forum for such relief, even where the parties' agreement to arbitrate expressly empowers the arbitrator to grant such remedies.[13]

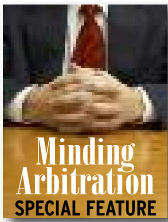
The RUAA now provides, "The arbitrator may issue such orders for interim remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding … to the same extent and under the same conditions as if the controversy were the subject of a civil action."[14] Before an arbitrator is appointed and is authorized and able to act, the court, for good cause shown, may enter an order for interim remedies if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.[15]

If an arbitrator makes a pre-award ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award and then make a motion to the court for an expedited order to confirm the award, in which case the court shall summarily decide the motion and issue an order to confirm the award unless the court otherwise vacates, modifies or corrects the award.[16] A party does not waive its right to arbitrate by asking the court to grant such interim remedies in a matter otherwise subject to arbitration,[17] which effectively statutorily overrules (in non-"carved out" disputes) the Arizona Supreme Court decision in *Bolo Corp. v. Homes & Son Const. Co.*,[18] wherein the court held:

> When this plaintiff sought redress through the courts [seeking a pre-judgment provisional remedy], in lieu of the arbitration tribunal, and asked the court for exactly the same type of relief (i.e. damages), which an arbitrator is empowered to grant, it waived the right to thereafter arbitrate the controversy over the protest of the defendant.

Consolidation of Separate Arbitration Proceedings[19]

Another contemporary problem area in modern arbitration practice lies in the con-



solidation of separate arbitration proceedings, which typically arises in Arizona in large and complex construction defect disputes.

The RUAA now provides that the court may order consolidation of separate arbitration proceedings as to all or some of the claims under certain circumstances (generally, the same circumstances as those under which a court could consolidate separate court proceedings).[20] One notable exception, however, is that the court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation,[21] which may make passage of this provision a "Pyrrhic victory" at best, because many arbitration agreements (e.g., the American Institute of Architects construction contracts) routinely prohibit consolidation of certain parties or claims.

However, if a court finds that contractual provisions prohibiting consolidation were, say, unconscionable or violative of the "reasonable expectations" of the parties and strikes them from the parties' agreement to arbitrate,[22] then a court could thereafter order consolidation, which would serve the purposes of both judicial and arbitral economy in many cases.

The General Requirement of Neutral Arbitrators[23]

A.R.S. § 12-3011(B) provides, "An individual who has a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral." This RUAA provision essentially codifies the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes, approved by the American Bar Association House of Delegates on Feb. 9, 2004, which provides, "This Code establishes a presumption of neutrality for all arbitrators, including party appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise."

However, until the RUAA the "presumption" of an arbitrator's neutrality was only established by the rules of procedure of various arbitration organizations (e.g., the American Arbitration Association—the AAA)[24] or non-binding "codes of conduct" like the one above. Under the RUAA (but not the UAA), neutrality is now expressly the legal norm.

Mandatory Disclosures by Arbitrators[25]

Consistent with the general requirement for neutral arbitrators:

> Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate, to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including both: (1) A financial or personal interest in the outcome of the arbitration proceeding [and] (2) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness or another arbitrator.[26]

This is a continuing duty of an arbitrator throughout the arbitration proceeding.[27] Again, though this "disclosure" practice has been common under current arbitration organization industry practice, it was not codified until enacted by the RUAA. If a party timely objects to either the appointment or continued service of the arbitrator based on a fact disclosed by the prospective arbitrator, or an arbitrator's failure to disclose a required fact, then the objection may be a ground under A.R.S.§ 12-3023(A)(2) for vacating the arbitrator's award.[28] An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party is presumed to act with evident partiality under A.R.S.§ 12-3023(A)(2), which would likely result in vacatur of the arbitrator's award.

Immunity of Arbitrator[29]

Codifying existing Arizona Supreme Court case law,[30] the RUAA now expressly provides, "An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity."[31] Significantly, the failure of an arbitrator to make a required disclosure does not cause any loss of immunity.[32]

Arbitration Process and Discovery[33]

An arbitrator now has expanded statutory powers to conduct the arbitration proceeding,[34] including the rights (for the first time under any Arizona arbitration statute) to:

- Decide a request for "summary disposition" (e.g., a motion for summary judgment, a motion for judgment on the pleadings or a motion to dismiss for failure to state a claim for which relief can be granted) of a claim or issue[35];
- "Permit such discovery as the arbitrator decides is appropriate in the circumstances"[36];

Been Appointed an Arbitrator?
The Bar Can Help

Many Arizona lawyers have faced the challenge of serving as a court-appointed arbitrator. Rule 72 permits the court to make such appointments in matters whose value is under $75,000. But that doesn't mean the designated attorney—who may be a non-litigator—feels prepared for the assignment.

The State Bar's Alternative Dispute Resolution Section has created a free video that teaches the nuts and bolts of the Rule 72 arbitration. The ADR Section understands that the assignment may still be daunting, but this 20-minute video should get you up and running.

Find the free video online at the ADR Section's web page: **www.myazbar.org/SecComm/Sections/DR/**

- "Order a party to the arbitration proceeding to comply with the arbitrator's discovery related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding and take action against a non-complying party to the extent a court could if the controversy were the subject of a civil action in this state"[37]; and
- "Issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this state."[38]

An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct and material interest in the outcome of the arbitration proceeding…is presumed to act with evident partiality.

Remedies (Including Punitive Damages or Other Exemplary Relief)[39]

Although the United States Supreme Court has long allowed FAA arbitrators to award punitive damages in FAA arbitration proceedings (even where applicable state statutes prohibited them from so doing),[40] for the first time under any arbitration statute the RUAA now expressly provides, "An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim."[41]

However, "If an arbitrator awards punitive damages or other exemplary relief under [A.R.S. § 12-3021(a) then] the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief."[42] Collectively, these two subsections effectively adopt separate bases of judicial review, but only concerning punitive or exemplary damages.[43]

But A.R.S. §§ 12-2021(A) and (E) are even more restrictive than the federal "manifest disregard of the law" doctrine, which will nonetheless uphold an erroneous arbitration award as long as the arbitrator did not "recognize the applicable law and then ignore it"—a subjective standard. In Arizona, under the RUAA, an arbitrator is not even empowered to award punitive or exemplary damages unless such an award "is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim," and "[i]f an arbitrator awards punitive damages or other exemplary relief … the basis in fact justifying and the basis in law authorizing the award" is separately stated in the arbitration award—an objective standard for the courts to review.[44] An arbitrator that awards punitive damages or other exemplary relief without complying with these substantive and procedural requirements for doing so "exceeds the arbitrator's powers" under §§ 12-2021(A) and (E), which should result in a vacatur of the arbitrator's award under § 12-2023(A)(4) (permitting vacatur of an arbitrator's award where "[a]n arbitrator exceeded the arbitrator's powers").

In light of §§ 12-2021(A) and (E), an interesting question arises as to whether Arizona's old UAA allowed arbitrators to award punitive or exemplary damages, since it is altogether silent on the issue of such damages. While no Arizona state court case has addressed the issue directly, past Arizona cases ordered to arbitration by the Arizona state courts impliedly suggest that arbitrators are empowered to award punitive damages under the UAA.[45] Furthermore, most agreements to arbitrate incorporate arbitration organization rules that are broad enough to empower arbitrators to award punitive or exemplary damages.[46]

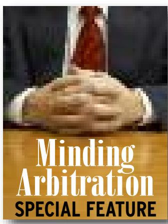
A.R.S. § 12-3021(C) provides, "As to all remedies other than [punitive damages and attorneys' fees], an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award … or for vacating an award."

Attorneys' Fees and Costs and Expenses of Arbitration[47]

A.R.S. § 12-3021(B) provides, "An arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration only if that award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." This provision statutorily overrules (in non-"carve out" cases) *Canon School Dist. No. 50 v. W.E.S. Const. Co., Inc.*,[48] wherein the Arizona Supreme Court held that a party to an arbitration proceeding is not entitled to attorneys' fees incurred in the arbitration proceeding under § 12-341.01(A). Under the RUAA, such an award of attorneys' fees could now be made by the arbitrator. Likewise, "An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award."[49]

Scrivener's Error in the RUAA

Except for the "carve out" provisions of A.R.S. §§ 12-3003(B) and (C), Arizona's RUAA was supposed to mirror, word for word, the NCCUSL RUAA, except for non-substantive language to conform the RUAA to the style of other Arizona statutes (e.g., NCCUSL RUAA "Section 5(b)" might instead read "12-3005, SUBSEC-



TION A" under Arizona's RUAA). NCCUSL RUAA Sections 5(a) and 6(a) were enacted as Arizona RUAA Sections 12-3005(A) and 12-3006(A), respectively.

The problem is that Arizona's RUAA Section 12-3004(B)(1), as enacted, should have read Sections "12-3005, SUBSECTION A, 12-3006, SUBSECTION A …" Instead, it only read, "… 12-3005, 12-3006,…" (omitting references to "SUBSECTION A"). These omissions are significant and need to be corrected as soon as possible. As of the writing of this article, the ADR Section has a request before the State Bar Board of Governors to authorize the sponsorship of legislation in the next legislative session to correct this scrivener's error in the RUAA.

Conclusion

Arizona's new RUAA will materially change the face of arbitration practice in Arizona. Lawyers and arbitrators handling arbitration proceedings in commercial, construction, employment, real estate and other common business disputes need to become familiar with it. AZ AT

endnotes

1. The Act is now embodied in Title 12, Chapter 21, Article 1 of the Arizona Revised Statutes—A.R.S. §§ 12-3001 *et seq.*
2. Other jurisdictions adopting the RUAA include Alaska, Colorado, District of Columbia, Hawaii, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah and Washington. *See* NCCUSL website: http://uniformlaws.net/Update/uniformact_factsheets/uniformacts-fs-aa.asp
3. As embodied in Title 12, Chapter 9, Article 1 of the Arizona Revised Statutes—A.R.S. § 12-1501 *et seq.*
4. *See, e.g.,* Rules 72-77 of the Arizona Rules of Civil Procedure regarding "Compulsory Arbitration" in Arizona civil courts.
5. A.R.S. § 12-3003(A)(1).
6. *Id.* § 12-3003(A)(3).
7. *Id.* § 12-3003(A)(2). Curiously, because the RUAA does not take effect until Dec. 31, 2010, it is uncertain how this provision can be operative before that time, but that's what the Legislature intended.
8. *See generally* the "Definitions" in A.R.S. § 12-3001.
9. *See* 9 U.S.C. § 2.
10. A.R.S. §§ 12-3003(B) and (C).
11. *See generally* § 12-3004.
12. *See generally* § 12-3008.
13. *See, e.g.,* Rule 34 of the American Arbitration Association's Commercial Arbitration Rules Amended and Effective June 1, 2009 (the "AAA Rules").
14. A.R.S. § 12-3008(B)(1).
15. *Id.* §§ 12-3008(A) and (B)(2).
16. *Id.* §§ 12-3018 and 12-3022.
17. *Id.* § 12-3008(C).
18. 464 P.2d 788 (Ariz. 1970).
19. A.R.S. § 12-3010.
20. *See generally id.* § 12-3010(A).
21. Id. § 12-3010(C).
22. *See, e.g., id.* § 12-3006(A), which provides: "A. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable *except on a ground that exists at law or in equity for the revocation of a contract.*" (Emphasis added.)
23. A.R.S. § 12-3011.
24. *See, e.g.,* AAA Rule R-17, which provides: "Disqualification of Arbitrator. (a) Any arbitrator *shall be impartial and independent* and shall perform his or her duties with diligence and in good faith, and *shall be subject to disqualification for: (i) partiality or lack of independence.*" (Emphasis added.)
25. A.R.S. § 12-3012.
26. *Id.* § 12-3012(A).
27. *Id.* § 12-3012(B).
28. *Id.* §§ 12-3012(C) and (D).
29. *Id.* § 12-3014.
30. *See Craviolini v. Scholer & Fuller Associated Architects,* 357 P.2d 611 (Ariz. 1960).
31. A.R.S. § 12-3014(A).
32. *Id.* § 12-3014(C).
33. *Id.* §§ 12-3015 and 12-3017.
34. *Id.* § 12-3015(A).
35. *Id.* § 12-3015(B).
36. *Id.* § 12-3017(C).
37. *Id.* § 12-3017(D).
38. *Id.* § 12-3017(E).
39. *Id.* § 12-3021.
40. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52 (1995) (In FAA case, arbitration panel permitted to award punitive damages to brokerage house customers, even though choice-of-law provision provided that contract was governed by New York law, which prohibited arbitrators from awarding punitive damages.)
41. A.R.S. § 12-3021(A).
42. *Id.* § 12-3021(E).
43. Generally, the "manifest disregard of the law" is a federal common law doctrine that only applies to the FAA. Arizona state courts have never adopted it in construing the UAA. Indeed, it is even questionable whether the federal "manifest disregard of the law" doctrine is itself alive after the U.S. Supreme Court decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576 (2008). The Ninth Circuit thinks so, but other circuits disagree. *See Comedy Club, Inc. v. Improv West Associates,* 553 F.3d 1277 (9th Cir. 2009). Essentially, "Manifest disregard of the law" means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law. Rather, "[i]t must be clear from the record that the arbitrator recognized the applicable law and then ignored it." *Id.* at 1290.
44. A.R.S. § 12-3021(E).
45. *See, e.g.,* these Arizona state court cases wherein the parties' arbitrable claims would have permitted or allowed an award punitive damages: *Flower World of America, Inc. v. Wenzel,* 594 P.2d 1015 (Ariz. Ct. App. 1978) ("various deceptive practices" in violation of Arizona's Consumer Fraud Act); *Rocz v. Drexel Burnham Lambert, Inc.,* 743 P.2d 971 (Ariz. Ct. App. 1987) (investor's claim that trading by brokerage firm constituted device, scheme or artifice to defraud in violation of Securities Act of 1933); *Smith v. Logan,* 799 P.2d 1378 (Ariz. Ct. App. 1990) (fraudulent inducement claim); *Steer v. Eggleston,* 47 P.3d 1161 (Ariz. Ct. App. 2002) (arbitrator made award on claims for breach of fiduciary duty, diversion of partnership funds, accounting, and racketeering); *New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass'n,* 467 P.2d 88 (Ariz. Ct. App. 1970) (malicious filing of liens). Nothing in any of these cases suggests that the parties could not (or did not) seek punitive damages from the arbitrators.
46. *See, e.g.,* AAA Rule R-43, which provides: "Scope of Award. (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract."
47. A.R.S. §§ 12-3021(B) and (D).
48. 882 P.2d 1274 (Ariz. 1994).
49. A.R.S. § 12-3021(D).