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New Jersey Supreme Court Provides Guidelines on Enforceability of Consumer Arbitration Agreements

After its decision last year in *Hirsch v. Amper Financial Services, LLC*, 215 N.J. 174, 179 (2013), rejecting "intertwinement" theory as a basis to force a non-signatory to arbitrate disputes on grounds of equitable estoppel, the New Jersey Supreme Court last month decided another case that further ratcheted down on the prerequisites for the enforceability of arbitration agreements. In *Atalese v. United States Legal Services Group, L.P.*, 2014 N.J. LEXIS 906 (N.J. Sept. 23, 2014), the court invalidated an arbitration clause in a consumer contract on the grounds that it did not "clearly and unambiguously" inform the consumer that, in deciding to arbitrate its dispute, it was waiving its right to a jury trial.

In *Atalese*, a customer of defendant's debt consolidation service filed a civil complaint under New Jersey's Consumer Fraud Act (CFA) and Federal Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), alleging that defendant misrepresented its license status and the amount of money that went to actually paying attorneys to handle her case. The trial court granted defendant's motion to compel plaintiff to arbitrate her dispute pursuant to a clause in the parties' contract. That clause did not advise the plaintiff of her right to have her consumer claims tried before a jury. The contract stated, in pertinent part, as follows:

> **Arbitration**: In the event of any claim or dispute between Client and the [defendant] related to this Agreement or related to any performance of any services related to this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party. The parties shall agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by the Judicial Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in either the county in which Client resides, or the closest metropolitan county. Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction.

Plaintiff appealed the trial court's decision, arguing that the arbitration provision was unenforceable because it did not adequately notify plaintiff of her rights. The appellate division affirmed, but the New Jersey Supreme Court reversed, rejecting defendant's argument that the term "arbitration" was universally understood as an alternative forum to litigation and therefore alone sufficient to notify plaintiff that she was waiving her rights to a jury trial.

Examining the level of notice required in consumer arbitration clauses, the court concluded that an arbitration clause in a consumer contract must provide "clear and unambiguous" notice to consumers of their rights to a jury trial and that, in electing to undergo arbitration, they are deciding to waive those rights. *Id.* at *24-25. The court's decision was based on two main principles. First, the court reasoned that arbitration was essentially a waiver of rights which, to be effective, "requires a party to have full knowledge of his legal rights and intent to surrender those rights." *Id.* at *18. Second, the court recognized a countervailing policy implicit in the state legislature's enactments of the CFA and TCCWNA that favored consumers seeking relief though courts of law. *Id.* at *23 (citing N.J.S.A. 56:8-19, 56:12-17). In sum, the arbitration clause in the consumer contract was unenforceable because it did not provide adequate notice of legal rights for a valid waiver to exist and because state policy favored resolving consumer claims through the courts.

After decades of increased favor toward arbitration at the federal level, it is not surprising to see state courts exercise their authority to limit arbitration where they are not preempted by federal law. At the same time, narrowing the parameters of what constitutes an enforceable arbitration clause increases a company's exposure to potential class action lawsuits. This is

especially true where an otherwise valid class action waiver might be invalidated simply because it exists within an improperly drafted arbitration clause. *Cf. NAACP of Camden County East v. Foulke Management Corp.*, 421 N.J. Super. 404, 410 (App. Div. 2011) (expressly upholding validity of class action waivers in consumer arbitration clauses). Although the New Jersey Supreme Court did not identify specific language that must exist in consumer contracts to limit this exposure, it did provide the following broad guidance for the enforceability of consumer arbitration clauses. Generally, an enforceable consumer arbitration clause must 1) state what arbitration is, 2) explain how arbitration differs from a court proceeding, and 3) do so in language that is plain and understandable to the average consumer. *Id.* at *24. Reference to specific statutes or legislation is not required.

The court cited *Griffin v. Burlington Volkswagen, Inc.*, 411 N.J. Super. 515 (App. Div. 2010) (purchase of a motor vehicle) and *Curtis v. Cellco Partnership*, 413 N.J. Super. 26 (App. Div. 2010) (cell phone services agreement) as model cases wherein a consumer arbitration clause was deemed acceptable. The clauses in those cases are quoted below:

By agreeing to arbitration, **the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding,** to settle their disputes. New Jersey Consumer Fraud Act, Used Car Lemon Law, and Truth-in-Lending claims are just three examples of the various types of claims subject to arbitration under this agreement.

Griffin, 411 N.J. Super. at 518 (emphasis added).

INSTEAD OF SUING IN COURT, WE EACH AGREE TO SETTLE DISPUTES (EXCEPT CERTAIN SMALL CLAIMS) ONLY BY ARBITRATION. **THE RULES IN ARBITRATION ARE DIFFERENT. THERE'S NO JUDGE OR JURY, AND REVIEW IS LIMITED**, BUT AN ARBITRATOR CAN AWARD THE SAME DAMAGES AND RELIEF, AND MUST HONOR THE SAME LIMITATIONS STATED IN THE AGREEMENT AS A COURT WOULD.

Curtis, 413 N.J. Super. at 31 (emphasis added).

The New Jersey Supreme Court has articulated more stringent standards for consumer arbitration clauses and has provided broad guidelines for their enforceability. The *Griffin* and *Curtis* cases are examples of arbitration provisions in consumer contracts that meet the "clear and unambiguous" standard set by the court in *Atalese*. Knowing the parameters for what constitutes an enforceable arbitration provision will better inform consumers of their rights and provide businesses with greater confidence in the validity of their arbitration agreements.