N.J. SUPREME COURT STRIKES DOWN ARBITRATION PROVISION ON CONTRACT GROUNDS

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The New Jersey Supreme Court has ruled that a mandatory arbitration clause, like any comparable contract provision, must clearly and unambiguously notify the consumer that he or she is waiving the right to seek judicial relief, and the failure to do so renders the arbitration agreement unenforceable. The ruling is a departure from other state and federal court decisions around the country. (*Atalese v. U.S. Leg. Servs. Group, L.P.*, 2014 WL 4689318 (N.J. Sept. 23, 2014).)

In 2011, Patricia Atalese signed a debt-adjustment services contract with U.S. Legal Services Group. She paid about $5,000, mostly in legal fees. She alleges the only legal work performed was preparing a one-page answer for a collection action in which she was pro se, although the company said numerous attorneys worked on her behalf. The company settled only one debt for her. She sued U.S. Legal Services for violations of the New Jersey Consumer Fraud Act and Truth-in-Consumer Contract, Warranty and Notice Act, seeking treble damages, statutory penalties, and attorney fees.

After initially defaulting in the action, U.S. Legal Services filed a motion to compel arbitration pursuant to the services contract, which the trial court granted. Although the agreement's arbitration provision did not state that the plaintiff was waiving her right to seek relief in court, the

trial court concluded that the provision was “minimally, barely sufficient” to put the plaintiff on notice that all disputes would be arbitrated. In 2013, the appellate court affirmed, finding that “the lack of express reference to a waiver of the right to sue in court or to arbitration as the ‘exclusive’ remedy” did not bar enforcement of the arbitration clause.

On appeal, the plaintiff argued that the arbitration clause does not comply with New Jersey law because it doesn’t “clearly and unequivocally” state that it deprives the consumer of the right to sue. The term “arbitration” is universally understood, the defendant countered, and no reasonable consumer would doubt its meaning.

In a unanimous decision, the New Jersey Supreme Court concluded that under state law and relevant jurisprudence, a waiver of rights in any contract “must be clearly and unmistakably established.” The court found that the arbitration clause was devoid of any explanation that the plaintiff was waiving her right to seek judicial relief for breach of her statutory rights and did not contain any of the language New Jersey courts have found satisfactory in upholding arbitration provisions.

Citing *AT&T Mobility v. Concepcion,* the 2011 Supreme Court decision that held the Federal Arbitration Act (FAA) preempted a state law that barred class action waivers as unconscionable, the court noted that Section 2 of the FAA allows arbitration agreements “to be invalidated by ‘generally applicable contract defenses.’” It added: “Arbitration’s favored status does not mean that every arbitration clause, however phrased, will be enforceable.”

“This decision wasn’t a big leap for the New Jersey Supreme Court to make. It inched a little bit closer to securing the right of access to courts for consumers,” said Manahawkin, N.J., attorney William Wright, who represents Atalese. “You can’t bind someone to a provision he or she is not agreeing to. It’s an important bedrock right.” He added that the ruling will help people who face the prospect of forced arbitration based on similar arbitration provisions: “I would argue those people now have a right to file their lawsuits and will overcome the defendants’ motions to dismiss.”

The defense bar has taken note of the decision’s potential impact, Wright said. “Some big [defense] law firms are recommending to the industry—the corporate side—that they should revise their arbitration agreements. I assume that some companies will, and whether it’s for a credit card, bank, or cellphone, these contract amendments may start trickling in,” he said.

Washington, D.C., attorney John Vail, who represents plaintiffs in litigation challenging arbitration clauses, called it “an excellent victory for plaintiffs” but cautioned that a certiorari petition to the Supreme Court is likely. “In recent years, the Supreme Court has given greater breadth to the preemptive scope of the FAA. This is an example of a state applying generally applicable consumer law, which the framers of the FAA never would have anticipated would be within the preemptive scope of the FAA,” Vail said.

At press time, no cert petition had been filed.