

October 2014

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New Jersey Supreme Court Calls for More Specific Language in Arbitration Agreements

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Although New Jersey public policy generally favors arbitration as a method of resolving disputes, following the New Jersey Supreme Court's unanimous holding in *Atalese v. U.S. Legal Services Group L.P.*, companies doing business in New Jersey should revisit their contractual arbitration provisions to consider whether they are still enforceable.

The *Atalese* Decision

In *Atalese*, the New Jersey Supreme Court held that an arbitration provision in a consumer contract was unenforceable because it did not contain language explaining that the plaintiff was surrendering her right to pursue claims in court.¹ The plaintiff in *Atalese* entered into a contract with U.S. Legal Services Group, LP ("USLSG") for debt-adjustment services. She paid USLSG approximately \$5,000, the vast majority of which was for legal fees. The plaintiff alleged that USLSG misrepresented that the monies were spent on numerous attorneys negotiating with creditors on her behalf when the only work done by an attorney was the preparation of a single one-page answer for a collection action in which the plaintiff represented herself. The plaintiff filed suit and USLSG moved to compel arbitration.

The trial court and the Appellate Division, relying on New Jersey's strong public policy favoring arbitration, held that the subject arbitration provision passed muster.^{2,3} The Supreme Court reversed, explaining that while New Jersey law favors arbitration, its "favored status does not mean that every arbitration clause, however phrased, will be enforceable."⁴ In the context of consumer contracts, the Supreme Court expressed concern that "an average member of the public may not know -- without some explanatory comment -- that arbitration is a substitute for the right to have one's claim adjudicated in a court of law."⁵ Accordingly, the Supreme Court held the arbitration agreement at issue was not enforceable because it "did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court."⁶ The Supreme Court explained that the arbitration provision was ineffective because it did not "explain what arbitration is" and did not "indicate how arbitration is different from a proceeding in a court of law."⁷ The Court was

¹ *Atalese v. U.S. Legal Servs. Grp., L.P.*, A-64-12, September 23, 2014.

² The arbitration provision at issue provided that "any claim or dispute between [the parties] 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." *Id.* at 4.

³ *Id.* at 6.

⁴ *Id.* at 10.

⁵ *Id.* at 12.

⁶ *Id.* at 20.

⁷ *Id.* at 18.

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also troubled by the fact that the arbitration provision appeared “on page nine of a twenty-three-page contract.”⁸

In holding the subject arbitration provision to be unenforceable, the Supreme Court did not provide the “magic language” that will allow contracting parties to avoid the same pitfall going forward. Instead, the Court explained that there is “no prescribed set of words . . . [required] to accomplish a waiver of rights” to sue in court.⁹ Nevertheless, the Court provided some guidance by citing language from the following arbitration provisions that New Jersey’s courts have previously upheld as enforceable:

- The parties agree “to waive [the] right to a jury trial” and that “all disputes relating to [the plaintiff’s] employment . . . shall be decided by an arbitrator.”¹⁰
- “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.”¹¹
- “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.”¹²

Moving Forward from *Atalese*

Companies doing business in New Jersey with consumers should review their contracts to evaluate whether they comply with *Atalese* and be mindful that they may face uphill battles enforcing arbitration provisions that were routinely enforced prior to *Atalese*. Moreover, while the Supreme Court’s decision in *Atalese* involved a consumer, it is possible that *Atalese* may be used in the future to challenge arbitration provisions outside the context of consumer contracts. Although there are important differences in how courts view consumer contracts as opposed to contracts between businesses and other sophisticated entities, the Court examined and relied on general contract provisions in reaching its holding that an agreement to arbitrate must contain language that clearly and unambiguously expresses that the parties are surrendering their right to pursue claims in court. Accordingly, all companies doing business in New Jersey should revisit their contracts to ensure that their arbitration provisions contain language that satisfies *Atalese*.

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⁸ *Id.* at 17.

⁹ *Id.* at 19.

¹⁰ *Id.* at 15.

¹¹ *Id.* at 15–16.

¹² *Id.* at 16.

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