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A Meeting of the Minds in New Jersey

The state supreme court provides clarity on enforceable arbitration provisions after Atalese.

By Kelly A. Ringston

Two recent decisions turn the tide on an anti-arbitration trend that began with the court's 2014 decision and provide much needed clarity for practitioners.

In 2014, in the matter of *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014), the New Jersey Supreme Court invalidated an arbitration provision in a consumer services contract because it did not explicitly state that the consumer had waived her right to seek relief from a court in the event of a dispute, and for that reason, the agreement lacked "mutual assent" to arbitrate as the parties' sole means of dispute resolution.

Critics of the decision argued that it reflected the anti-arbitration bias that the Federal Arbitration Act (FAA) and New Jersey Arbitration Act (NJAA) were enacted to prevent and that by requiring specific—yet undefined—waiver language in otherwise clear and unambiguous agreements to arbitrate, the court was improperly treating arbitration agreements differently than other contracts.

In the years that followed *Atalese*, "lack of mutual assent" became a familiar, and often successful, refrain for parties seeking to invalidate contractual agreements to arbitrate. Two recent decisions from the New Jersey Supreme Court—*Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020), and *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020)—enforcing arbitration provisions in the face of such arguments may finally turn the tide on the state's anti-arbitration trend and offer much needed clarity on when arbitration provisions will be enforced in the wake of *Atalese*.

The *Atalese* Decision

The plaintiff in *Atalese* was a consumer who entered into a debt adjustment services contract with the defendant, U.S. Legal Services Group (USLSG). Following a dispute between the parties, the plaintiff commenced an action against USLSG alleging violations of two consumer protection statutes. USLSG moved to compel arbitration based on the provision contained in the service contract. Although the trial court and Appellate Division both held that the arbitration provision should be enforced, the New Jersey Supreme Court reversed, finding that the provision was not sufficiently clear that the plaintiff had waived her right to seek relief in a court of law.

The disputed provision provided, in relevant part, that

> [i]n the event of any claim or dispute between [the parties] related to this Agreement or related to the performance of any service 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. . . .

It further described the way the parties would select an arbitrator, where the arbitration would take place, and how the cost would be allocated, and it stated that "[a]ny decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction."

While the trial court acknowledged that the arbitration clause was barely sufficient to put the consumer on notice that *all* disputes would be resolved through arbitration, it determined that the clause met the criteria previously outlined by the Appellate Division in *Curtis v. Cellco Partnership*, 413 N.J. Super. 26, 33–37, 992 A.2d 795 (App. Div. 2010), *certification denied*, 203 N.J. 94, 999 A.2d 462 (2010), holding that an arbitration provision will be enforced so long as it is "sufficiently clear, unambiguously worded, satisfactorily distinguished from the other [a]greement terms, and . . . provide[s] a consumer with reasonable notice of the requirement to arbitrate. . . ." The trial court concluded that upholding the arbitration provision was not "a slam dunk" but that public policy favoring arbitration compelled the outcome. The Appellate Division affirmed, holding that an explicit waiver was not required, that the arbitration clause gave the "parties reasonable notice of the requirement to arbitrate all claims under the contract," and that "a reasonable person, by signing the agreement, [would have understood] that arbitration is the sole means of resolving contractual disputes."

For the state supreme court, however, the absence of any language in the arbitration provision that the plaintiff had waived her statutory right to seek relief in a court of law was fatal and rendered the provision

unenforceable. The court underscored that arbitration's favored status does not mean that every arbitration clause will be enforceable and that an agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law. Because an average member of the public may not know, without explanation, that arbitration is a substitute for the right to have one's claim adjudicated in a court of law, the court determined that while there is "no prescribed set of words" that must be included, there can be no mutual assent without clear and unambiguous language that a consumer has chosen to arbitrate disputes rather than have them resolved in a court of law.

A Reset in 2020?

Troubled by the trend in anti-arbitration decisions that followed *Atalese*, arbitration proponents—and their clients—have been buoyed by back-to-back, pro-arbitration decisions from the New Jersey Supreme Court in the latter half of 2020.

In *Skuse v. Pfizer, Inc.*, plaintiff Amy Skuse commenced an action against her employer, Pfizer, Inc., following the termination of her employment. Pfizer moved to dismiss the complaint and compel arbitration based on the company's arbitration policy, which had been adopted 4 years after Skuse joined Pfizer and 13 months prior to her termination.

Skuse argued that the arbitration provision was unenforceable because she was never asked to agree to the terms of the new policy, only to acknowledge its receipt, and as a result, never expressed her individual assent to arbitrate. The trial court nonetheless upheld the agreement, dismissed the complaint, and ordered the parties to arbitrate. The Appellate Division reversed, holding that Pfizer's communications to Skuse regarding the new arbitration policy were inadequate to ensure that she "knowingly and unmistakably" agreed to arbitrate her claims and waive her right of access to the court. The Appellate Division cited three aspects of Pfizer's communications that it deemed insufficient to convey proper notice and assent: (1) Pfizer's use of emails to disseminate the agreement to employees already inundated with emails; (2) its use of a "training module" or a training "activity" to explain the arbitration agreement; and (3) its instruction that employees click their computer screen to "acknowledge" their obligation to assent to the agreement in the event that they remained employed for 60 days thereafter, as opposed to affirmatively "agreeing" to the agreement.

By order dated August 18, 2020, the New Jersey Supreme Court reversed the Appellate Division's decision and reinstated the trial court's order to arbitrate. In analyzing the enforceability of Pfizer's arbitration provision, the court examined whether the terms of the agreement itself satisfied the standard governing contractual waivers of rights and whether Pfizer's means of extracting its employees' consent was adequate.

The court reiterated its holding in *Atalese* that arbitration agreements must be the result of the parties' mutual assent—a "meeting of the minds"—and that a waiver of rights provision must be written clearly and unambiguously. It concluded that the agreement was enforceable. Specifically, the court found that the arbitration policy clearly and unmistakably explained the rights that Skuse would waive by agreeing to arbitration and that Pfizer's related communications clearly informed her that if she remained a Pfizer employee for more than 60 days from receipt of the agreement, she was deemed to have assented to it. Moreover, the court determined that Pfizer's delivery of the agreement by email did not warrant its invalidation, and the court viewed Pfizer's use of the word "acknowledge" instead of "agree" to be appropriate in the circumstances of the case. Though the court agreed that Pfizer should not have labeled the communication explaining its arbitration agreement a "training module" or training "activity," it did not view that as a basis to invalidate the agreement.

Less than a month later, on September 11, 2020, the court again overruled an Appellate Division decision invalidating an arbitration agreement. In the matter of *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020), plaintiff Marilyn Flanzman commenced an action against her former employer, Jenny Craig, Inc., following a dispute over the terms of her employment. Jenny Craig moved to dismiss the action and compel arbitration in accordance with the parties' arbitration agreement. Flanzman opposed the motion and asserted that the arbitration agreement was invalid because it failed to identify a forum for the proposed arbitration and did not contain a choice of law provision, leaving it unclear whether New Jersey or California law would govern the proceedings. Without this information, Flanzman asserted, there could be no "meeting of minds" as required by the court in *Atalese*.

The trial court granted Jenny Craig's motion and ordered the parties to arbitrate but was reversed by the Appellate Division, which invalidated the arbitration agreement because it did not designate an "arbitral forum." The Appellate Division reasoned that the failure to designate a forum deprived the parties from knowing what rights replaced their right to judicial adjudication because the selection of a forum "informs the parties, at a minimum, about that institution's general arbitration rules and procedures." The court went on to hold that if the parties select no "arbitral institution," they must at least identify "the general process for selecting an arbitration mechanism or setting" in order for their agreement to be binding.

In reversing the Appellate Division, the New Jersey Supreme Court once more looked to its holding in *Atalese*, noting that while no particular form of words is necessary to accomplish a clear and unambiguous waiver of rights, agreements to arbitrate must explain that a party who agrees to arbitration waives the right to sue in court and must make clear that arbitration and civil litigation are distinct proceedings. The court found that the

arbitration agreement between Flanzman and Jenny Craig represented the "meeting of the minds" described in *Atalese*, having clearly and unmistakably informed the parties that for "[a]ny and all claims or controversies arising out of or relating to [Flanzman's] employment, the termination thereof, or otherwise arising between" Flanzman and Jenny Craig, "final and binding arbitration" will take the place of "a jury or other civil trial." Although the agreement provided only a general concept of the arbitration proceeding that would replace a judicial determination of Flanzman's claims, it made clear that the contemplated arbitration would be very different from a court proceeding.

The court concurred with the Appellate Division's view that a detailed description of the contemplated arbitration in an agreement only enhances the clarity of that agreement but rejected the notion that the failure to so do invalidates the agreement, particularly given that parties that mutually assent to arbitration may prefer to defer the choice of an arbitrator to a later stage when they will be in a better position to assess the scope and subject of the dispute. It deferred the choice of law issue to the arbitrator.

The long-term impact of *Skuse* and *Flanzman* remains to be seen, but the matter of *Falzo v. Greene Jumpers South Plainfield*, 2020 WL 5944006 (N.J. Super. Ct. App. Div. 2020), may provide insight sooner rather than later. On October 7, 2020, the Appellate Division was forced to remand this matter back to the trial court for reconsideration after the trial court relied on the Appellate Division's now-overturned decision in *Flanzman* to determine that an arbitration agreement lacked a "meeting of the minds" and was unenforceable due to its designation of an improper arbitral forum.

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