Will my Arbitration Agreement be Enforced?

New Jersey Law Journal

April 30, 2018

J. Philip Kirchner

This article originally ran in the *New Jersey Law Journal* on April 30, 2018.

It might depend upon which court you ask. New Jersey's state courts, in many cases, appear to have applied a more stringent standard of review than their federal counterparts.

When it comes to enforcement of arbitration agreements, the Federal Arbitration Act, 9 U.S.C.A. §§1-16, has been the law of the land since it was enacted nearly a century ago. The FAA was passed by Congress "to reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (wrongful firing claim under ADEA subject to arbitration agreement). It declares arbitration is a favored means of dispute resolution (9 U.S.C.A. §1), and agreements requiring arbitration of certain disputes are to be enforced in the same manner and to the same extent as any other contractual provision (9 U.S.C.A. §2). Cases construing the FAA have concluded that any doubts about whether a particular dispute is subject to arbitration must be resolved in favor of arbitration. *See, e.g.,Moses H. Cone Memorial Hosp.*, 460 U.S. 1, 24-25 (1983). New Jersey state courts have made similar pronouncements about the enforceability of arbitration agreements, s*ee, e.g., EPIX Holdings Corp. v. Marsh & McLennan Companies*, 410 N.J. Super. 410, 453, 477 (App. Div. 2009), although it can be argued that such statements are lip service.

Despite the universal applicability of the FAA, a difference of opinion between New Jersey's state and federal courts regarding the enforceability of arbitration agreements has emerged, particularly in cases involving employment and consumer contracts. New Jersey's state courts, in many cases, appear to have applied a more stringent standard of review to arbitration agreements in consumer and employment contracts than their federal court counterparts. Indeed, it can be argued that many New Jersey state court arbitration enforcement decisions are inconsistent with the FAA's mandates.

Enforceability of Arbitration Agreements in State Court

The case that established parameters for the enforcement of arbitration agreements in consumer contracts in New Jersey state courts is *Atalese v. U.S. Legal Services Group*, 219 N.J. 430 (2014). Atalese was unhappy with the service she received from a debt adjustment company and filed a complaint alleging violations of two consumer protection statutes. Defendant moved to dismiss and compel arbitration on the basis of the parties' contract, which stated:

In the event of any claim or dispute between Client and the USLSG 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 436.

The trial court granted defendant's motion despite plaintiff's argument that the arbitration clause did not give her adequate notice she was waiving her right to sue in court, and the Appellate Division affirmed. In a unanimous decision, the Supreme Court reversed, holding the arbitration agreement unenforceable because it did not give the consumer sufficient notice that she was waiving her right to take her case to court. In fact, the arbitration clause did not mention waiver of any rights, including the right to sue in court; instead, it employed a simpler mechanism: in the event of any dispute, either party could choose to refer it to arbitration, and, once that election was made, the parties agreed to resolve their dispute by arbitration. The language is arguably clear and easy to understand, but it does not explicitly put the consumer on notice she is waiving her right to sue in court, and, for that reason, the agreement was held unenforceable. However, there is nothing in the FAA that requires notice to parties that they are waiving their right to sue in court or any other right. Contrary to the mandate of the FAA, *Atalese* arguably added additional conditions to the enforceability of an arbitration agreement.

The decision in *Atalese* was not surprising because, 13 years earlier, the New Jersey Supreme Court had reached the same conclusion for similar reasons in an employment case. In *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 132 (2001), a doctor sued his employer and two officers for discrimination, tortious interference and defamation. As in *Atalese*, the trial court granted defendants' motion to dismiss and compel arbitration, and the Appellate Division affirmed. The employment agreement provided, in part, "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration in Morristown, New Jersey, in accordance with the rules then obtaining of the American Arbitration Association." Although the *Garfinkel* court noted arbitration agreements enjoy "favored status" under the FAA and, thus, "[a]n agreement to arbitrate should be read liberally in favor of arbitration," *id.* at 132, it concluded, nonetheless, that waiver of the "time-honored right to sue," especially for a claim of gender discrimination under New Jersey's Law Against Discrimination, required specific language putting the employee on notice he was relinquishing those statutory rights. Once again, the FAA contains no such requirement and, to the contrary, states that arbitration agreements are not to be burdened with extra requirements not required of other contracts.

Since the decisions in *Garfinkel* and *Atalese*, a whole host of New Jersey state courts have refused to enforce arbitration agreements for reasons identical or similar to the rationales expressed in the two Supreme Court decisions. *See, e.g., Kernahan v. Home Warranty Adm'r of Florida*, No. MID-L-7052-15 (Law Div. Nov. 18, 2016) (arbitration agreement that did not give notice of waiver of right to jury trial unenforceable); *Griffoul v. NRG Residential Solar Solutions,* No. BER-L-1503-17 (Law Div. July 14, 2017) (despite language that parties waived right to sue in court, arbitration agreement unenforceable because it did not "encompass [plaintiff's] statutory consumer claims.").

Recently, both employers and sellers of goods and services to consumers have begun to include language in their arbitration agreements that the parties are agreeing to waive the right to sue in court, seek a jury trial, and bring certain statutory and class action claims. Such contracts are more likely to be enforced by New Jersey courts. *See, e.g., Perez v. Leonard Automotive Enterprises*, No. BER-L-5882-16 (Law Div. December 8, 2016) (arbitration agreement in consumer contract enforced because it clearly put plaintiff on notice of waiver of right to sue in court).

In its relative hostility to arbitration agreements, New Jersey precedent is perhaps unique. A recent trial court opinion, which compared New Jersey law to New York law concerning enforceability of arbitration agreements, highlights New Jersey's different approach. In *Fidelity & Deposit Co. of Maryland v. Frawley*, No. BER-L-410316 (Law Div. July 21, 2017), defendant employer urged the court to apply New York law and enforce the arbitration provision in the employment agreement. The court found, under New York law, "the use of the phrase 'either party may submit such dispute to arbitration' should be interpreted to limit the aggrieved party to a choice between arbitration and abandonment of the claim ...." *Id.* Unlike New Jersey law, New York law does not require language notifying the other party that it is waiving its right to sue in court or seek a jury trial.

Enforceability of Arbitration Agreements in Federal Court

Decisions rendered by the District of New Jersey under the FAA take a different approach to enforcement of arbitration agreements. Applying principles of New Jersey contract law and Third Circuit precedent interpreting the FAA, those decisions almost universally enforce arbitration clauses regardless of whether they contain language waiving the right to sue in court, seek a jury trial or bring specific statutory claims. In *Singh v. Uber Technologies*, 235 F. Supp. 656 (D.N.J. 2017) (Wolfson, J.), for example, the court granted a motion to compel arbitration and dismiss class action claims for wage and hour violations and misclassification of drivers as independent contractors. The court also held the arbitration agreement was not an unconscionable contract of adhesion because it gave plaintiff the right to opt out of it.

In *Beery v. Quest Diagnostics,* 953 F. Supp. 531 (D.N.J. 2013), the three class plaintiffs/employees opposed enforcement of an arbitration agreement because its "loser pays" feature, prohibition on EEOC or other agency consideration of plaintiffs' claims, and forum selection clause would unreasonably interfere with their ability to vindicate their statutory civil rights. Although recognizing that an arbitration requirement could be voided if it would frustrate the vindication of statutory rights, the court held plaintiffs had failed to carry their burden of proving any of those contract provisions would unreasonably interfere with enforcement of their rights. The court did find two provisions of the arbitration agreement—a 90-day limitations period and a pre-arbitration "discussion" requirement—unduly burdened plaintiffs' vindication of their federal statutory rights, but it severed those provisions from the contract and ordered the parties to proceed with arbitration.

Similarly, in *Doyle v. Ad Astros*, No. 1:17-cv-05233, Judge Hillman dismissed a class action complaint alleging unfair debt collection practices, rejected plaintiff's argument that the arbitration agreement did not give her notice she was waiving her claims under the FDCPA, and ordered arbitration of plaintiff's individual claims. The court held a waiver of class action claims and agreement to arbitrate only individual claims was not unconscionable under federal law. *See also Cavallo v. Uber Technologies,* No. 16-4264 (D.N.J. May 31, 2017) (employment agreement's class action waiver does not violate National Labor Relations Act, which prohibits actions restraining concerted activities, because agreement gave driver right to opt out of arbitration agreement).

Conclusion and Practice Tip

The lesson is clear: If you are seeking judicial enforcement of an arbitration agreement in New Jersey, you are much better off doing so in a federal court. Unfortunately, the FAA does not confer federal question jurisdiction, so you will have to find another basis for establishing it. If you do have a choice, however, you stand a much better chance of having your arbitration agreement enforced in federal court.

Philip Kirchner is a member of Flaster Greenberg's Litigation Department, headquartered in Cherry Hill. He concentrates his practice on resolving business disputes, including complex litigation of all types of business issues in both the federal and state courts of New Jersey and Pennsylvania.

Reprinted with permission from the "APRIL 30th" edition of the "NEW JERSEY LAW JOURNAL"© 2018 ALM Media Properties, LLC. All rights reserved.

ATTORNEYS MENTIONED

J. Philip Kirchner