The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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STATE COURT HOSTILITY TO ARBITRATION

Dispenziere v. Kushner Companies, 438 N.J. Super. 11, 101 A.3d 1126 (App. Div. 2014)

Recently, the New Jersey Supreme Court has expounded upon how courts should determine the intent of the parties in consumer arbitration agreements, especially in circumstances when a consumer opposes a motion to compel arbitration.[2] Based on the court's earlier holding in *Atalese v. U.S. Legal Services Group*, a New Jersey appellate court has refused to enforce an arbitration agreement, holding a contractual arbitration provision unenforceable because it did not use explicit language indicating both parties' intent to waive the right to use the court system to resolve their dispute. Whether parties have agreed to arbitrate is a question of law, which courts use customary contract interpretation principles to decide. Although the court does not explicitly limit its holding to consumer arbitration agreements, it seems that New Jersey courts are inadvertently or intentionally creating a higher threshold for the enforcement of consumer arbitration agreements.

The dispute arose out of alleged misrepresentations the defendants made to induce the plaintiffs to purchase condominium units in a real estate development between the years 2004-2007.[3] The plaintiffs allege the condominium property was to include certain amenities once the development was finished. The defendants initially issued a public offering statement concerning one of the condominium buildings, and subsequently entered into several purchase agreements with the individual plaintiffs regarding the condominium units. The seventeen-page purchase agreement used in the transactions—at the center of this case—contained an arbitration provision on page ten stating "any disputes arising in connection with this Agreement… shall be heard and determined by arbitration before a single arbitrator of the American Arbitration Association in

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Nicole Muñoz, third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] *Atalese v. U.S. Legal Servs. Grp.*, 219 N.J. 430 (2014).

[3] *Dispenziere v. Kushner Co.*, 438 N.J. Super. 11, 101 A.3d 1126 (App. Div. 2014).

Morris County, New Jersey. The decision of the arbitrator shall be final and binding … ."[4] In executing the purchase agreement, the buyers acknowledged receipt of the 450 page public offering statement. In the public offering statement, there was a stand-alone page with distinctive font calling attention to the arbitration agreement provision within the purchase agreement.[5]

The plaintiffs alleged that when they purchased their units they relied on the defendants' representations that certain amenities would be developed on the property. As a result, the plaintiffs sued the defendants for violations of the New Jersey Consumer Fraud Act, negligence, breach of contract, breach of warranty, breach of implied covenant of good faith and fair dealing, as well as other similar causes of action.[6] The defendants moved to compel arbitration of the plaintiffs' claims, relying on the arbitration provision in the purchase agreements. The trial court compelled arbitration and the plaintiffs appealed. The appellate court, without stating the plaintiffs' objections, relied on a very recent New Jersey Supreme court case.[7]

The central issue in the present case was whether the plaintiffs had actually agreed to arbitrate claims "in connection with" the purchase agreement – particularly whether the consumer signatories to the agreement were reasonably aware that choosing to arbitrate constituted a waiver of their rights to sue in court rather than arbitrate.

In order to answer the mutual assent question, the court relied on the recent holding in *Atalese v. U.S. Legal Services Group*.[8] In *Atalese*, the consumer-plaintiff entered into a contract with the defendant for debt-adjustment services. The arbitration provision contained within the *Atalese* contract stated "in the event of any claim or dispute… relating to this Agreement, the claim or dispute shall be submitted to binding arbitration."[9] Despite this clear agreement to arbitrate, the New Jersey Supreme Court "first looked to customary contract principles" to determine "mutual assent and a meeting of the minds."[10] Assuming that an agreement to arbitrate "by its very nature" involves a waiver of the right to sue, the court then applied customary waiver principles to require that an enforceable arbitration clause involving a consumer requires explicit, knowing consent of both parties to the waiver of the right to sue.[11] The New Jersey Supreme Court explained that customary contract principles regarding the requirement of mutual assent to a contract's terms provides the basis for determining whether a consumer has effectively agreed or intended to be bound by an arbitration agreement.[12]

Moreover, the *Atalese* court reasoned that "because arbitration involves a waiver of the right to pursue a case in a judicial forum," courts should take particular care in assuring the informed assent of both parties to arbitrate, which requires clear, unambiguous, knowing

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[4] *Id.* at 1128.
[5] *Id.*
[6] *Id.* at 1129.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 1129-30.
[10] *Id.* at 1130.
[11] *Id.*
[12] *Id*. (*citing Atalese*, 99 A.3d. at 306.).

relinquishment of the "time-honored right to sue."[13] The Court ultimately held the arbitration agreement was unenforceable since it failed to contain *sufficient* language explaining to the plaintiff what arbitration is, how it is different from a proceeding in a court of law, and that the plaintiff was waiving her rights to seek relief in a court for a breach of a statutory rights claim.[14] The Court further explained that in order to show mutual assent, the agreement must explain that a plaintiff is giving up the right to have a court resolve the dispute.[15]

Relying on the cautionary holding in *Atalese*, the court of appeals, in *Dispenziere*, sought to determine the intent of the parties by examining whether the arbitration provision explicitly and unambiguously indicated the plaintiffs were waiving their right to sue in a court of law.[16] The court found that the arbitration provision was devoid of explicit language that would inform the condominium buyers, such as the plaintiffs, that they were waving their right to resolve disputes in a court of law. This lack of notice prevented the enforcement of the arbitration provision since mutual assent was not established. Interestingly, the court was unpersuaded by the defendants' argument that many of the plaintiffs were represented by independent counsel when they executed their purchase agreements, and therefore, had a reasonable opportunity to fully review the arbitration provision.[17]

It remains to be seen what will happen when these New Jersey holdings are faced with Federal Arbitration Act preemption.

OBSERVATIONS

1. In order to avoid the possibly of an arbitration agreement becoming unenforceable due to a court finding the parties did not intend to arbitrate, arbitration agreement drafters should incorporate the mutual assent and waiver language outlined in this case, especially in regards to consumer-related arbitration.

2. The *Dispenziere* court classifies an election to arbitrate or becoming a signatory to an arbitration agreement, as an exclusive waiver-of-rights concept and as "a sole exclusive remedy" when in actuality arbitration is merely an *alternative* dispute resolution method – not a waiver of the right to seek relief at all.

3. Although the main issue in *Dispenziere* rested on determining the reasonable intention of the parties, the holding suggests that sufficient intent cannot be established if both parties do not subjectively comprehend the full extent of each term in an arbitration agreement. Is a consumer's sophistication now a prerequisite to enforceability?

4. This opinion never discusses unconscionability defenses to enforcement of arbitration agreements.

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[13] *Id.*
[14] *Id.*
[15] *Id*. at 1131.
[16] *Id.*
[17] *Id.*

5. In using customary contract principles to interpret arbitration agreements, the court ignores the long-standing principle that unless a contract is unconscionable, ignorance of contractual obligations is not a defense.

6. Although *Dispenziere* and *Atalese* have held that arbitration agreements do not need to "identify the specific constitutional or statutory right guaranteeing a citizen access to the courts that is waived by agreeing to arbitration,"[18] both cases seem to suggest otherwise in the context of consumer arbitration agreements.

7. Like the Texas Supreme Court in *Americo Life, Inc. v. Myer*,[19] this case illustrates another instance where courts use the "intent of the parties" inquiry to deny enforceability of an arbitration agreement contrary to what the parties clearly agreed.

[18] *Id.*
[19] *Americo Life, Inc. v. Myer*, 440 S.W.3d 18 (Tex. 2014*), reh'g denied* (Oct. 3, 2014).