The Arbitration Newsletter

(Published by Whitaker Chalk Swindle & Schwartz PLLC)
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August, 2016

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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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MEETING OF THE MINDS TEST: THE NEW DARLING OF THE ANTI-ARBITRATION FORCES

***Morgan v. Sanford Brown Inst.*, 137 A.3d 1168 (N.J. 2016).**

In November 2009, plaintiff students signed enrollment agreements to begin an ultrasound technician program at the Sanford Brown Institute ("Sanford Brown"). Sanford Brown Institute is a for-profit post-secondary school that offers allied health training programs. The enrollment agreement students signed before beginning the program contained an "Agreement to Arbitrate" section, which was thirty-five (35) lines of a four page agreement in nine-point font. In pertinent part, the arbitration agreement read as follows:

> Any disputes, claims, or controversies . . . arising out of or relating to (i) this Enrollment Agreement; (ii) the Student's recruitment, enrollment, attendance, or education; (iii) financial aid or career services assistance by SBI; (iv) any claim . . . or (v) objection to arbitrability . . . shall be resolved pursuant to this paragraph.[2]

In addition, the second page of the enrollment agreement read, "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES" directly above the signature lines, which both the student and Sanford Brown signed.[3]

On May 2, 2013, plaintiffs filed a complaint against the school and its administrators alleging that misrepresentations and deceptive business practices led the students to enroll in the Sanford Brown ultrasound technician program. The plaintiffs alleged that Sanford Brown misrepresented the value of its ultrasound technician program, provided inadequate instruction, and pressured students

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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 Tave Parker Doty, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] Morgan v. Sanford Brown Inst., 137 A.3d 1168, 1178–79 (N.J. 2016).

[3] *Id.* at 1173.

into financing their education with high interest loans.[4] Sanford Brown then filed a pre-answer motion to compel arbitration based on the enrollment agreement's arbitration clause. The New Jersey trial court denied Sanford Brown's motion to compel arbitration because the arbitration provision in the enrollment agreement "did not inform the plaintiffs they were waiving statutory remedies and because the provision conflicted with the remedies available under the New Jersey Consumer Fraud Act."[5]

Sanford Brown appealed the trial court's denial of its motion to compel arbitration to the Superior Court of New Jersey, Appellate Division. Upon appeal, the trial court's order was reversed, and the parties were sent to arbitration, as required in the enrollment agreement. The appellate court determined that the trial court failed to enforce the delegation clause in the arbitration provision.[6]

The students then petitioned for certification of their case to the Supreme Court of New Jersey, which was granted. New Jersey's Supreme Court determined that the arbitration provision and putative delegation clause in the enrollment agreement were not enforceable. The arbitration provision did not sufficiently explain to the plaintiffs that arbitration was a substitute for seeking remedy in court for their claims against Sanford Brown, and the putative delegation clause did not clearly delegate the issue of arbitrability to the arbitrator.

In its decision, the New Jersey Supreme Court frequently relied on its 2014 decision in *Atalese*,[7] along with *Rent-A-Center*[8] and *First Options*.[9] Under *Atalese*, the delegation of power to decide validity and scope in an arbitration provision in a consumer contract must be "clear and unambiguous" and also explain "that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law."[10] Both *Atalese* and *Sanford Brown* argue that under New Jersey's state contract law, a greater burden is not imposed on arbitration agreements than on other contracts that waive rights.[11] Under *Rent-A-Center*, if an arbitration agreement is valid, then it may delegate authority to an arbitrator to resolve disputes concerning the agreement's enforceability.[12] Under *First Options*, the issue of arbitrability depends on "whether the parties agreed to submit that question to arbitration."[13]

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[4] *Id.* at 1168. Specifically, the students alleged the defendants "misrepresented the value of the school's ultrasound technician program and the quality of its instructors, instructed students on outdated equipment and with inadequate teaching materials, provided insufficient career-service counseling, and conveyed inaccurate information about Sanford Brown's accreditation status." *Id.* at 1172–73. The students also alleged the school "employed high-pressure and deceptive business tactics that resulted in plaintiffs financing their education with high-interest loans, passing up the study of ultrasound at a reputable college, and losing career advancement opportunities." *Id.* at 1173.

[5] *Id.* at 1171.

[6] This clause delegates to the arbitrator the decision of whether or not the parties agreed to arbitration. In reversing the trial court's decision, the appellate court determined the plaintiffs failed to attack the delegation clause and the arbitration provision was "sufficiently clear, unambiguously worded, and drawn in suitably broad language" to alert plaintiffs that their claims would be resolved through arbitration. *Id.* at 1175.

[7] Atalese v. U.S. Legal Servs. Grp., 99 A.3d 306 (2014); *see also The Arbitration Newsletter* (December 2014).

[8] Rent-A-Ctr., West, Inc. v. Jackson, 561 U.S. 63 (2010).

[9] First Options of Chi. v. Kaplan, 514 U.S. 938 (1995).

[10] Atalese, 99 A.3d at 316.

[11] Sanford Brown, 137 A.3d at 1180; Atalese, 99 A.3d at 316.

[12] Rent-A-Ctr., 561 U.S. at 69–70.

[13] First Options, 514 U.S. at 943.

To be enforceable, the arbitration agreement and delegation provision must satisfy state law elements for forming a valid contract.[14] This position is consistent with the Federal Arbitration Act, which requires that arbitration agreements be "on an equal footing with other contracts" and enforced as such.[15] As contracts under state law, contract defenses such as fraud, duress, or unconscionability may invalidate an arbitration agreement.[16]

Consumer arbitration provisions in New Jersey must also explain to consumers that they are waiving their right to resolve their disputes in a judicial forum by agreeing to arbitration. Since seeking relief in a court of law is a right granted by the New Jersey Constitution, and guaranteed by the New Jersey Consumer Fraud Act, any contractual provision acting as a "waiver-of-rights provision must reflect that [the party] has agreed clearly and unambiguously" to the waiver.[17] "No magical language is required to accomplish a waiver of rights in an arbitration agreement."[18] Rather, the provision's language must simply put consumers on reasonable notice that they are electing to resolve their disputes through arbitration rather than seeking relief in a court of law.[19]

The main issue in *Sanford Brown* was who decides: (i) whether an enforceable contract to arbitrate exists; and (ii) whether the claims being made for arbitration fall within the scope of the arbitration agreement. When determining whether the court or an arbitrator decides these arbitrability questions, the presumption under the Federal Arbitration Act is that the court will decide arbitrability.[20] But, "the judicial-resolution presumption" can be overcome with "'clea[r] and unmistakabl[e]' evidence 'that the parties agreed to arbitrate arbitrability.'"[21] If a party opposes a motion to compel arbitration, then they must "mount a specific challenge to validity of a delegation clause."[22]

Under New Jersey contract law, "mutual assent" and "a meeting of the minds based on a common understanding of the contract terms" are required for an enforceable agreement.[23]

The court determined that the arbitration agreement and delegation clause present in the Sanford Brown enrollment contract were not enforceable. The enrollment agreement's arbitration provision states, in part, that "any objection to arbitrability . . . shall be resolved **pursuant to this paragraph**."[24] This language does not explain who will determine whether or not the parties agreed to arbitrate their claims. In addition, after *Atalese*, an arbitration agreement must contain language alerting a consumer that the agreement acts as a "judicial forum" waiver.[25] Language explaining this

[14] Sanford Brown, 137 A.3d at 1177 (citing First Options, 514 U.S. at 944).
[15] Sanford Brown, 137 A.3d at 1177 (citing Rent-A-Ctr., 561 U.S. at 67); 9 U.S.C.A. § 2.
[16] Sanford Brown, 137 A.3d at 1180 (citing Rent-A-Ctr., 561 U.S. at 63).
[17] Sanford Brown, 137 A.3d at 1180; Atalese v. U.S. Legal Servs. Grp., 99 A.3d 306, 313 (2014) (citing Leodori v. CIGNA Corp., 814 A.2d 1098 (N.J. 2003)).
[18] Sanford Brown, 137 A.3d at 1180; Atalese, 99 A.3d at 316.
[19] Atalese, 99 A.3d at 316.
[20] Sanford Brown, 137 A.3d at 1181 (quoting First Options of Chi. v. Kaplan, 514 U.S. 938, 944 (1995)).
[21] Sanford Brown, 137 A.3d at 1181 (alterations in original) (quoting First Options, 514 U.S. at 944).
[22] Rent-A-Ctr., West, Inc. v. Jackson, 561 U.S. 63, 72 (2010).
[23] Sanford Brown, 137 A.3d at 1180.
[24] *Id.* at 1178–79 (emphasis added).
[25] *Id.* at 1180.

judicial forum waiver to students is not present in the Sanford Brown enrollment agreement; therefore, the court deemed the arbitration agreement and delegation clause unenforceable.[26]

In order for an agreement to be enforceable under New Jersey contract law, "a common understanding of the contract terms" must be present.[27] Thus, unless the arbitration agreement explains to the consumer that arbitration is a substitute for relief in court, a meeting of the minds has not occurred, the contract has not been mutually agreed, and is unenforceable. Likewise, if the arbitration agreement does not contain a provision explaining to the consumer that an arbitrator, rather than a court, will determine whether or not the claim will be resolved in arbitration, then the delegation clause is also unenforceable under the meeting-of-the-minds test.

OBSERVATIONS

1. Drafting an enforceable arbitration clause, especially one to be signed by consumers, just got more difficult in New Jersey.

2. No longer does an undefined term or a non-term-of-art in a New Jersey contract get defined by its usual, ordinary, and customary usage, especially if the word is "arbitration" in a consumer arbitration agreement.

3. Now in *Morgan v. Sanford Brown* consumers who sign enrollment contracts need a definition of "arbitration," because the word is "not self-defining."[28]

4. The New Jersey Supreme Court, since *Atalese* in 2014, requires all consumer arbitration agreements to contain mandatory waiver language regarding the consumer's right to seek relief in the judicial system.

5. How do these New Jersey cases, following *Atalese*, not trigger Federal Arbitration Act preemption by requiring a higher threshold of meeting-of-the-minds language definition for consumer arbitration contracts than for any other New Jersey state-law-governed contract formation analysis?

6. Is not New Jersey's word play with "arbitration" an example of the arbitration agreement in question not being placed on equal footing with other contracts?[29]

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[26] *Id.* at 1181. "The meaning of arbitration is not self-evident to the average consumer," who will not know without explanation "that arbitration is a substitute for the right to have one's claims adjudicated in a court of law." *Id.* at 1180 (quoting Atalese, 99 A.3d at 313).
[27] Sanford Brown, 137 A.3d at 1180.
[28] *Id.* at 1171.
[29] "The FAA thereby [9 U.S.C. §2] places arbitration agreements on an equal footing with other contracts [omitting cite to *Buckeye*], and requires courts to enforce them according to their terms."