

Analysis

# Compelling Arbitration: Recent Rulings and Issues to Consider

New Jersey's Supreme Court addressed arbitration clauses in 2019 and will confront them again in the upcoming term. Practitioners continue to face unique issues, outlined in this article, which are sometimes overlooked by a court when construing an arbitration clause.

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Proponents of arbitration cite many advantages. Arbitration is a process intended to resolve disputes quickly, and at less cost. But does it? Courts have made it clear that they continue to favor and compel it, but are the “benefits” of arbitration always realized? What procedural issues and claims prevent a “speedy” or “cost-effective” arbitration process? When should the courts take a second look at compelling arbitration?

New Jersey's Supreme Court addressed arbitration clauses in 2019 and will confront them again in the upcoming term. Practitioners continue to face unique issues, which are sometimes overlooked by a court, when construing an arbitration clause. These include the following:

- Claims against non-signatories to the agreement containing an arbitration clause;
- Multiple agreements that govern the relationship/transaction with varying and inconsistent dispute resolution provisions; or
- Multiple claims against multiple parties, some subject to arbitration and others not.

These issues raise unique challenges that often increase costs and create protracted litigation in multiple forums.

## Recent and Pending Issues Before the NJ Supreme Court

New Jersey's highest court continues to address myriad arbitration issues. In 2019, it decided *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191 (2019), and *Kernahan v. Home Warranty Adm' of Florida*, 236 N.J. 301 (2019),

which required the court to revisit New Jersey law interpreting the form, language and content of arbitration clauses, as well as contract formation principles.

In *Kernahan*, the court found that a contract lacked mutual assent for its arbitration clause, rendering it unenforceable. The plaintiff, a home-service agreement purchaser, had filed statutory and common law consumer fraud claims against the defendants, the sellers. The trial court denied the defendants' motion to compel arbitration based on the contract, finding that there was insufficient mutual assent; therefore, there was no arbitration agreement. The Appellate Division affirmed.

The Supreme Court also affirmed, finding the arbitration provision confusing, misleading, and internally inconsistent. The clause required the parties to mediate before arbitrating, but its language blurred the distinction between the two. The arbitration language was located under the contract's mediation section, which did not clearly advise consumers of the arbitration clause. It did not specify that the arbitration proceedings would be final or preclude litigation. It also failed to inform consumers of the differences between arbitration and litigation and that they would be waiving their right to a jury trial, as required by *Atalese v. U.S. Legal Services Group*, 219 N.J. 430 (2014). *Kernahan* reaffirmed *Atalese*, including its seminal requirement that arbitration clauses—and, importantly, jury trial waivers—be clear and conspicuous.

In *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191 (2019), the court addressed consumer challenges to the validity of the entire sales agreements. The plaintiffs—car buyers—filed statutory consumer fraud and common law claims against the defendants—car dealerships—alleging that the defendants' fraudulent sales practices and misrepresentations induced them to sign the agreements. The trial court compelled arbitration. The Appellate Division reversed.

The Supreme Court reversed, holding that arbitrators must decide enforceability issues as to the entire contract, as courts should only review threshold arbitrability and issues affecting the formation of the arbitration agreement. The Supreme Court ruled that the plaintiffs were compelled to arbitrate fraudulent inducement allegations.

The court recently granted Petition for Certification of several arbitration-related matters. In *Flanzman v. Jenny Craig*, No. A-2580-17T1 (App. Div. Nov. 13, 2018), the Supreme Court will examine whether the Appellate Division properly invalidated an arbitration clause that failed to identify an arbitration forum or enumerate an arbitration process. The court will also tackle when parties can invoke N.J.S.A. 2A:23B-11(a), which permits judges to appoint arbitrators. In *Skuse v. Pfizer Inc.*, No. A-3027-17T4 (App. Div. Jan. 16, 2019), a case involving a company's practice of having its employees agree to arbitration as part of the employment process and requiring that its employees complete mandatory courses and training modules, the Supreme Court will consider whether those requirements are valid to form a binding and enforceable contract, and whether this process is an explicit, affirmative and unmistakable assent to arbitration.

Finally, in *Delaney v. Dickey*, No. A-1726-15T4 (App. Div. Aug. 23, 2019), the Supreme Court will grapple with the question of whether a client can be bound to an arbitration provision in an engagement letter regarding a legal malpractice claim, or whether such provision runs afoul of attorney ethics rules, and an attorney's duty to adequately notify a client to permit informed decisions.

## **Unique Arbitration Issues Continue to Emerge**

Each of these cases poses a unique legal concern about the efficiency of including an arbitration provision in a contract. Beyond those cases pending before the New Jersey Supreme Court, cases challenging arbitration provisions also include concerns about the ability to bring claims against non-signatories, how to interpret overlapping contracts with inconsistent dispute-resolution provisions, and the consequences of staying a claim where a separate arbitration involving a different party could affect its outcome.

In *Hirsh v. Amper Financial Services*, 215 N.J. 174 (2013), the plaintiffs—securities purchasers—filed breach of contract and breach of fiduciary duty claims against financial services and accounting firms due to an alleged Ponzi scheme. After the defendants filed a third-party complaint against a broker-dealer for indemnification and contribution, with whom the plaintiff had signed a contract with an arbitration clause, the trial court compelled arbitration among the parties. But the other defendants had not signed the arbitration clause contract. The Appellate Division affirmed, as the parties and claims were sufficiently “intertwined” to invoke equitable estoppel because the plaintiff’s claims against the non-signatories arose from their claims against the signatory.

The Supreme Court reversed. While New Jersey courts have compelled non-signatories to arbitrate based on agency principles, it rejected the “intertwinement” theory to compel arbitration “when its application is untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or at a minimum an oral agreement to submit to arbitration.” The court reiterated that the preference for resolving ambiguities in favor of arbitration only applies when the parties have agreed to arbitrate. Absent express contractual language signaling an agreement to arbitrate, a court “has little to interpret in favor of compelling arbitration.”

In cases involving non-signatories to a contract containing an arbitration clause, the parties’ relationships and facts surrounding execution of an arbitration clause must be carefully considered to determine whether claims against those non-signatories can be referred to arbitration. On the other hand, when claims against one party proceed to arbitration, courts typically stay related claims against other parties, which requires plaintiffs to prosecute their claims first in arbitration and then in court. That practice may increase litigation costs and result in inefficient, protracted litigation, as parties have to pay arbitration organization fees, arbitrator expenses, court costs, duplicative attorney fees, discovery, and other ancillary costs and fees to effectively prosecute two separate actions in separate forums.

Claims arising from complex transactions with multiple contracts and disparate dispute-resolution provisions present analytical challenges. In *Rosenthal v. Rosenblatt*, No. A-3753-12T2, 2014 WL 5393243 (App. Div. Oct. 24, 2011), the plaintiff-buyer sued the defendants—dental practice sellers—for misrepresentations of the value and condition of that practice. The sale involved an asset purchase agreement and separate ancillary contracts. The asset purchase agreement had an arbitration clause, but some ancillary documents did not. One ancillary agreement referenced the asset purchase arbitration clause, and another contained a different fee and cost provision.

The Appellate Division held that ambiguity and inconsistencies in the contract documents rendered the arbitration provision in the asset purchase agreement invalid. It reversed the trial court’s decision to compel arbitration. Therefore, parties should be mindful that if a transaction employs multiple contracts or ancillary documents, arbitration or dispute-resolution provisions must be clear, present, cross-referenced in all documents, and internally consistent. Any ambiguity or inconsistency between or among them could complicate enforcement of some or all of the agreements.

As courts continue to favor arbitration, litigants will encounter unique arbitration issues, particularly in cases with multiple parties or dispute resolution clauses. Attorneys should follow New Jersey Supreme Court jurisprudence on the language, form and content of arbitration clauses, the requirements for mutual assent, and the elements of a valid and binding agreement to arbitrate. The use of arbitration clauses in specific industries, such as attorney-client agreements, employer-employee agreements and consumer cases will be revisited. In advising their clients, counsel should be mindful of how developing law affecting the risks and benefits of arbitration will impact their clients’ businesses, industries, relationships and outcomes. ###

For additional information about this article or other litigation issues, please contact **Rose A. Suriano**, Co-Chair and Member, Litigation Practice, Brach Eichler LLC, at [rsuriano@bracheichler.com](mailto:rsuriano@bracheichler.com) or 973-403-3129.