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SCOTUS Asked to Review NJ Arbitration Case

By Mary Pat Gallagher

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The U.S. Supreme Court has been asked to review a New Jersey Supreme Court holding that arbitration clauses in consumer contracts are not enforceable unless they explicitly waive the right to go to court.

The petition for certiorari was filed by U.S. Legal Services Group, a San Francisco-based law firm that provides debt relief services to clients around the country through contracts with local attorneys.

U.S. Legal framed the question for the court as, "Whether the Federal Arbitration Act pre-empts a state-law rule holding that an arbitration agreement is unenforceable unless it affirmatively explains that the contracting party is waiving the right to sue in court."

It contends that the New Jersey Supreme Court's unanimous decision in *U.S. Legal Services Group v. Atalese* is contrary to the plain language of the Federal Arbitration Act and conflicts with numerous holdings by other courts, both state and federal, including the U.S. Court of Appeals for the Third Circuit.

The petition refers to the New Jersey holding as a "radical departure from innumerable contracting parties' settled expectations," which, if left uncorrected, will invalidate numerous other arbitration agreements and lead to forum-shopping.

"The New Jersey Supreme Court's decision reflects judicial hostility toward arbitration that the court has been fighting for decades," U.S. Legal argued.

Half-a-dozen amici curiae have lined up alongside U.S. Legal in briefs filed with the court Feb. 23.

They include the U.S. Chamber of Commerce, a Washington, D.C., federation of businesses and business associations; the Cato Institute, a libertarian think tank also in Washington; and the Pacific Legal Foundation, based in Sacramento, California, which advocates for free enterprise positions.

The arbitration clause U.S. Legal seeks to enforce states "any 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" and that any "decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction."

It appeared in an agreement for debt adjustment services signed by Patricia Atalese with U.S. Legal in July 2011, according to court documents.

Atalese claims she paid about $5,000 in fees but the firm settled only one debt, though it told her it was negotiating with other creditors to resolve other debts, court documents said.

The firm also allegedly informed her that it had numerous attorneys working on her file when the only work done by an attorney was the preparation of a one-page answer for her to file pro se, according to court documents.

Atalese sued under New Jersey's Consumer Fraud Act and Truth-in-Consumer Contract Warranty and Notice Act, claiming that U.S. Legal was not authorized to provide debt relief services in New Jersey and that it made misrepresentations about that, the work it was doing and the fees it collected.

The trial and appeals courts found Atalese had waived her right to go to court.

Reversing on Sept. 23, 2014, the New Jersey Supreme Court cited the importance of the "time-honored right to sue" and the need for courts to "take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent."

Arbitration, by its very nature, involves a waiver of the right to sue, Justice Barry Albin acknowledged in the court's opinion.

"But an average member of the public may not know—without some explanatory comment—that arbitration is a substitute for the right to have one's claim adjudicated in a court of law," he said.

The clause in question did not tell Atalese she was waiving her right to sue in court or explain what arbitration is or how it differs from a lawsuit, Albin said.

An arbitration clause must, "at least in some general and sufficiently broad way ... explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute," Albin said.

No particular wording is necessary but New Jersey law mandates that consumer contracts be written in a "simple, clear, understandable and easily readable way," Albin said.

Albin emphasized that the court was not imposing tougher standards on arbitration clauses, which would violate the Federal Arbitration Act's requirement that they be placed "on an equal footing with other contracts."

According to amici, however, that is exactly what the court did.

"In my view, the New Jersey Supreme Court decision clearly conflicts with U.S. Supreme Court precedent that forbids states from imposing special notice requirements for arbitration that are not generally applicable to all other contracts," said Archis Parasharami of Mayer Brown in Washington, D.C., who represents the U.S. Chamber and fellow amicus, the New Jersey Civil Justice Institute.

His brief urged summary reversal of the New Jersey court.

Deborah La Fetra, lawyer for the Pacific Legal Foundation, said the New Jersey opinion "seems to require that the parties include legal advice in the actual text of their arbitration contracts."

The Cato Institute and the National Federation of Independent Business argued in a joint brief that U.S. Supreme Court review is particularly important to small and medium-sized businesses, which rely on arbitration to limit litigation costs, especially in dealing with out-of-state customers or suppliers that would otherwise be able to sue them in distant jurisdictions.

Such businesses might lack the resources to monitor changes in arbitration law in the various states where they do business and thus be "unable to adapt their contracts to New Jersey's anomalous and ill-defined rule," said the brief, filed by Derek Ho of Washington, D.C.'s Kellogg, Huber, Hansen, Todd, Evans & Figel.

In an interview, Ho referred to a "tug of war" between state courts and the U.S. Supreme Court regarding the scope of the Federal Arbitration Act, which requires the court "to step in with some frequency to enforce what the FAA demands."

U.S. Legal's lawyer, Matthew Hellman of Jenner & Block in Washington, D.C., said, "We think this is an important case because the New Jersey Supreme Court has imposed barriers to enforcing arbitration agreements that the federal law and the federal courts do not allow."

Manahawkin solo William Wright, who represents Atalese, said the New Jersey court "did a very good job of making it clear that this was about New Jersey state law" and "they relied on and followed the Federal Arbitration Act and all the federal precedent."

His client's brief is due April 24.

The Supreme Court typically grants fewer than 4 percent of the appeals requested in private civil matters.

It already has one arbitrability case on next year's docket, *DirecTV v. Imburgia.* The appeal, granted March 23, challenges a California state-court decision regarding class action waiver.

During the 2013-14 term, the U.S. Supreme Court decided two arbitrability cases, one of which, *Oxford Health Plans v. Sutter*, originated in federal court in New Jersey.

The high court's ruling in *Oxford* upheld a Third Circuit decision allowing an arbitrator to decide that the agreement allowed class arbitration, even though it was silent on the issue.

Eric Katz of Roseland's Mazie Slater Katz & Freeman, who represents the Sutter class, noted that on March 9, certiorari was denied in another New Jersey case, *Opalinski v. Robert Half International*, which also concerned classwide arbitration.