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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NJ High Court Poised To Reshape Arbitration Disputes

By **Martin Bricketto**

Law360, Jersey City (August 13, 2015, 4:19 PM ET) -- A 2014 New Jersey Supreme Court decision upping requirements for consumer arbitration agreements has made it easier for some plaintiffs to pursue claims in court and spurred companies to retrofit their contracts. Now, almost a year after *Atalese v. U.S. Legal Services Group LP*, the justices are considering another arbitration case that could bring even more changes.

The court is expected to hear arguments in *Morgan v. Sanford Brown Institute* later this year or early next year on whether enrollees with career training provider Sanford Brown Institute **must arbitrate claims** over their enrollment agreements, including New Jersey Consumer Fraud Act claims.

The state Appellate Division ruled the institute's arbitration language was broad enough to cover plaintiffs' CFA claims just before the state Supreme Court issued its **consumer-friendly ruling** in *Atalese v. U.S. Legal Services Group LP* on Sept. 23.

In *Atalese*, the court found that an arbitration provision in a contract for debt adjustment services was unenforceable because it didn't have clear language stating the plaintiff was waiving her right to go to court.

That's a fixable issue for companies compared to what could happen in *Morgan*, where the justices could potentially require language that signatories are forgoing the right to sue under specific statutes like the CFA, according to Gavin Rooney of Lowenstein Sandler LLP. Rooney is representing the New Jersey Civil Justice Institute and U.S. Chamber of Commerce as amicus participants in the case.

"It will obviously cause problems for certain existing arbitration agreements, but it's something I think industry can react to," Rooney said about *Atalese*. "If you go beyond that and you have to say you're giving up rights to sue under this statute or that statute, that strikes me as next to impossible to do practicably."

Morgan represents a chance for the New Jersey Supreme Court to bring arbitration law in the state more in line with the Federal Arbitration Act and federal jurisprudence, the NJCJI and Chamber of Commerce argued in their amicus brief, urging the justices to affirm the Appellate Division's Sept. 8 ruling.

The appeals court found that the institute's arbitration provision was clear and unambiguously worded and that a severability clause in the agreement addresses possible conflicts between the contract's terms and the CFA. The justices agreed to hear the case in January.

The Supreme Court has viewed such cases in terms of a waiver of rights when they should

be interpreted as a choice of forum, according to Rooney.

"When you have a waiver, there are other threshold requirements that come into play in order to determine whether something is enforceable," Rooney said. "I think arbitration is really just a choice of forum and should not be viewed as a waiver per se."

But Kevin M. Costello of Costello & Mains PC said jury trials are an enshrined right, and arbitration "cuts it out of us like healthy tissue."

"Arbitration is oppression," Costello said. "I don't believe that arbitration is a fair way to resolve the sort of disputes that otherwise would go to a jury."

William Wright, who represented Patricia Atalese against U.S. Legal, said the court could take the opportunity to strengthen the rights of consumers.

The Atalese decision itself isn't going anywhere, with the U.S. Supreme Court in June **declining to take up a petition** from U.S. Legal Services to hear the case. The company and its supporters argued in vain that the decision clashed with the FAA and numerous decisions in federal and state courts.

Since its release, Atalese has helped topple as well as uphold arbitration agreements in other state court cases.

"That goes to show you it really is not necessarily a major change but just a restatement of New Jersey's contract law, which is that a waiver of rights provision must clearly and unequivocally state its purpose," Wright said.

For example, the state Appellate Division in October reversed a ruling that sent a dispute over the sale of a dental practice to arbitration, finding that arbitration provisions in agreements from that sale weren't enforceable because "they failed to clearly and unambiguously inform the signatories that they were giving up the right to pursue their claims in court."

The appeals court in November again relied on Atalese in toppling a decision that 22 condominium buyers had to arbitrate claims that Kushner Cos. and others misled them into joining a waterfront community in Perth Amboy, New Jersey, that wasn't developed as promised.

Atalese also showed up in the Appellate Division's consideration of an age discrimination suit against Ernst & Young US LLP. However, the appeals court in July affirmed that plaintiffs couldn't avoid arbitration. Among other findings, the panel said that the auditing giant's mandatory, alternative dispute resolution policy gelled with Atalese and clearly stated that the employees wouldn't be able to sue in court over covered disputes.

As some of those cases and others illustrate, Atalese has touched more than just consumer disputes.

John North of Greenbaum Rowe Smith & Davis LLP told Law360 that he has represented a client in litigation involving a commercial banking contract in which the parties — a bank and a hedge fund — agreed to arbitrate any disputes. The language included elaborate procedures for arbitrating claims, but since the agreement was between sophisticated parties, it didn't specifically say that they were waiving their rights to sue in court, according to North.

While North said his client, the bank, proceeded to arbitration, the other side went to court and asserted Atalese. The trial court avoided the issue and directed the parties to arbitration based on another, allegedly controlling agreement with clearer waiver language,

but the case is on appeal, according to North. The hedge fund contends the appeals court should look to the other agreement, which it says runs afoul of *Atalese*, North said. Even if it decides that agreement applies, the appeals court could still find that it's clear enough to satisfy *Atalese*, North added.

Either way, the case raises questions about *Atalese's* reach that the Supreme Court may one day have to address, according to North.

"If you've got two lawyers sitting down and negotiating a \$75 million deal for two financial service organizations and they spell out a three-page arbitration provision but don't say 'By pursuing arbitration, as we've agreed to do, we both acknowledge we're forgoing any remedy in court,' that would render the whole thing unenforceable?" North said. "I can't imagine in that kind of situation that the court wouldn't distinguish the *Atalese* case."

So far, the clearest impact of *Atalese* was inspiring businesses to take a fresh look at arbitration terms in their contracts, according to Charles Gormally of Brach Eichler LLC.

"Anybody who we knew that had arbitration either in their buy-sell agreements, their consumer contracts, all the way to our fee agreements — it was time to take them out and dust them up and modernize them," Gormally said.

Atalese has also made state court an even more welcoming venue for parties hoping to sidestep arbitration, who will look to ensure they are pleading their cases in a manner that avoids federal jurisdiction, according to Michael R. McDonald of Gibbons PC. Requiring "magic words" in the form of waiver language seems inconsistent with federal policy, McDonald added.

"I think U.S. Supreme Court and circuit courts have been fairly consistent over the last couple of years that the policy favoring arbitration under the FAA is very, very strong, and I have a hard time believing that a federal court would have reached the same decision in the *Atalese* case," McDonald said.

The pending case is *Morgan et al. v. Sanford Brown Institute et al.*, case number 075074, before the New Jersey Supreme Court.

--Additional reporting by Alex Wolf. Editing by John Quinn and Philip Shea.

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