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Arbitration Clauses - Good or Bad?

by Laura D. Ruccolo, Esq.

Mandatory arbitration clauses continue to be a hot topic. In recent months, there has been a plethora of decisions in a number of states concerning whether arbitration agreements in consumer contracts are unconscionable.

The New Jersey courts have squarely addressed the issue of arbitration agreements in consumer contracts. Although, recently, that law has been changing and evolving. In 2001, in *Gras v. Associated First Capital Corp.*, 346 N.J. Super. 42 (App. Div. 2001), the New Jersey Appellate Division held unambiguously that arbitration agreements are permissible in consumer contracts, even those that are forms prepared by the business with whom the consumer is dealing. In *Gras*, the consumer brought an action asking the court to find that certain portions of their loan agreement violated the New Jersey Consumer Fraud Act. As anyone who has ever been sued under the Consumer Fraud Act knows, this statute is broadly interpreted and can result in an award of treble damages and attorney's fees to the consumer if successful.

The contract provision at issue in *Gras* was an arbitration agreement that provided "any claim or dispute based on federal or state statute" be arbitrated rather than tried before a jury. The provision also prohibited the consumer from pursuing class actions in arbitration. The plaintiff claimed that he did not negotiate or discuss this arbitration agreement with the defendant. The plaintiff further alleged that the agreement was presented to him in a "stack" of documents and that he never read the provision. A not uncommon claim. The Appellate Division held that arbitration agreements are enforceable and not against public policy. The court emphasized that New Jersey law, as well as federal law, favors arbitration.

The Appellate Division also held that there is no inherent conflict between arbitration and the underlying purposes of the Consumer Fraud Act. Specifically, the court noted that the Consumer Fraud Act does not create a private right to bring a class action. Therefore, the Appellate Division found an arbitration agreement where the consumer waived his right to bring a class action was enforceable. However, that was not the end of the question in the New Jersey courts. The New Jersey courts continue to address the issue of arbitration agreements and waivers to bring class actions.

In 2004, the Appellate Division reviewed a trial court's decision to enforce arbitration agreements contained in a buyer's order and a retail installment contract used by an automobile dealership. See *Rockel v. Cherry Hill Dodge*, 368 N.J. Super. 577 (App. Div. 2004) cert. denied 181 N.J. 545 (2004). In *Rockel*, the Appellate Division refused to enforce the arbitration agreement because it found that it was ambiguous. The court emphasized that the size of the print and the location of the arbitration provision in the agreement has a great relevance to the determination to compel arbitration. Thus, it is important that any arbitration agreement used in connection with a consumer contract meet the guidelines provided by the New Jersey courts in *Gras* and *Rockel*, among other decisions.

More recently, in 2006, the New Jersey Supreme Court addressed for the first time the enforceability of class action waivers in arbitration agreements. In *Muhammad, et al v. County Bank of Rehoboth Beach*, 89 N.J. 1 (2006), the New Jersey Supreme Court held that an arbitration agreement that forbade class-wide arbitration in a consumer pay day loan contract was unconscionable and unenforceable. The court severed the class action provision and enforced the rest of the

arbitration agreement. In *Delta Funding Corp. v. Harris*, decided at the same time as the *Muhammad* case, the New Jersey Supreme Court found enforceable and not unconscionable a class arbitration waiver. While the *Delta Funding* opinion may seem to be in conflict with the New Jersey Supreme Court's opinion in *Muhammad*, the difference appears to be explained by the amount of damages at issue. Unlike in *Muhammad*, the plaintiff's claim in *Delta Funding*

involved substantial damages of more than \$100,000.00. The claim for damages in the *Muhammad* case was much smaller, less than \$200.00. Therefore, while arbitration agreements in consumer contracts are enforceable in New Jersey if prepared correctly, it appears that whether a class action waiver will be upheld will depend upon the facts of each case and, specifically, the amount of damages at issue.

Arbitration Agreements

Pros	Cons
1. May prevent lawsuits - Plaintiff's attorneys usually shy away from cases that do not allow them to run up large fees, which arbitration typically prevents.	1. Discovery is limited, so that helpful facts in defense of a claim may not be discovered.
2. Disputes are typically resolved quicker than in Court.	2. If not done right, the arbitration agreement will not be enforced. The law continues to change and arbitration provisions need to be continually reviewed and updated.
3. The amount of an arbitration award is usually less than a jury award.	3. Filing fees and hearing costs are higher than Court fees.

TOPICS YOU WOULD LIKE TO SEE ADDRESSED

If you have any suggestions for future articles, please call Ms. Ruccolo at 856.234.6800 or email them to lruccolo@capehart.com.



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