

In *Kernahan*, New Jersey Supreme Court Rules On the Enforceability of Arbitration Clauses in Consumer Contracts

Alan S. Pralgever

Greenbaum, Rowe, Smith & Davis LLP Client Alert

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On January 10, 2019, a unanimous decision by the New Jersey Supreme Court in *Amanda Kernahan v. Home Warranty Administrator Florida, Inc.* reaffirmed a fundamental principle set forth in the Court's 2014 ruling in *Atalese*, which provides that an arbitration clause in a consumer contract is unenforceable unless the contract language affirmatively states and unambiguously conveys "that there is a distinction between agreeing to resolve a dispute in arbitration and in a judicial forum."

Both the Federal Arbitration Act (FAA) and the New Jersey Arbitration Act encourage the resolution of disputes through arbitration. However, per *Atalese* and now *Kernahan* the arbitration clause must state clearly and unambiguously such that a lay person would understand that they are agreeing to waive their right to resolve the dispute in a court of law, and instead are agreeing to arbitration to resolve all disputes.

In *Kernahan*, the plaintiff purchased a "home service agreement" from the defendants. The agreement contained a "MEDIATION" section that incorporated an arbitration provision that failed to clearly spell out plaintiff's and other policy purchasers' agreement to arbitrate all contractual disputes. The New Jersey Supreme Court ruled that the agreement failed to explicitly inform the purchaser that she was waiving her right to a jury trial, and would therefore be prevented from seeking such additional remedies as treble damages, punitive damages, attorney's fees and costs.

The defendant in *Kernahan* initially set forth an argument that *Atalese* was in conflict with a recent U.S. Supreme Court decision in *Kindred Nursing Centers L.P., Partnership vs. Clark*. The Court's ruling in *Kindred Nursing* determined that the Kentucky Supreme Court's "clear statement

Attorneys

Alan S. Pralgever

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rule” violated the FAA because the rule singled out arbitration agreements “for disfavored treatment.”

In *Kernahan*, Justice Albin wrote a concurring opinion making it clear that the *Atalese* and *Kernahan* cases are not in conflict with the U.S. Supreme Court’s *Kindred Nursing* opinion, as they did not single out arbitration clauses for special “disfavored treatment.” Justice Albin went on to clarify that like all contractual agreements, an arbitration agreement must be the product of “mutual assent,” which requires that the parties have a clear understanding of the terms to which they have agreed. *Kernahan* reaffirmed the holding in *Atalese* that a contractual provision must be sufficiently clear to place a consumer on notice that they are waiving a constitutional, statutory, or common law right to trial.

In *Kernahan*, the arbitration provision was not only unclear, it was embedded in a section entitled “MEDIATION.” Thus, the New Jersey Supreme Court determined that the arbitration agreement was “misleading” because it was mislabeled, was not conspicuous, and would not be perceived as binding by the employee. Therefore, the Court held that there was no “mutual assent” to the arbitration agreement, and that without “mutual assent” the agreement could not be binding under general principles of contract law.

Since Justice Albin’s concurrence makes it clear that neither *Atalese* nor *Kernahan* are in conflict with the U.S. Supreme Court’s *Kindred Nursing* opinion or the FAA, it is less likely that the New Jersey Arbitration Act will be overturned in a federal court or by the U.S. Supreme Court.

Please contact the author, **Alan S. Pralgever**, for additional information concerning the issues discussed in this Alert.