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Express Waiver of Rights in Arbitration Provisions Called Into Question by Recent New Jersey Appellate Decision

In an [opinion](#) issued on February 8, 2023, the New Jersey Appellate Division carved out an exception to the New Jersey Supreme Court's requirement in [Atalese v. U.S. Legal Services Group, L.P.](#) that arbitration provisions must contain clear and unambiguous waiver-of-rights language, holding that *Atalese* does not apply to sophisticated commercial parties with relatively equal bargaining power.

An agreement that the County of Passaic entered into with Horizon Healthcare Services, Inc. contained a dispute resolution provision simply stating that "the parties shall submit the dispute to binding arbitration under the commercial rules of the American Arbitration Association." After the trial court granted Horizon's motion to compel arbitration based on this provision, the county appealed, arguing that the arbitration clause was unenforceable because it lacked an express waiver of access to the courts, as required by *Atalese*. The Appellate Division affirmed, relying on section 2 of the Federal Arbitration Act, which provides that a written arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." That provision, the Appellate Division reasoned, requires courts to apply standard contract principles, including "notions of unconscionability," in order to determine whether mutual assent to the arbitration clause exists, thus rendering the arbitration clause enforceable. Importantly, whether such assent exists will "vary from case to case based on the parties' sophistication and the one-sided nature of the negotiations." Thus, in making this assessment, courts should consider the sophistication of the parties, representation by counsel during negotiations and the formation of the agreement, and other factors that may unreasonably leverage one party's contractual position over the other. Because the county

and Horizon “are sophisticated and possess relatively equal bargaining power,” the Appellate Division found the arbitration provision to be enforceable, notwithstanding the absence of an *Atalese*-type waiver.

The Appellate Division reconciled its reasoning with *Atalese* by referencing the *Atalese* court’s overarching focus on asymmetries of contractual bargaining power, such as in consumer and employment contracts, holding “that an express waiver of the right to seek relief in a court of law to the degree required by *Atalese* is unnecessary when parties to a commercial contract are sophisticated and possess comparatively equal bargaining power.”

Although the Appellate Division’s recent decision defines an exception to *Atalese* for commercially sophisticated parties, the New Jersey Supreme Court may grant certification to revisit the issue. Stay tuned for further developments in this always-evolving area of the law to understand your rights to litigate disputes in court rather than in arbitration.

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