

## Enforceability of Arbitration Clauses-Has the New Jersey Appellate Division's Recent Decision Provided Clarity?

### Litigation Law Alert

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On February 8, 2023, the New Jersey Appellate Division issued its ruling in [\*County of Passaic v. Horizon Healthcare Services, Inc., d/b/a Horizon Blue Cross Blue Shield of New Jersey, No. A-0952-21\*](#) ("Passaic"). The decision is highly significant in that it narrows the holding of [\*Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430\*](#) (2014), in which the Court had previously found an arbitration clause to be unenforceable because it lacked language constituting an "explicit waiver of access to the courts".

By way of background, the underlying dispute arose out of a contract between the County of Passaic and Horizon Healthcare Services, Inc. ("Horizon") to manage the County's self-funded health benefit plan. In 2021, the County commenced a lawsuit against Horizon in the Superior Court, claiming that Horizon breached the contract by failing to implement certain modified reimbursement rates. Horizon moved to compel arbitration based on a clause in the agreement that "[i]n the event of any dispute between the parties to this Agreement arising under its terms, the parties shall submit the dispute to binding arbitration under the commercial rules of the American Arbitration Association." The trial court granted Horizon's motion, and ordered the parties to arbitration.

The County, on appeal, argued that the matter should not have been ordered to arbitration because the arbitration clause at issue did not contain an explicit waiver of the County's right to proceed in court, and was therefore unenforceable pursuant to the Court's decision in *Atalese*. In *Atalese*, the Supreme Court explained that arbitration provisions must "be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right." 219 N.J. at 443. Following that decision, Courts and practitioners generally assumed that an arbitration provision lacking such an express waiver could well be unenforceable in any context. The Court in *Passaic* clarified that the broad rule applies only to consumer contracts, holding "because the parties are sophisticated and possess relatively equal bargaining power – *Atalese's* requirement of an express

waiver of the parties' right to seek relief in a court of law is inapplicable and the arbitration agreement [between Passaic and Horizon] is enforceable."

Thus, Passaic confirms that *Ata/ese* does not require an explicit waiver in all situations, but only as a safeguard where there is an "unequal relationship between the contracting parties or the adhesional nature of the contract" makes such protection necessary. The Court also noted that the stricter approach found in *Ata/ese* has generally only been followed in the context of employment and consumer contracts. Accordingly, it appears that New Jersey Courts will enforce arbitration provisions in contracts made between sophisticated parties even where those provisions do not contain an explicit waiver of the right to jury trial. Consumer contracts, however, unquestionably must contain such a waiver.

*If you have any questions about this alert, please contact:*

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