

# THE FPT NEWS

“. . . useful information for clients and prospective clients.”

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Attorneys at Law

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## **ARBITRATION CLAUSES**

### *Court Sets New Standard*

It is time for clients to review arbitration clauses in their contracts. As most know, New Jersey courts are in the vanguard across the nation in enforcing contractual agreements to arbitrate disputes, including arbitration clauses found in employment applications and agreements, commercial contracts, personal contracts, settlement agreements, and even in the fine print of consumer warranties. The New Jersey Supreme Court, however, has ruled such arbitration provisions must "clearly and ambiguously" notify the parties to the contract that they are waiving their right to bring a law suit in a court. Taking greater care in consumer-related contracts is absolutely essential.

In Atalese v. U.S. Legal Servs. Grp., 214 N.J. LEXIS 906 (2014), Plaintiff Atalese signed a twenty-three-page services contract with defendant, a debt adjustment company. Plaintiff paid approximately \$5,000 for the services, which expressly included attorneys' fees. When she learned that defendant would only prepare documents for her to file in court but not represent her, plaintiff filed a law suit in the Special Civil Part under the New Jersey Consumer Fraud Act ("CFA"), among other claims, and sought treble damages and attorneys' fees as permitted by the CFA. Defendant moved to compel arbitration and relied on the arbitration provision on page nine of the services contract.

In this case, the arbitration provision was lengthy. It significantly provided that any dispute related to the

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## **LIVE BY THE SHORTCUT**

### *Die by the Shortcut*

A recent decision by the New Jersey Supreme Court demonstrates how taking shortcuts in the formation of a new business can come back to haunt you. In ADS Associates v. Oritani Savings Bank, 2014 N.J. LEXIS 923 (2014), the Court held that a required signatory on a checking account has no common law cause of action against the bank that permitted a business partner, without the signatory's consent, to electronically transfer funds out of the account and into accounts held solely by the business partner. The very shortcuts or workarounds employed to start the business deprived the signatory of the ability to control his own destiny.

The facts of the case were determinative in the Court's decision. Brendan Allen wanted to bid on work related to the building of the Bergen-Hudson Light Rail project. To increase his bid's chances of selection, he approached Asnel Sanchez who was the sole owner of an existing business, ADS Associates Group, Inc. ("ADS"). Together, Allen and Sanchez agreed to a joint venture. Instead of starting up a new company, the two decided to bid on the contract as ADS. After submitting the winning bid, they opened up a checking account in ADS's name at Oritani Savings Bank, where ADS already had accounts. The account agreement expressly required that both Allen and Sanchez must sign checks drawn on this new account. Soon thereafter, using on-line banking, Sanchez electronically linked the joint venture account to his pre-existing ADS accounts and began electronically transferring money. Allen claimed that Sanchez transferred over \$600,000 from the joint venture account without Allen's authorization. Allen sued both Sanchez and Oritani, but the claims against Sanchez went nowhere because Sanchez had filed for bankruptcy.

Allen's law suit against Oritani went further but, in the end Allen came out the loser. The Supreme Court held that

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agreement or the services "shall be submitted to binding arbitration upon the request of either party," conducted by "a single arbitrator," in plaintiff's home county, and any "decision of the arbitrator shall be final." The arbitration costs would be split, unless the arbitrator ordered the loser to pay, and each side would bear its own attorneys' fees. The trial court and the Appellate Division decided against plaintiff and ordered the parties to proceed to arbitration. The Supreme Court reversed.

The high court decided that defendant's lengthy and comprehensive arbitration clause was missing a key ingredient, i.e., a clear and unambiguous notice that the parties are waiving their right to have a court and/or jury hear the dispute. The Court reasoned that waiving important, time-honored rights guaranteed by both the Federal and State Constitutions and, in this type of consumer action, important statutory rights, must be done with full notice and knowledge of what is being waived and the ramifications. The Court will not require a particular form of words, but the words chosen must be in plain language and understandable to a reasonable person.

The bottom line is that all arbitration clauses should be reviewed now. The logic and reasoning, as found in the Atalese case, was used by FPT one of our clients' advantage, when we defeated a motion to dismiss brought by the Defendant on the basis that an arbitration provision in a Stock Purchase Agreement. We successfully argued that because the parties had agreed to litigate certain claims that it was unclear and ambiguous that there was an actual agreement to arbitrate. Therefore, the Court found that the Plaintiff had not waived its right to litigate. – *ACT & ALP*

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Allen had no individual claim against Oritani because Allen was not the bank's customer under the Uniform Commercial Code (the "UCC"). As the Court explained, the bank's customer was ADS, in whose name the joint venture's account was opened. It made no difference to the Court that Allen was an officer of ADS, was present when the account was opened, was a required signatory, and relied on the branch manager's assurances that no money could be removed from the joint venture's account without his permission. The Court simply determined that such facts did not create a "special relationship" that would justify going beyond the UCC to allow a negligent misrepresentation claim.

Moreover, Allen could not sue Oritani on behalf of ADS derivatively. While Allen maintained his law suit derivatively for a time, Sanchez, at Oritani's urging, caused ADS to withdraw any such authorization for Allen to sue on the company's behalf and removed him as a company officer.

Allen did not help by his inattentiveness. It was a full year after the account opened that he even asked to see bank statements and did nothing for another year after his request was refused. In fact, he only took action when a check written out to him bounced. Nevertheless, it is clear, as Justice Albin, who alone dissented describes, the majority decision allows a bank that facilitated the fleecing of a party by his business partner get away with no liability for its actions.

To avoid such disastrous outcomes, it is critically important that business partners pay closer attention to the details of their business relationship and to other start-up necessities. Experience shows that few small business entrepreneurs dot all the "i's" and cross all the "t's." Considering that two thirds of all start-ups fail within a year, such disregard may make sense at the macro level. Experience, however, shows that some critical steps can be taken at the cost of only a few minutes of time and could save a lot of money in the long run if the business is successful. These things include registering with the State of New Jersey a business name or a logo as a trademark and putting well-known symbols on signage, on websites, and other printed material (e.g., ©, ™). These things help a successful, new business fend off predatory competitors or unscrupulous former employees. - *ACT*

## THE NEW JERSEY TORT CLAIMS ACT WHEN YOU HAVE TO SUE A PUBLIC ENTITY; PART TWO

In our last issue, we discussed some of the preliminary requirements to bringing a lawsuit against the New Jersey State Government and state municipalities with claims of negligence, most notably the 90 day Notice of Claim requirement and the mandatory 6 month waiting period before filing your law suit. Now it is time to consider the substantive hurdles that await a plaintiff bringing suit against a government entity.

The hurdles of which we speak are the various protections afforded the State and other government entities in the New Jersey Tort Claims Act, N.J. Stat. 59:1-1 to 59:12-3 (the "TCA"). Underlying the TCA and its judicial interpretation are three main themes. The first is "sovereign immunity," which is explained historically by the expression, "you cannot sue the King unless he says you can." In this country, the people, as manifested by their government, are the sovereign, and, in this case, the people of New Jersey. The TCA, therefore, is the law that permits an individual to sue the State, its subdivisions (such as towns, water/sewer authorities, NJ Transit, etc.), and their employees, but only in certain circumstances.

The second theme underlying the TCA is protection of the public purse. The TCA recognizes that most governmental units have limited budgets and a citizenry that abhors taxes. Ergo, simple, every-day negligence is excused under the TCA, and instead the State's actions or inactions must be "palpably unreasonable" before liability can be found. Indeed, entire categories of injury claims are simply not allowed, e.g., failure to post a traffic sign, design of an exit ramp, computer glitches, refusal to issue permits, failure to inspect public property, and contamination of the water supply. Moreover, even if you do prevail in a suit against the State, your monetary damages for pain and suffering are limited, there can never be a punitive damage award, and you have to pay your own attorneys.

Finally, the third theme underlying the TCA is the balance of powers between the executive, legislative, and judicial branches of government. The TCA obligates the judiciary to refrain from second-guessing policy and discretionary decisions of the other two branches of government. For example, a town has a limited budget to repair roads and sets up a plan that includes a list of roads to repair by priority. Thus, the chances are slim to none for being successful in a

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claim against a municipality for damages to your car caused by un-remedied pot holes in a road not on the priority list (or even lower on the priority list) because the judiciary is not likely to interfere in such discretionary decisions by the town, i.e., a Court will not get into the business of deciding which roads to repair first.

There are exceptions to the application of the TCA. For example, in passing the Law Against Discrimination (the "LAD"), the State Legislature determined that making New Jersey free of discrimination was so important that the substantive immunities shielding government entities, for the most part, do not apply. Similarly, State government entities are not shielded from the federal laws prohibiting discrimination, e.g., the Civil Rights Act of 1964 and the Americans with Disabilities Act. In both instances, attorneys' fees can be imposed on the government entity. Note, however, that even in discrimination cases, the procedural aspects of the TCA do apply, such as the Notice of Claim requirement, and you must prove intentional discrimination. Moreover, an employee is shielded by the "good faith" immunities.

Public employees can be liable for actions taken that lack good faith. To prevail, one must prove that the employees actions lacked good faith as it would appear to the average, reasonable person (a/k/a "objective" good faith) and that the employee in fact lacked good faith at the time he acted (a/k/a "subjective" good faith). Subjective good faith is the hardest to overcome. For example, when an employee acts in accordance with what he thought was the law - even a law later ruled unconstitutional - he cannot be liable for such good faith. And note that if an employee acts outside the law, he is acting outside the scope of his employment, and thus the public entity that employs this person cannot be liable; only the employee can.

Every potential suit against an entity or individual covered under the TCA needs examination for coverage by the multitudinous immunity provisions. Exhaustive research is warranted. To say the least, filing a lawsuit against a public entity or employee is not for the weak of heart. The odds are purposely stacked against a claimant. Under the right circumstances, however, an experienced lawyer can navigate the TCA and guide your case into a favorable settlement, or, if necessary, the courtroom. - JNF

## *In CASE you were wondering . . . Interesting or Quirky Court Decisions*

**Don't Bet On It:** In a victory for the NCAA and major professional sports leagues, the U.S. Supreme Court let stand decisions by lower courts that invalidated a State law that would have legalized sports wagering in New Jersey. The lower courts ruled that federal law prohibited sports betting and that New Jersey missed the deadline to be exempted. *Christie v. NCAA* (no.13-967, U.S. Sup. Ct.).

**School Detention to the Max:** With a previous DWI conviction, Defendant was again convicted in another town for DWI and for DWI within a school zone, which is within 1000 feet of any school property. That last one, being a third offense, earned Defendant 180 days in jail, a 20-year suspension of his driver's license, and fines. (*State v. Pathak*, App. Div. 2014).

**Internet Slang:** Via a Freedom of Information Act request, the website, MuckRock, obtained the FBI's 83-page glossary of internet slang. The glossary contains commonly used slang, such as LOL (meaning Laugh Out Loud) and TTYL (Talk to You Later), but it also contains rarely used slang, such as GNSTDLETBBB (good night, sleep tight, don't let the bed bugs bite).

**Elevator Law:** Based on the common law and NJ regulations, a hotel has a non-delegable duty to exercise reasonable care for the safety of its guests and other business invitees. This duty cannot be delegated to a third-party independent contractor, whose negligence is imputed to the hotel. (*Jones v. Sheraton Atlantic City*, App. Div. 2014).

**Lemon Law:** The car sold to you is a lemon. The manufacturer agrees and offers to refund your money. But what about those other "deals" the finance guy at the dealership sold you, such as the

extended warranty and the security system? Under the Lemon Law, if a lawyer is needed to get you out of those ancillary agreements with the third-party contractors, the auto manufacturer must reimburse you for the fees. (*Casal v. Hyundai*, App. Div. 2014).

**Medical Bills:** The fact that your insurance company wrongfully denied coverage for your hospital bill is NOT a valid defense to the lawsuit filed by the hospital against you for payment of the bill. You have to file a third-party complaint against the carrier to determine who pays the bill. (*HUMC v. Onuigbo*, App. Div. 2014).

**Show the Tenant the Money:** A security deposit on a residential apartment is the tenant's money. Thus, the landlord bears the burden of proving that all or part of the security deposit was lawfully withheld at the end of occupancy, provided, the tenant timely objected to any withholding. If only part of the deposit was improperly withheld, the Landlord must still pay the former tenant an amount twice that of the improperly withheld portion of the deposit, even if the Landlord timely returned part of the deposit. (*Wubshet v. California Apts.*, App. Div. 2014).

**You Gotta Know When to Hold 'Em:** Withholding a municipal police department accident report because of an ongoing criminal investigation may toll the 90-day time period by which a notice of claim must be filed with a public entity under the New Jersey Tort Claims Act. In this case, the report was not delivered to plaintiff's lawyer, despite repeated requests, until nine months after the accident. This report revealed for the first time that an investigator for the County prosecutor's office took part in a high-speed chase that resulted in plaintiff's injuries. Such a delay constituted "extraordinary circumstances" justifying permission to file a late notice of claim against the County. (*Williams v. Tinton Falls PD*, App. Div. 2014). - ACT

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