

Warranty Arbitration Clause Was Clear, NJ Justices Told

By Jeannie O'Sullivan

Law360 (September 12, 2018, 8:16 PM EDT) -- Two home warranty companies on Wednesday urged the New Jersey Supreme Court to enforce their arbitration clause, arguing that a lower appeals court wrongly expanded the alternative dispute resolution language requirements set by high court precedent.

During oral arguments in Trenton, Home Warranty Administrator of Florida Inc. and Choice Home Warranty sought to overturn the Appellate Division's refusal to force Amanda Kernahan's putative class action over consumer fraud and related allegations into arbitration. The appeals court, which found Kernahan's contracts didn't clearly inform customers like her they were waiving their rights to sue, misapplied the New Jersey Supreme Court's 2014 decision in *Atalese v. U.S. Legal Services Group*, and contravened the U.S. Supreme Court's 2017 decision in *Kindred Nursing Centers v. Clark*, attorney Lori Grifa of Archer Law told the justices.

The *Atalese* decision held that arbitration clauses must "clearly and unambiguously" say the customer is waiving the right to sue. The contracts in the instant suit met that requirement, Grifa said.

"It should be enforced because it clearly and unambiguously said that any complaint arising from the agreements shall be resolved exclusively through the [American Arbitration Association], in New Jersey, pursuant to its rules," Grifa said.

To require a clear statement about forfeiting the opportunity to hash out disputes in a judicial forum adds a burden that isn't present in *Atalese*, Grifa said. Such a requirement also flies against the *Kindred* decision, which overturned a Kentucky Supreme Court's creation of a "clear statement rule" requiring express waiver language, she said.

"Justice [Elena] Kagan found that the clear statement rule to be an undue burden under the Fair Arbitration Act," Grifa said.

But a lawful arbitration clause must state "what is being taken away," John E. Keefe Jr. of the Keefe Law Firm, an attorney for Kernahan, told the justices.

"We would look at what is the right, what is it that's being taken away and what are the rules of engagement," Keefe said when Justice Anne M. Patterson asked what the drafter of an agreement should consider.

Kernahan's suit alleged violations of New Jersey's Consumer Fraud Act and the Truth in Consumer Contract, Warranty and Notice Act, as well as breach of the implied covenant of good faith and fair dealing, according to the opinion.

Kernahan had entered into a service agreement with the companies in 2015 for the repair or replacement of home appliances and systems, the opinion said. The cover page of the agreement at issue said the contract term ran from April 23, 2015, to Oct. 23, 2018. The second page included a section titled "Coverage Period" that stated, "Coverage starts 30 days after acceptance of application by us and receipt of applicable contract fees and continues for 365 days from that date," according to court records.

Kernahan also alleges a section on the last page of the agreement — titled "Mediation" — failed to advise her she was waiving her right to file a court action and have her claims decided by a jury, according to the appeals opinion.

In June 2017, the Appellate Division affirmed a trial court's denial of a motion to dismiss the complaint or, alternatively, to compel arbitration.

Justice Faustino J. Fernandez-Vina focused on the "Mediation" language, suggesting that mediation was very different than arbitration.

"Can we agree this doesn't really tell someone they're going into arbitration? There's no arbitration agreement here," Justice Fernandez-Vina said.

Grifa acknowledged she could have written it differently, noting that it "joined mediation and arbitration."

The 6.5-point font size of the mediation language also drew scrutiny from the justices. Justice Barry T. Albin noted that the New Jersey Plain Language Law guideline calls for a 10-point font.

"Should this court be blessing language in the arbitration agreement that's put in in as small a point as possible?" Justice Albin asked.

Grifa said she didn't know the mediation language font size, and Chief Justice Stuart J. Rabner asked the court to take "judicial notice" that the font at issue is less than 10 points.

The warranty companies did receive amicus support from the New Jersey Business and Industry Association, the New Jersey Chamber of Commerce and the Commerce and Industry Association of New Jersey.

Representing the amici, David R. Kott of McCarter & English LLP reiterated the Kindred decision's finding that a clear statement spelling out the waiver of the right to sue disfavors arbitration because a "primary characteristic of arbitration is the inability to go to court."

Kernahan got amici backing from the Locks Law Firm and the New Jersey State Bar Association.

Locks attorney James A. Barry agreed with Justice Fernandez-Vina that the agreement at issue focused on mediation, not arbitration. He suggested that mediation doesn't necessarily foreclose the ability to use a judicial forum.

"You would find the mediation rules for the [Arbitration Association] have no provision for the final resolution," Barry said to the justices.

Bar Association attorney George Conk acknowledged that the bar "recognizes that justice may be achieved by private or public forums."

"But the contracting parties' right of access to our courts can only be waived only knowingly, that is, if minds have actually met," Conk told the court.

Kernahan is represented by John E. Keefe Jr. of the Keefe Law Firm.

The warranty companies are represented by Lori Grifa of Archer & Greiner PC.

Amici New Jersey Business and Industry Association, New Jersey Chamber of Commerce and the Commerce and Industry Association of New Jersey are represented by David R. Kott of McCarter & English LLP.

Amicus Locks Law Firm is represented by James A. Barry.

Amicus New Jersey State Bar Association is represented by George Conk.

The case is Amanda Kernahan v. Home Warranty Administrator of Florida Inc. et al., case number A-15-17, in the Supreme Court of the State of New Jersey.

--Editing by Dipti Coorg.