



KeyCite Yellow Flag - Negative Treatment

Distinguished by [GAR Disability Advocates, LLC v. Taylor](#), D.N.J.,  
February 6, 2019

236 N.J. 301

Supreme Court of New Jersey.

Amanda KERNAHAN, Plaintiff-Respondent,

v.

HOME WARRANTY ADMINISTRATOR  
OF FLORIDA, INC. and [Choice Home  
Warranty](#), Defendants-Appellants.

A-15 September Term 2017

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079680

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Argued September 12, 2018

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Decided January 10, 2019

**Synopsis**

## Synopsis

**Background:** Purchaser of home service agreement brought action against seller alleging violations of the Consumer Fraud Act (CFA), the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), and the implied covenant of good faith and fair dealing. Seller filed motion to dismiss in favor of arbitration. The Superior Court, Law Division, Middlesex County, No. L-7052-15, [Arnold L. Natali Jr.](#), J.S.C., 2016 WL 6916523, denied motion. Seller appealed. The Superior Court, Appellate Division, 2017 WL 2705414, affirmed. Seller petitioned for certification, which was granted.

**[Holding:]** The Supreme Court, [LaVecchia, J.](#), held that purchaser and seller lacked mutual assent to arbitration provision, which was confusing, contradictory, and, in part, misleading.

Affirmed as modified.

[Albin, J.](#), concurred and filed opinion.

## West Headnotes (29)

**[1] Alternative Dispute Resolution**

🔑 Constitutional and statutory provisions and rules of court

Both the Federal Arbitration Act (FAA) and the New Jersey Arbitration Act value the benefits from arbitration of disputes and encourage enforcement of arbitration agreements. 9 U.S.C.A. § 1 et seq.; N.J. Stat. Ann. § 2A:23B-1 et seq.

4 Cases that cite this headnote

**[2] Alternative Dispute Resolution**

🔑 Construction

Federal law requires that arbitration agreements be placed on equal footing with all other contracts. 9 U.S.C.A. § 1 et seq.

**[3] Alternative Dispute Resolution**

🔑 What law governs

**Alternative Dispute Resolution**

🔑 Construction

In dispensing even treatment to arbitration agreements, basic contract formation and interpretation principles still govern, for there must be a validly formed agreement to enforce; the court applies state law principles of contract formation in that analysis.

1 Cases that cite this headnote

**[4] Alternative Dispute Resolution**

🔑 Scope and standards of review

**Appeal and Error**

🔑 Construction, interpretation, and application in general

De novo review applies when appellate courts review determinations about the enforceability of contracts, including arbitration agreements.

**[5] Alternative Dispute Resolution**

🔑 [Scope and standards of review](#)

Whether a contractual arbitration provision is enforceable is a question of law, and the Supreme Court need not defer to the interpretative analysis of the trial or appellate courts unless the Court finds it persuasive.

[1 Cases that cite this headnote](#)

[6] **Alternative Dispute Resolution**

🔑 [Constitutional and statutory provisions and rules of court](#)

The Federal Arbitration Act's (FAA's) principal purpose is to ensure that private arbitration agreements are enforced according to their terms. 9 U.S.C.A. § 2.

[7] **Alternative Dispute Resolution**

🔑 [Validity](#)

The savings clause of the Federal Arbitration Act (FAA) permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. 9 U.S.C.A. § 2.

[8] **Alternative Dispute Resolution**

🔑 [Contractual or consensual basis](#)

An arbitration agreement is valid only if the parties intended to arbitrate because parties are not required to arbitrate when they have not agreed to do so.

[4 Cases that cite this headnote](#)

[9] **Alternative Dispute Resolution**

🔑 [What law governs](#)

**Alternative Dispute Resolution**

🔑 [Construction](#)

When deciding whether the parties agreed to arbitrate a certain matter, courts generally should apply ordinary state-law principles that govern the formation of contracts. 9 U.S.C.A. § 4.

[1 Cases that cite this headnote](#)

[10] **Alternative Dispute Resolution**

🔑 [In general; formation of agreement](#)

When called on to enforce an arbitration agreement, a court's initial inquiry must be -- just as it is for any other contract -- whether the agreement to arbitrate all, or any portion, of a dispute is the product of mutual assent, as determined under customary principles of contract law. N.J. Stat. Ann. § 2A:23B-1 et seq.

[3 Cases that cite this headnote](#)

[11] **Alternative Dispute Resolution**

🔑 [Contractual or consensual basis](#)

Parties may not be compelled to arbitrate when they have not agreed to do so. N.J. Stat. Ann. § 2A:23B-1 et seq.

[1 Cases that cite this headnote](#)

[12] **Contracts**

🔑 [Necessity of assent](#)

There must be a meeting of the minds for an agreement to exist before enforcement is considered.

[1 Cases that cite this headnote](#)

[13] **Contracts**

🔑 [Intention of Parties](#)

A court's objective in construing a contract is to determine the intent of the parties.

[14] **Contracts**

🔑 [Subject, object, or purpose as affecting construction](#)

**Contracts**

🔑 [Intention of Parties](#)

**Contracts**

🔑 [Extrinsic circumstances](#)

In the quest for the common intention of the parties to a contract the court must consider the relations of the parties, the attendant

circumstances, and the objects they were trying to attain.

#### [15] Contracts

##### 🔑 Presumptions and burden of proof

Even in the consumer context, a party who enters into a contract in writing, without any fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect. *N.J. Stat. Ann.* § 56:12-1 et seq.

[2 Cases that cite this headnote](#)

#### [16] Contracts

##### 🔑 Language of Instrument

A basic tenet of contract interpretation is that contract terms should be given their plain and ordinary meaning.

[4 Cases that cite this headnote](#)

#### [17] Alternative Dispute Resolution

##### 🔑 Validity of assent

A consumer cannot be required to arbitrate when it cannot fairly be ascertained from the contract's language that she knowingly assented to the provision's terms or knew that arbitration was the exclusive forum for dispute resolution.

[2 Cases that cite this headnote](#)

#### [18] Alternative Dispute Resolution

##### 🔑 Validity

An arbitration agreement is clearly enforceable when its terms affirmatively state, or unambiguously convey to a consumer in a way that he or she would understand, that there is a distinction between agreeing to resolve a dispute in arbitration and in a judicial forum.

[3 Cases that cite this headnote](#)

#### [19] Alternative Dispute Resolution

##### 🔑 Validity

Parties lacked mutual assent to arbitration provision in home service agreement, thus rendering provision unenforceable; "arbitration agreement" was located within a section labeled "mediation," small size of print made provision burdensome to read and likely violated font size requirements of the Plain Language Act, and provision referred to use of American Arbitration Association's (AAA's) Commercial Mediation Rules. *N.J. Stat. Ann.* §§ 2A:23B-4, 2A:23B-15, 2A:23C-2, 56:12-2, 56:12-10(b)(3).

[3 Cases that cite this headnote](#)

#### [20] Alternative Dispute Resolution

##### 🔑 Mode and course of proceedings

Mediation sessions are not conducted under oath, do not follow traditional rules of evidence, and are not limited to developing the facts. *N.J. Stat. Ann.* § 2A:23C-2.

#### [21] Privileged Communications and Confidentiality

##### 🔑 Settlement negotiation privilege; mediation and arbitration

Mediation communications are privileged because honesty in communications is imperative in order to reach a settlement. *N.J. R. Evid.* 519.

#### [22] Compromise and Settlement

##### 🔑 Nature and Requisites

Public policy favors settlement of disputes in part because it spares the parties the risk of an adverse outcome and the time and expense -- both monetary and emotional -- of protracted litigation.

#### [23] Alternative Dispute Resolution

##### 🔑 Mediation

If mediation sessions fail, the parties can proceed in court to resolve their dispute. *N.J. Stat. Ann.* § 2A:23C-2.

**[24] Alternative Dispute Resolution**

🔑 Nature, purpose, and right to arbitration in general

The object of arbitration is the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties.

**[25] Alternative Dispute Resolution**

🔑 Arbitration Proceedings

Unless superseded by the parties' agreement, the New Jersey Arbitration Act prescribes the rules governing the conduct of the arbitration proceeding. *N.J. Stat. Ann. § 2A:23B-4*.

**[26] Alternative Dispute Resolution**

🔑 Reception of Evidence

The New Jersey Arbitration Act grants an arbitrator significant discretion over evidentiary matters in order to advance the goal of quick and fair disposition of the parties' dispute. *N.J. Stat. Ann. § 2A:23B-15*.

**[27] Alternative Dispute Resolution**

🔑 Arbitration Proceedings

Much like a judicial factfinder, arbitrators essentially weigh evidence, assess credibility, and apply the law when determining whether a party has proven his or her request for relief.

**[28] Contracts**

🔑 Certainty as to Subject-Matter

To be enforceable as a contractual undertaking, an agreement must be sufficiently definite in its terms that the performance to be rendered by each party can be ascertained with reasonable certainty.

**[29] Alternative Dispute Resolution**

🔑 Validity

An arbitration provision that purports to utilize mediation procedures is unenforceable because the parties cannot be said to have reached a meeting of the minds on whether the proceeding will result in a binding award.

**\*\*769** On certification to the Superior Court, Appellate Division.

**Attorneys and Law Firms**

[Lori Grifa](#), Hackensack, argued the cause for appellants (Archer & Greiner, attorneys; [Lori Grifa](#), of counsel and on the briefs, and [Michael J. Plata](#), Hackensack, and [Josiah Contarino](#), Hackensack, on the briefs).

[John E. Keefe, Jr.](#), Red Bank, argued the cause for respondent (Keefe Law Firm and Law Office of Jonathan Rudnick, attorneys; [Stephen T. Sullivan, Jr.](#), Red Bank, and [Jonathan Rudnick](#), Red Bank, on the briefs).

[David R. Kott](#), Newark, argued the cause for amici curiae New Jersey Business and Industry Association, Commerce and Industry Association of New Jersey and New Jersey Chamber of Commerce (McCarter & English, attorneys; [David R. Kott](#), Newark, [Edward J. Fanning, Jr.](#), Newark, and [Zane C. Riester](#), Newark, of counsel and on the briefs, and [Steven H. Del Mauro](#), Newark, on the briefs).

[James A. Barry](#), Cherry Hill, argued the cause for amicus curiae New Jersey Association for Justice (Locks Law Firm and Law Offices of Charles N. Riley, attorneys; [James A. Barry](#), [Michael Galpern](#), Cherry Hill, [Andrew P. Bell](#) and [Charles N. Riley](#), Cherry Hill, on the brief).

[George W. Conk](#), South Orange, argued the cause for amicus curiae New Jersey State Bar Association (New Jersey State Bar Association, attorneys; [Robert B. Hille](#), President, Morristown, of counsel and on the brief, and [George W. Conk](#) and [Timothy E. Dinan](#), Sparta, on the brief).

**Opinion**

JUSTICE [LaVECCHIA](#) delivered the opinion of the Court.

**\*307** In this appeal, we address whether parties to a consumer contract intended to create an agreement to arbitrate through the insertion of language within an alternative dispute resolution provision. See [Atalese v. U.S. Legal Servs. Grp.](#),

[L.P.](#), 219 N.J. 430, 435, 99 A.3d 306 (2014) (observing that inclusion of arbitration provisions in consumer contracts is now “commonplace”).

[1] [2] Both the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 to 16, and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, value the benefits from arbitration of disputes and encourage enforcement of arbitration agreements. See **\*\*770** [Roach v. BM Motoring, LLC](#), 228 N.J. 163, 173-74, 155 A.3d 985 (2017). In determining whether to give effect to the disputed alternative dispute resolution provision here, we are mindful that federal law requires that arbitration agreements be placed “on equal footing with all other contracts.” [Kindred Nursing Ctrs. L.P. v. Clark](#), 581 U.S. —, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017) (quoting [DIRECTV, Inc. v. Imburgia](#), 577 U.S. —, 136 S.Ct. 463, 465, 193 L.Ed.2d 365 (2015) ). Our case law recognizes that obligation as well. See [Atalese](#), 219 N.J. at 440-41, 99 A.3d 306 (collecting cases).

[3] In dispensing even treatment to arbitration agreements, basic contract formation and interpretation principles still govern, for there must be a validly formed agreement to enforce. See [Volt Info. Scis., Inc. v. Bd. of Trs.](#), 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); [Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.](#), 168 N.J. 124, 132, 773 A.2d 665 (2001). We apply state law principles of contract formation in that analysis. See [First Options of Chi., Inc. v. Kaplan](#), 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter ..., courts generally ... should apply ordinary state-law principles that govern the formation of contracts.”).

**\*308** In this matter, plaintiff Amanda Kernahan entered into an agreement with defendants for a home maintenance warranty. When she became dissatisfied, she filed a complaint in Superior Court seeking statutory and common law relief. Defendants sought dismissal of the action, arguing that the contract's alternative dispute resolution provision, labeled “MEDIATION,” contained language that required plaintiff to proceed with her claims exclusively through arbitration.

**\*\*\*4** The trial court refused to dismiss plaintiff's complaint, finding in the language of the provision no mutuality of assent to have formed an agreement to arbitrate. The Appellate Division affirmed. We granted certification to review defendants' argument that an overly demanding review resulted in a prohibited hostility to arbitration. Defendants

also contended that our recent decision in [Atalese](#), which examined a contract for mutuality of assent to arbitrate, thereby waiving one's right to pursue claims in court, violated recent United States Supreme Court pronouncements in [Kindred Nursing](#) about FAA requirements. Because defendants have retreated from their argument that our decision in [Atalese](#) transgresses the FAA under [Kindred Nursing](#), we do not address that contention. We will not address an argument that, at this time, is advanced only by amici.

In our de novo review of the pivotal provision at issue in the disputed contract, we conclude that the so-called “arbitration agreement” within this consumer contract fails to support a finding of mutuality of assent to form an agreement to arbitrate. The provision's language is debatable, confusing, and contradictory -- and, in part, misleading. The “arbitration agreement” touted by defendants is also obscure when this consumer contract is viewed as a whole. The provision does not fairly convey to an ordinary person that arbitration would be the required method of dispute resolution.

Accordingly, for the reasons expressed herein, we concur in the judgment that declined to enforce this provision as an understandable mutual agreement to arbitrate disputes, which, thereby, **\*309** allowed plaintiff to proceed with her claims in the action she filed in court.

I.

A.

Because this appeal arises from a denial of a motion to dismiss, we recite the facts **\*\*771** as alleged in plaintiff's November 30, 2015 putative class action complaint. In the spring of 2015, plaintiff purchased a “home service agreement” from defendants Home Warranty Administrator of Florida, Inc., and Choice Home Warranty (collectively, defendants). The agreement was essentially a consumer contract whereby defendants would pay for and arrange for a certified contractor to repair or replace certain home appliances at plaintiff's property in Orlando, Florida, in exchange for the contract term price of \$1050.

Becoming dissatisfied, plaintiff cancelled the contract in June 2015 and received a refund of the purchase price.<sup>1</sup> In November 2015, she filed the instant complaint alleging that defendants violated the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20; the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to

-18; and the implied covenant of good faith and fair dealing. She claimed that the agreement misrepresented its length of coverage and that the deceptively labelled “MEDIATION” section of the agreement failed to inform her that she was waiving her right to a jury trial and would be deterred from seeking the additional remedies of treble damages, punitive damages, and attorney's fees and costs.<sup>2</sup> Defendants filed \*310 a motion to dismiss the complaint with prejudice in favor of arbitration, citing the agreement's alternative dispute resolution provision.

The alternative-dispute-resolution section of the agreement that is the focus of this appeal appears on the fifth and last page of the contract, and it reads in full as follows:

**\*\*\*5 G. MEDIATION**

**In the event of a dispute over claims or coverage You agree to file a written claim with Us and allow Us thirty (30) calendar days to respond to the claim. The parties agree to mediate in good faith before resorting to mandatory arbitration in the State of New Jersey.**

Except where prohibited, if a dispute arises from or relates to this Agreement or its breach, and if the dispute cannot be settled through direct discussions you agree that:

1. Any and all disputes, claims and causes of action arising out of or connected with this agreement shall be resolved individually, without resort to any form of class action.

2. Any and all disputes, claims and causes of action arising out of or connected with this Agreement (including but not limited to whether a particular dispute is arbitrable hereunder) shall be resolved exclusively by the American Arbitration Association in the state of New Jersey under its Commercial Mediation Rules. Controversies or claims shall be submitted to arbitration regardless of the theory under which they arise, including without limitation contract, tort, common law, statutory, or regulatory duties or liability.

3. Any and all claims, judgments and awards shall be limited to actual out-of-pocket costs incurred to a maximum of \$1500 per claim, but in no event attorneys fees.

4. Under no circumstances will you be permitted to obtain awards for, and you hereby waives [sic] all rights to claim, \*\*772 indirect, punitive, incidental and consequential damages and any other damages, other than for actual out-of-pocket expenses, and any and all rights to have damages

multiplied or otherwise increased. All issues and questions concerning the construction, validity, interpretation and enforceability of this Agreement, shall be governed by, and construed in accordance with, the laws of the State of New Jersey, U.S.A. without giving effect to any choice of law or conflict of law rules (whether of the State of New Jersey or any other jurisdiction), which would cause the application of the laws of any jurisdiction other than the State of New Jersey.

[ (bolded emphasis in original) (underlined emphases added).]

Before the trial court, defendants argued that the contract's “arbitration provision” is valid and enforceable, containing several clauses that put plaintiff on notice that she is waiving her right to a jury trial, even though the provision does not explicitly reference a jury trial. Defendants maintained that the provision satisfied this \*311 Court's prior case law, including [Atalese](#), because the provision's language is “clear on [its] face” and without ambiguity.

Plaintiff argued that the arbitration requirement is ambiguous and that it is not conspicuous in the written document. She further argued that the arbitration language in the alternative dispute resolution provision does not satisfy the requirements for a knowing waiver of rights, citing [Atalese](#) and emphasizing the provision's failure to convey what arbitration is or how it is different from a court proceeding. Plaintiff maintained, in sum, that the failure to include language amounting to a knowing waiver coupled with the lack of conspicuousness of the arbitration language, buried in this contract's small font, precluded enforcement of defendants' asserted “arbitration agreement.”

\*\*\*6 The trial court denied defendants' motion to dismiss in an oral opinion, concluding that the arbitration provision is unenforceable. The court found the provision both ambiguous and noncompliant with [Atalese](#) “in either its form or its function.” The trial court reasoned that the provision does not contain clear language that would inform the consumer she is agreeing to arbitrate all disputes and that she is waiving her right to a jury trial. The court cited the provision's failure to convey unambiguously to a consumer that there is a difference between resolving a dispute in court and resolving it in arbitration.

Defendants filed for reconsideration, adding to their argument that the provision adequately informs the consumer that she is waiving her right to a court proceeding by stating that all

claims will be resolved “exclusively” by arbitration. Plaintiff countered that the word “exclusively” was insufficient, alone, to clarify defendants’ desired message because the clause remained ambiguous. Plaintiff emphasized the provision’s confusing references to mediation and arbitration in discussing proceedings and rules of procedure.

In a written opinion, the trial court denied reconsideration. Relying on [Atalese](#), the court reasoned once again that the arbitration provision was not sufficiently clear to have created an **\*312** agreement to arbitrate, thereby waiving the right to proceed in court. The court noted ambiguities in the provision before concluding that the provision’s language is not clear and straightforward, is not satisfactorily conspicuous or distinguished from the other contract terms, and does not convey that there is a difference between arbitration and judicial proceedings. The court rejected the argument that the provision’s placement of the word “exclusively” would or **\*\*773** should have adequately informed plaintiff that she is waiving her right to proceed in court, as opposed to use of other available dispute resolution processes.

On appeal to the Appellate Division, see [R. 2:2-3\(a\)](#) (orders denying arbitration appealable as of right as a final judgment), defendants again argued that the arbitration provision is enforceable. Plaintiff advanced largely the same arguments that she did before the trial court.

In an unpublished opinion, the Appellate Division affirmed the trial court’s refusal to dismiss the complaint. Relying on [Atalese](#), the panel reasoned that “[a]n arbitration provision that fails to ‘clearly and unambiguously signal’ to parties that they are surrendering their right to pursue a judicial remedy renders such an agreement unenforceable.” The panel determined the provision to be unenforceable because “[j]ust stating that arbitration is the ‘exclusive’ remedy ... is not sufficient” to inform a consumer that she is waiving her right to a jury trial. The panel added that there must be explanatory comment to notify an average member of the public that arbitration is a substitute for the right to adjudicate a claim in court.

We granted defendants’ petition for certification. [231 N.J. 334, 175 A.3d 177 \(2017\)](#). We also granted amicus curiae status to the New Jersey State Bar Association (NJSBA); the New Jersey Association for Justice (NJAJ); the New Jersey Business & Industry Association, the Commerce and Industry Association of New Jersey, and the New Jersey Chamber of Commerce (collectively, “the Industry Associations”).

## **\*313** II.

### A.

In their petition for certification, defendants asserted that [Atalese](#) requires a valid arbitration clause to contain a “clear and unambiguous” statement that waives the right to proceed in court. Thus, according to defendants, [Atalese](#) was preempted by the FAA in light of the United States Supreme Court’s decision in [Kindred Nursing](#).<sup>3</sup> [Kindred Nursing](#) was decided roughly one month before the Appellate Division’s decision in this matter.

**\*\*7** However, in oral argument before the Court, defendants clarified that their argument does not advance the position that [Atalese](#) is in conflict with [Kindred Nursing](#). In withdrawing from their earlier position, defendants instead note, expressly, that [Atalese](#) does not impose a requirement for the type of formal waiver language stricken in [Kindred Nursing](#). Therefore, defendant is no longer asking us to overturn [Atalese](#) in this appeal.

Instead, defendants now maintain that the Appellate Division decision worked an improper expansion of [Atalese](#) by imposing a requirement of formal waiver language in arbitration agreements, in violation of [Kindred Nursing](#) and the FAA. Defendants reason that, by finding that necessary waiver language was absent from the arbitration provision, the Appellate Division effectively created a [Kindred Nursing](#)-prohibited clear-statement rule.

**\*\*774** Further, defendants argue that the Appellate Division should have recognized that an arbitration provision that explicitly states **\*314** that it is the exclusive remedy to resolve disputes satisfies clarity requirements, thereby placing consumers on notice that their only remedy is arbitration. Defendants assert that the Appellate Division erred in not reading the provision as a whole and instead parsing the provision improperly by focusing on the word “exclusively.”

### B.

Much of plaintiff’s argument involves responding to defendants’ initial position. Suffice it to say that, in distinguishing [Kindred Nursing](#) from [Atalese](#), plaintiff points out that [Atalese](#) reflects “New Jersey’s long-standing and neutral requirement” that contractual waivers of rights be

contextually understandable to meet essential requirements for mutual assent.

Further, plaintiff argues that the arbitration provision in her contract is ambiguous. Because the provision failed to convey what she was agreeing to by signing a contract with that provision in it, plaintiff asserts that there was no basis for mutual assent and understanding about arbitration. Plaintiff adds that the provision neither distinguishes arbitration from a proceeding in court -- or, for that matter, from other dispute resolution mechanisms -- nor contains any waiver language. At the hearing on defendant's motion to dismiss, plaintiff's counsel also emphasized the "extraordinarily small font" of the arbitration provision.

C.

Amicus NJSBA urges that we affirm of the Appellate Division decision because the arbitration provision contains misleading terms and lacks waiver language. The NJSBA also distinguishes [Kindred Nursing](#) from our decision in [Atalese](#). The NJSBA warns that reversing [Atalese](#) will cause consumers to be "presented with confusing and difficult to understand arbitration provisions that fail to place the consumer on notice that he or she is waiving a constitutional or statutory right."

\*315 D.

The NJAJ urges that we affirm of the Appellate Division judgment because the alternative dispute resolution provision fails to satisfy the prerequisites for the formation of a valid contract. The NJAJ asserts that no meeting of the minds could have occurred here for three reasons: (1) the provision at issue is misleadingly titled "MEDIATION," "creating the impression that the mechanism being established is non-binding settlement discussions"; (2) the provision lacks waiver language; and (3) the provision uses "mandatory" language but does not address the right to go to court, the very right the clause seeks to waive.

\*\*\*8 The NJAJ points out that the "MEDIATION" provision fails to comply with New Jersey's Plain Language Act, [N.J.S.A. 56:12-1 to -13 \(PLA\)](#), applicable to all consumer contracts in this state as noted in [Atalese](#), because "it is not written in a simple, clear, understandable, and easily readable way." Amicus reasons that the arbitration provision in this consumer contract is buried in a section labeled "MEDIATION" and is printed in a smaller font-size than that required by the PLA. The NJAJ asserts that the provision is in

size 6.5 Helvetica font.<sup>4</sup> In other words, the provision fails the conspicuousness test. \*\*775 The NJAJ further agrees with the NJSBA's position that [Atalese](#) is distinguishable from [Kindred Nursing](#) because "New Jersey has long applied its waiver of rights analysis to all contracts."

E.

Amici, the Industry Associations, ask us to overrule [Atalese](#) even if defendants no longer advance that argument. They maintain that "[t]he same impermissible justifications used by the Kentucky Supreme Court were also used by this Court in [Atalese](#) ... when it required that all arbitration agreements contain 'clear \*316 and unambiguous language' that an individual is waiving her right 'to bring her claims in court or have a jury resolve the dispute.' " The Industry Associations contend that the FAA preempts [Atalese](#) because, by requiring specialized language of waiver, the [Atalese](#) decision disregards "the fundamental characteristic of arbitration -- the waiver of the right to resolve a dispute in a court before a jury." That, they contend, results in [Atalese](#)'s placing arbitration clauses on unequal footing with other contracts.

Here, the Industry Associations ask us to enforce the instant arbitration provision because they maintain that the provision clearly states that any and all claims will be resolved through arbitration.

III.

A.

[4] [5] De novo review applies when appellate courts review determinations about the enforceability of contracts, including arbitration agreements. [Hirsch v. Amper Fin. Servs., LLC](#), 215 N.J. 174, 186, 71 A.3d 849 (2013). Whether a contractual arbitration provision is enforceable is a question of law, and we need not defer to the interpretative analysis of the trial or appellate courts unless we find it persuasive. [Morgan v. Sanford Brown Inst.](#), 225 N.J. 289, 302-03, 137 A.3d 1168 (2016) (citing [Atalese](#), 219 N.J. at 445-46, 99 A.3d 306).

B.

Federal and state law governing arbitration agreements guide this matter.

1.

[6] In 1925, Congress enacted the FAA “to place arbitration agreements upon the same footing as other contracts.” \*317 [Gilmer v. Interstate/Johnson Lane Corp.](#), 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). The FAA was intended, in part, to curb a perceived “widespread judicial hostility to arbitration agreements.” [AT & T Mobility LLC v. Concepcion](#), 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); see also [Epic Sys. Corp. v. Lewis](#), — U.S. —, 138 S.Ct. 1612, 1621, 200 L.Ed.2d 889 (2018) (same). As stated further in [Concepcion](#), the FAA’s “ ‘principal purpose’ ... is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’ ” 563 U.S. at 344, 131 S.Ct. 1740 (quoting [Volt](#), 489 U.S. at 478, 109 S.Ct. 1248) (alteration in original).

[7] Section two of the FAA promotes those goals by prescribing that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Section two’s savings clause “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” [Concepcion](#), 563 U.S. at 339, 131 S.Ct. 1740 (quoting \*\*776 [Doctor’s Assocs., Inc. v. Casarotto](#), 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) ).

\*\*\*9 [8] [9] An arbitration agreement is valid only if the parties intended to arbitrate because parties are not required “to arbitrate when they have not agreed to do so.” [Volt](#), 489 U.S. at 478, 109 S.Ct. 1248. Section four of the FAA requires courts to compel arbitration “in accordance with the terms of the agreement,” assuming that the “making of the arbitration agreement” is not in issue. [Concepcion](#), 563 U.S. at 344, 131 S.Ct. 1740 (quoting 9 U.S.C. § 4).<sup>5</sup> The Supreme Court instructs that “[w]hen deciding \*318 whether the parties agreed to arbitrate a certain matter ..., courts generally ... should apply ordinary state-law principles that govern the formation of contracts.” [First Options](#), 514 U.S. at 944, 115 S.Ct. 1920.

In a recent opinion, the Supreme Court emphasized the FAA’s “equal-treatment principle,” stating that the FAA not only preempts any state rule that facially discriminates against arbitration but also “displaces any rule that covertly accomplishes the same objective by disfavoring contracts that

(oh so coincidentally) have the defining features of arbitration agreements.” [Kindred Nursing](#), 137 S.Ct. at 1426. The Supreme Court held that a Kentucky Supreme Court ruling requiring specific authority for an attorney-in-fact to waive her principal’s right to a jury trial “singles out arbitration agreements for disfavored treatment ... [and] violates the FAA.” [Id.](#) at 1425. The Court cautioned that state court decisions that rest on general principles may violate the FAA if they implicitly “rely on the uniqueness of an agreement to arbitrate as [their] basis.” [Ibid.](#) (quoting [Concepcion](#), 563 U.S. at 341, 131 S.Ct. 1740).<sup>6</sup>

2.

New Jersey codifies its own hospitable approach toward arbitration in the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, using terms nearly identical to those of the FAA. See [Roach](#), 228 N.J. at 173-74, 155 A.3d 985 (citing \*319 [Atalese](#), 219 N.J. at 440, 99 A.3d 306). The statutory policies of the FAA and New Jersey law are in synchronicity.

[10] [11] [12] In this state, when called on to enforce an arbitration agreement, a court’s initial inquiry must be -- just as it is for any other contract -- whether the agreement to arbitrate all, or any portion, of a dispute is “the product of mutual assent, as determined under customary principles of contract law.” [Atalese](#), 219 N.J. at 442, 99 A.3d 306 (internal quotation marks and citation omitted). And, equivalent to federal law, parties may not be compelled “to arbitrate when they have not agreed to do so.” [Ibid.](#) (quoting [Volt](#), 489 U.S. at 478, 109 S.Ct. 1248); see also [Garfinkel](#), 168 N.J. at 132, 773 A.2d 665 (“[O]nly those \*\*777 issues may be arbitrated which the parties have agreed shall be.”) (quoting [In re Arbitration Between Grover & Universal Underwriters Ins. Co.](#), 80 N.J. 221, 228, 403 A.2d 448 (1979) ). As a general principle of contract law, there must be a meeting of the minds for an agreement to exist before enforcement is considered. See [Johnson & Johnson v. Charmley Drug Co.](#), 11 N.J. 526, 538, 95 A.2d 391 (1953) (“[A] contract does not come into being unless there be a manifestation of mutual assent by the parties to the same terms .... [I]t is elementary that there can be no operative acceptance by acts or conduct unless the offeree’s assent to the offer according to its terms is thereby unequivocally shown.”).

\*\*\*10 In [Atalese](#), this Court relied on mutuality of assent as its animating principle when we considered the enforceability of an agreement to arbitrate in a consumer contract for debt-adjustment services. 219 N.J. at 442, 99 A.3d 306. We

were guided essentially by twin concerns. First, the Court was mindful that a consumer is not necessarily versed in the meaning of law-imbued terminology about procedures tucked into form contracts. *Ibid.* The decision repeatedly notes that it is addressing a form consumer contract, not a contract individually negotiated in any way; accordingly, basic statutory consumer contract requirements about plain language implicitly provided the backdrop to the contract under review. *Id.* at 444, 99 A.3d 306. And, second, the Court was \*320 mindful that plain language explanations of consequences had been required in contract cases in numerous other settings where a person would not be presumed to understand that what was being agreed to constituted a waiver of a constitutional or statutory right. *Id.* at 442-44, 99 A.3d 306.

At bottom, the judgment in *Atalese*, which declined to enforce the arbitration provision at issue, is rooted in the notion that mutual assent had not been achieved because the provision did not, in some fashion, explain that it was intended to be a waiver of the right to sue in court. *Id.* at 436, 99 A.3d 306. Because the provision could not be deemed a knowing waiver of the right to sue in court, a meeting of the minds did not occur. *Id.* at 435, 447, 99 A.3d 306. The consumer context of the contract mattered. *Id.* at 444, 99 A.3d 306 (referencing N.J.S.A. 56:12-2). That said, the decision imposes no talismanic recitations, acknowledging that a meeting of the minds can be accomplished by any explanatory comment that achieves the goal of apprising the consumer of her rights. *Id.* at 445, 447, 99 A.3d 306.

#### IV.

##### A.

In this matter, we again review consumer contract language to determine whether there was mutuality of assent to form an agreement to arbitrate. But, unlike in *Atalese*, the question in this case is whether mutuality of assent is achieved when a provision confusingly and unpredictably shifts between the terms “arbitration” and “mediation” and the procedures for the two types of proceedings.

[13] [14] [15] A court's objective in construing a contract is to determine the intent of the parties. *Kieffer v. Best Buy*, 205 N.J. 213, 223, 14 A.3d 737 (2011). “In the quest for the common intention of the parties to a contract the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain.” \*321 *Tessmar v. Grosner*, 23 N.J. 193, 201, 128 A.2d

467 (1957). In New Jersey, we have a Plain Language Act that imposes certain simple principles on consumer contracts generally -- to wit, they must use plain language that is commonly \*\*778 understood by the wide swath of people who comprise the consuming public. By doing so, we then can confidently state that, even in the consumer context, “[a] party who enters into a contract in writing, without any fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect.” *Rudbart v. N. Jersey Dist. Water Supply Comm'n*, 127 N.J. 344, 353, 605 A.2d 681 (1992) (quoting *Fivey v. Pa. R.R.*, 67 N.J.L. 627, 632, 52 A. 472 (E. & A. 1902) ).

[16] A basic tenet of contract interpretation is that contract terms should be given their plain and ordinary meaning. *Roach*, 228 N.J. at 174, 155 A.3d 985; *M.J. Paquet, Inc. v. DOT*, 171 N.J. 378, 396, 794 A.2d 141 (2002). Here, the parties and amici have varying positions on whether the term arbitration is self-defining. *Atalese* recognizes that “[b]y its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court.” 219 N.J. at 442, 99 A.3d 306 (citation and internal quotation marks omitted). However, in the context of that decision, we were unwilling to attribute knowledge of that definition to consumers in part because “an average member of the public may not know -- without some explanatory comment -- that arbitration is a substitute for the right to have one's claim adjudicated in a court of law.” *Ibid.*

\*\*\*11 In this instance, we examine the use of the word “arbitration” in the context of the contract to determine if its meaning is apparent, and whether it can therefore supply the mutual assent required for the provision to constitute a meeting of the minds. We find that the meaning of the provision is not apparent from the manner in which it relayed information to the consumer who signed the contract. Although we are not expecting a specific recitation of words to effect a meeting of the minds to create an agreement to arbitrate, the construct and wording of the instant provision are too confusing and misleading to meet simple plain wording standards \*322 demanded by the public policy of this state for consumer contracts.

##### B.

Plaintiff has argued throughout these proceedings that the arbitration agreement lacks sufficient clarity to be enforced. She points to the multiple ambiguities and inconsistencies within the provision. She advances a compelling argument that “the arbitration provision's inconspicuous location

and confusing, inconsistent and contradictory terms are unenforceable.” We discuss those points in turn.

[17] [18] A consumer cannot be required to arbitrate when it cannot fairly be ascertained from the contract's language that she knowingly assented to the provision's terms or knew that arbitration was the exclusive forum for dispute resolution. In light of that concern, [Atalese](#) stands for the proposition that an arbitration agreement is clearly enforceable when its terms affirmatively state, or unambiguously convey to a consumer in a way that he or she would understand, that there is a distinction between agreeing to resolve a dispute in arbitration and in a judicial forum. 219 N.J. at 442-44, 99 A.3d 306.

[19] Where [Atalese](#) discussed the distinction between resolving suits in arbitration versus a judicial forum, here, the ambiguity that affects the mutuality of assent question focuses on the overall language of this provision and whether the instant plaintiff-consumer fairly should have known that by signing her contract, she was knowingly assenting to arbitration as an exclusive remedy. We think not.

\*\*779 On a macro level, the contract fails to signal to consumers that it contains an arbitration provision affecting their rights because the alternative dispute resolution provision's “arbitration agreement” is located within a section labeled “MEDIATION.” Even when located, the small size of the print makes the provision \*323 burdensome to read and appears to violate the font size requirements of the PLA.

As for the substance of the provision, its terms are contradictory. The internal sentences refer to the use of the AAA's Commercial Mediation Rules, which cannot be reconciled with arbitration. The provision's terms cannot be read to provide clarity to a consumer that she was agreeing to arbitration, or what that term, in the context of confusing references to mediation or mediation rules, actually meant. Indeed, mediation and arbitration are distinct and different procedures.

[20] [21] [22] [23] Under [N.J.S.A. 2A:23C-2](#), mediation is “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.” As a facilitator, a mediator does not reach a final decision on the matter. Instead, the mediator, albeit remaining neutral, encourages the participants to resolve their differences and reach an agreement. See [R. 1:40-2\(c\)](#) (“ ‘Facilitative Process,’ which includes mediation, is a process by which a neutral third

party facilitates communication between parties in an effort to promote settlement without imposition of the facilitator's own judgment regarding the issues in dispute.”). Mediation sessions “are not conducted under oath, do not follow traditional rules of evidence, and are not limited to developing the facts.” [State v. Williams](#), 184 N.J. 432, 447, 877 A.2d 1258 (2005) (quoting [Rinaker v. Superior Court](#), 62 Cal. App. 4th 155, 162, 74 Cal.Rptr.2d 464 (1998) ). Mediation communications are privileged under [N.J.R.E. 519](#) because honesty in communications is imperative in order to reach a settlement. Public policy favors settlement of disputes in part because it “spares the parties the risk of an adverse outcome and the time and expense -- both monetary and emotional -- of protracted litigation.” [Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.](#), 215 N.J. 242, 253-54, 71 A.3d 888 (2013) (citing [Williams](#), 184 N.J. at 441, 877 A.2d 1258). Of utmost importance, if mediation sessions fail, the parties can proceed in court to resolve their dispute.

\*\*\*12 \*324 [24] On the other hand, “[t]he object of arbitration is the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties.” [Hojnowski v. Vans Skate Park](#), 187 N.J. 323, 343, 901 A.2d 381 (2006) (citation omitted). Arbitration involves a process that results in an adverse outcome for one party. See [Williams](#), 184 N.J. at 447, 877 A.2d 1258 (stating goal of both formal adjudication and arbitration “is to uncover and present evidence of claims and defenses in an adversarial setting”).

[25] [26] [27] Unless superseded by the parties' agreement, the New Jersey Arbitration Act prescribes the rules governing the conduct of the proceeding. See [N.J.S.A. 2A:23B-4](#); [Fawzy v. Fawzy](#), 199 N.J. 456, 469-70, 973 A.2d 347 (2009). The Act grants an arbitrator significant discretion over evidentiary matters in order to advance the goal of quick and fair disposition of the parties' dispute. See [N.J.S.A. 2A:23B-15](#). The “arbitrator's role is evaluative, requiring the parties to present their evidence for a final determination.” [Minkowitz v. Israeli](#), 433 N.J. Super. 111, 144, 77 A.3d 1189 (App. Div. 2013) (citing [R. 1:40-2\(b\)](#) (2) ). Much like a judicial factfinder, “[a]rbitrators essentially weigh evidence, assess credibility, and apply the law \*\*780 when determining whether a party has proven his or her request for relief.” [Ibid.](#)

In sum, mediation stands in “stark contrast” to formal adjudication and arbitration. [Williams](#), 184 N.J. at 447, 877 A.2d 1258.

C.

As noted, defendants initially petitioned asking this Court to hold that our decision in [Atalese](#) runs afoul of [Kindred Nursing](#) -- an argument now abandoned. Even if defendants maintained that argument, we would not need to address any perceived conflict between those cases because the threshold issue of whether the instant provision's language contains sufficient clarity to form any agreement about arbitration is easily answered. This provision does not meet the rudiments for showing a mutual assent to have arbitration be the only means of dispute resolution permitted to **\*325** plaintiff, necessarily foreclosing her from pursuing her right to bring an action in court.

[28] “To be enforceable as a contractual undertaking, an agreement must be sufficiently definite in its terms that the performance to be rendered by each party can be ascertained with reasonable certainty.” [Borough of West Caldwell v. Borough of Caldwell](#), 26 N.J. 9, 24-25, 138 A.2d 402 (1958) (citing [Friedman v. Tappan Dev. Corp.](#), 22 N.J. 523, 531, 126 A.2d 646 (1956) ). The shortcomings of the provision in issue here are, as noted, three-fold: (1) the inconspicuous location of the agreement to arbitrate under a section labeled “MEDIATION”; (2) its small-font text and confusing ordering of sentences; and (3) the invocation of the Commercial Mediation Rules.

[29] As noted, mediation and arbitration are “distinctly different proceedings.” [Minkowitz](#), 433 N.J. Super. at 146, 77 A.3d 1189. Yet, the provision's terms blur any distinction. To the extent a lay reader perceives that there are two procedures being proposed through this confusing alternative dispute resolution provision labeled “MEDIATION,” the provision's discussion of the arbitration process is misleading. An arbitration provision that purports to utilize mediation procedures is unenforceable because the parties cannot be said to have reached a meeting of the minds on whether the proceeding will result in a binding award. Here, if a court were to compel arbitration pursuant to the provision's terms, there would be no binding resolution of the parties' disputes. Although arbitration by definition involves the issuance of a final award by a neutral third party, see [R.](#) 1:40-2(a)(1), the references to arbitration in defendants' provision lack sufficient clarity to preclude resort to judicial relief should the parties' good-faith settlement negotiations fail.

**\*\*\*13** Despite the title “MEDIATION,” the bold-faced text that follows prescribes a two-step dispute resolution

process: “The parties agree to mediate in good faith before resorting to mandatory arbitration in the State of New Jersey.” The provision does not **\*326** next outline the scope of the proceedings, but instead first includes a waiver of class proceedings. The provision then prescribes that

[a]ny and all disputes, claims and causes of action arising out of or connected with this Agreement (including but not limited to whether a particular dispute is arbitrable hereunder) shall be resolved exclusively through the American Arbitration Association in the state of New Jersey under its Commercial Mediation Rules. Controversies or claims shall be submitted to arbitration regardless of the theory under which they arise, including without limitation contract, tort, **\*\*781** common law, statutory, or regulatory duties or liability.

[ (emphasis added).]

The provision seemingly envisions the issuance of an award. In the third subsection, the provision limits “[a]ny and all claims, judgments and awards” to “actual out-of-pocket costs incurred to a maximum of \$1500 per claim.” (emphasis added). The final subsection dictates that “[u]nder no circumstances will you be permitted to obtain awards for, and you hereby waive[ ],” any other form of damages and multiplied damages. (emphasis added).

Reading the provision as a whole, the references to arbitration cannot be harmonized with the title of the section and the intended use of the Commercial Mediation Rules in order to give rise to an enforceable agreement to arbitrate. Should a diligent and prudent consumer read defendants' form contract in full, a reader could, and most likely would, reasonably understand subsection two to prescribe that the Commercial Mediation Rules “exclusively” govern “any and all disputes.” The small typeface, confusing sentence order, and misleading caption exacerbate the lack of clarity in expression. It is unreasonable to expect a lay consumer to parse through the contents of this small-font provision to unravel its material discrepancies.

Our Plain Language Act requires that more be done in the setting of consumer contracts to make them understandable for a lay person. See [N.J.S.A. 56:12-10\(b\)\(3\)](#) (prescribing, for consumer contracts, that “[c]onditions and exceptions to the main promise of the agreement shall be given equal prominence with the main promise, and shall be in at least 10 point type”); see also [Morgan](#), 225 N.J. at 310 n.8, 137 A.3d 1168 (noting that in judging whether consumer contract meets

standard of being written in clear and \*327 understandable manner, “courts must ‘take into consideration the guidelines set forth in [N.J.S.A. 56:12-10]’ ” (alteration in original) (quoting N.J.S.A. 56:12-2) ).

Because the contract contains material discrepancies that call into question the essential terms of the purported agreement to arbitrate, mutual assent is lacking. Accordingly, we hold that this arbitration agreement is not enforceable.

V.

The judgment of the Appellate Division is affirmed as modified.

CHIEF JUSTICE RABNER and JUSTICES ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and TIMPONE join in JUSTICE LaVECCHIA's opinion. JUSTICE ALBIN filed a separate, concurring opinion.

JUSTICE ALBIN, concurring.

I concur with my colleagues that the purported arbitration clause in this consumer contract case is unenforceable because its confusing and contradictory provisions do not demonstrate that the parties mutually assented to arbitrate their dispute. Unlike my colleagues, however, I would not sidestep the issue on which this Court granted certification: whether *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430, 99 A.3d 306 (2014), cert. denied, — U.S. —, 135 S.Ct. 2804, 192 L.Ed.2d 844 (2015), runs afoul of *Kindred Nursing Centers Ltd. Partnership v. Clark*, 581 U.S. —, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017), and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 to 16.

\*\*\*14 Although defendants' petition for certification contended that *Atalese* could not be reconciled with *Kindred Nursing*, defendants conceded at oral argument that those two cases were not in conflict with each other. In response to a question from \*\*782 the Court, “So your contention is that *Atalese* in and of itself does not violate *Kindred Nursing* but the Appellate Division overread it,” defendants' \*328 counsel replied, “Yes, absolutely.” Instead, defendants argued that the arbitration agreement did not violate *Atalese*.

Defendants' concession did not deprive this Court of its authority to decide the issue raised in defendants' petition -- an issue argued forcefully from different vantage points by the amici curiae before us.<sup>1</sup> That issue will not go

away. Tomorrow is not a better time to resolve an issue on which courts need emphatic guidance. In my view, our jurisprudence, including *Atalese*, conforms to the FAA, and *Kindred Nursing* has not altered that equation.

Indeed, the Court reaffirms the fundamental principle animating *Atalese* -- an arbitration clause in a consumer contract is unenforceable unless the contract's language conveys in some manner “that there is a distinction between agreeing to resolve a dispute in arbitration and in a judicial forum.” *Ante* at 322, 199 A.3d at 788 (citing *Atalese*, 219 N.J. at 442-44, 99 A.3d 306). The Court also acknowledges that mutual assent -- the basic element of a contract -- requires that consumers have an understanding that arbitration means their disputes will be resolved out of court in an alternative forum. *Ante* at 319–21, 199 A.3d at 777. If *Kindred Nursing* were antithetical to the simple precept that consumers have a right to know what they are signing, then much of the reasoning of today's opinion would be rendered a nullity.

But *Kindred Nursing* is not in conflict with *Atalese* and the state-law jurisprudence on which *Atalese* is founded.

I.

The United States Supreme Court in *Kindred Nursing* applied the well-established FAA requirement that arbitration agreements must be placed “on equal footing with all other contracts.” \*329 137 S.Ct. at 1424 (quoting *DIRECTV, Inc. v. Imburgia*, 577 U.S. —, 136 S.Ct. 463, 465, 193 L.Ed.2d 365 (2015) ). In doing so, the Court struck down a new rule adopted by the Kentucky Supreme Court concerning powers of attorney that singled out arbitration agreements for disfavored treatment. *Id.* at 1429.

In *Kindred Nursing*, a husband conveyed to his wife and a mother conveyed to her daughter powers of attorney granting them broad authority to manage their loved ones' affairs, including the legal right to enter into contracts. *Id.* at 1425. The husband and mother were admitted as residents into a Kindred nursing home. *Ibid.* Exercising their powers as legal representatives of their loved ones, the wife and daughter signed documents, including arbitration agreements, required by the nursing home.<sup>2</sup> *Ibid.*

\*\*\*15 Later, they sued the nursing home for substandard care that they alleged caused \*\*783 the deaths of their husband and mother. *Ibid.* The Kentucky Supreme Court declared the arbitration agreements invalid because the

powers of attorney -- despite the broad grants of authority to the family-member representatives to act on behalf of their loved ones -- did not specifically authorize those representatives to enter arbitration agreements. Id. at 1425-26. That precise authorization was necessary, the Kentucky high court asserted, because arbitration denied the nursing home residents (and their estates) access to the courts. Id. at 1426.

The Kentucky Supreme Court's newly adopted power-of-attorney "clear-statement rule" violated the FAA because it was "too tailor-made to arbitration agreements" and singled out arbitration agreements "for disfavored treatment." Id. at 1426-27. The United States Supreme Court observed that "[n]o Kentucky court ... ha[d] ever before demanded that a power of attorney explicitly \*330 confer authority to enter into contracts implicating constitutional guarantees." Id. at 1427. Despite the Kentucky Supreme Court's assertions, its clear-statement rule, in reality, applied only to arbitration agreements. Id. at 1427-28 (noting "the arbitration-specific character of the rule, much as if it were made applicable to arbitration agreements and black swans"). For that reason, "[t]he Kentucky Supreme Court specially impeded the ability of attorneys-in-fact to enter into arbitration agreements," and therefore its clear-statement rule did not pass muster under the FAA. Id. at 1429.

Unlike the Kentucky Supreme Court's decision in Kindred Nursing, New Jersey case law does not disfavor or discriminate against arbitration agreements.

## II.

In Atalese, this Court reaffirmed principles long embedded in our jurisprudence. Under the FAA, state courts may construe arbitration agreements under general contract principles, provided arbitration agreements are treated no differently from other agreements. Atalese, 219 N.J. at 441, 99 A.3d 306. Although the FAA promotes a national policy favoring arbitration, an arbitration agreement, like any other agreement, may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." Ibid. (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 85, 800 A.2d 872 (2002) (quoting, in turn, 9 U.S.C. § 2) ). The FAA "permits agreements to arbitrate to be invalidated by generally applicable contract defenses," so long as those defenses do not discriminate against arbitration. Ibid. (internal quotation marks omitted) (quoting AT & T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) ).

Like all contractual agreements, an arbitration agreement must be the product of mutual assent. Atalese, 219 N.J. at 442, 99 A.3d 306. In turn, "[m]utual assent requires that the parties have an understanding of the terms to which they have agreed." Ibid.

Atalese wove together two interconnected strands of our state-law jurisprudence in assessing the validity of an arbitration agreement \*331 -- both of which applied neutral principles of state contract law. One strand involves contracts in which individuals waive their statutory or constitutional rights. Our Court has consistently maintained that a person who enters into an arbitration agreement should understand that he is waiving his right to prosecute or defend his claim in a civil court or judicial forum. See Morgan v. Sanford Brown Inst., 225 N.J. 289, 308-09, 137 A.3d 1168 (2016) ("[W]hen a contract contains a waiver of rights -- whether in an arbitration or other clause -- the waiver must be clearly \*\*784 and unmistakably established." (internal quotation marks omitted) (quoting Atalese, 219 N.J. at 444, 99 A.3d 306) ); Leodori v. CIGNA Corp., 175 N.J. 293, 302, 814 A.2d 1098 (2003) ("[A] waiver-of-rights provision must reflect that an employee has agreed clearly and unambiguously to arbitrate the disputed claim."); Martindale, 173 N.J. at 95, 800 A.2d 872 (stating in reference to arbitration agreements that "[t]he Court will not assume that employees intend to waive [their statutory rights] unless their agreements so provide in unambiguous terms" (second alteration in original) (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 135, 773 A.2d 665 (2001) ) ); Garfinkel, 168 N.J. at 136, 773 A.2d 665 ("[W]e will not assume that an employee intends to surrender [his] choice [of an administrative or judicial forum in an LAD case] in favor of arbitration unless that intention has been 'clearly and unmistakably established[.]'" (fourth alteration in original) (quoting Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Ed., 78 N.J. 122, 140, 393 A.2d 267 (1978) ) ); Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282, 633 A.2d 531 (1993) ("A clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." )<sup>3</sup>.

\*\*\*16 \*332 "The requirement that a contractual provision be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right is not specific to arbitration provisions." Atalese, 219 N.J. at 443, 99 A.3d

306. In [Atalese](#), we catalogued a non-exhaustive list of non-arbitration cases involving a party's waiver of statutory rights in which our courts have required that the waiver be clear and unmistakable. [Id.](#) at 443-44, 99 A.3d 306 (citing examples). In light of the general applicability of this doctrine to the waiver-of-rights line of cases, we emphasized in [Atalese](#) that “[a]rbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under state law.” [Id.](#) at 444, 99 A.3d 306.

The other strand of our jurisprudence involves the modest acknowledgement that the term arbitration is not self-defining. [Id.](#) at 442, 99 A.3d 306. This Court has recognized that “[t]he meaning of arbitration is not self-evident to the average consumer.” [Morgan](#), 225 N.J. at 308, 137 A.3d 1168. “[A]n average member of the public may not know -- without some explanatory comment -- that arbitration is a substitute for the right to have one's claim adjudicated in a court of law.” [Atalese](#), 219 N.J. at 442, 99 A.3d 306. Notably, “[o]ne statistical study concluded ‘that consumers have no idea what they are agreeing to when they enter into contracts containing arbitration clauses’ and that many consumers believe that access to ‘court will be available to them, if only as a last resort.’” [Morgan](#), 225 N.J. at 308 n.7, 137 A.3d 1168 (quoting Jeff Govern et al., \*\*785 [“Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements](#), 75 *Md. L. Rev.* 1, 63 (2015) ).<sup>4</sup>

\*333 Underscoring the ambiguity about the precise meaning of arbitration are court-adopted schemes that allow for judicial review of an arbitrator's decision. For example, [Rule 4:21A-1](#) requires parties to arbitrate automobile negligence actions, other personal injury actions, and non-personal injury actions. [R.](#) 4:21A-1(a)(1) to (3). Under [Rule 4:21A-6](#), however, arbitration may be only the first step in the dispute resolution process. A party disappointed with the result of arbitration can still have the dispute decided by a jury or the court. After an arbitration decision, “[a]n action in which a timely trial de novo has been demanded by any party shall be returned, as to all parties, to the trial calendar for disposition.” [R.](#) 4:21A-6(c). Under our court rules, a mandatory arbitration proceeding does not necessarily result in a binding outcome. [Ibid.](#)

Accordingly, nothing better illustrates that arbitration is not a self-defining term than our court rules. There is no reason to believe that the average consumer would understand that

the term arbitration -- without some explanation -- means that court review or relief is unavailable.

Not only because of our waiver-of-rights case law, but also, separately, because of the uncertainty that may arise from the bare use of the term arbitration, this Court in [Atalese](#) came to the unremarkable conclusion that the parties to a consumer contract involving an arbitration clause “must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum.” 219 N.J. at 445, 99 A.3d 306. An arbitration clause should at least be clear about its meaning; mutual assent is not achieved \*334 through ignorance. [See Marchak](#), 134 N.J. at 282, 633 A.2d 531 (“A[n arbitration] clause depriving a citizen of access to the courts should clearly state its purpose.”); [see also](#) [N.J.S.A. 56:12-2](#) (“A consumer contract ... shall be written in a simple, clear, understandable and easily readable way.”).

\*\*\*17 We have stressed that to accomplish the goal of allowing a consumer to make an informed choice about the forum in which a dispute will be resolved, no “magic words” or “prescribed set of words must be included in an arbitration clause.” [Atalese](#), 219 N.J. at 439, 447, 99 A.3d 306. “Our courts have upheld arbitration clauses phrased in various ways when those clauses have explained that arbitration is a waiver of the right to bring suit in a judicial forum.” [Id.](#) at 444-45, 99 A.3d 306 (citing examples); [see also](#) [Morgan](#), 225 N.J. at 309, 137 A.3d 1168. However an arbitration agreement is worded, it must simply make clear that the “consumer is choosing to arbitrate disputes rather than have them resolved in a court of law.” [Atalese](#), 219 N.J. at 447, 99 A.3d 306.

This sensible, neutral, nondiscriminatory application of our state law does not burden legitimate arbitration agreements; it simply requires reasonable notice to the consumer of the meaning of an arbitration agreement. Most arbitration agreements comply with the exceedingly low bar set by [Atalese](#) and inform consumers of what they need to know.

\*\*786 The United States Supreme Court's FAA precedents, such as [Concepcion](#), are not hostile to an informed citizenry. Those cases do not bar an undemanding state-law requirement that allows consumers a minimal understanding that in choosing arbitration they will not have access to a judicial forum. Nothing in [Kindred Nursing](#) changes that landscape or undermines the efficacy of decades of our jurisprudence, including [Atalese](#).

III.

The Court today has bypassed the opportunity to put the issue on which it granted certification to rest. I am confident, however, that the Court, when next presented with this issue, will reaffirm \*335 the continued vitality of our long-established jurisprudence. In [Atalese](#), we held, consistent with that jurisprudence, that an arbitration clause must simply explain to the average consumer what it forecloses -- the

right to a judicial forum for the resolution of a dispute. Every contract must explain in some way its purpose. We do not discriminate against an arbitration agreement by requiring it to do the same. [Kindred Nursing](#) does not hold otherwise.

## All Citations

236 N.J. 301, 199 A.3d 766, 2019 WL 166309

## Footnotes

- 1 Plaintiff secured that portion of her relief by notifying defendants of her claim, as the alternative dispute resolution provision requires. The defendants agreed to the cancellation and refunded plaintiff the full purchase price to her credit card a few days later.
- 2 We note that plaintiff filed an amended complaint before the trial court later during the proceedings, in which she alleged additional evidence of asserted wrongful conduct and harm suffered by plaintiff.
- 3 As discussed [infra](#) in Section III. B. 1., in [Kindred Nursing](#), the Supreme Court reviewed a Kentucky Supreme Court holding that required an explicit statement in a power of attorney agreement to the effect that the attorney-in-fact has authority to waive the principal's state constitutional rights to access the courts and to a jury trial (its "clear-statement rule"). See generally [Kindred Nursing](#), 137 S.Ct. at 1421-29. The Supreme Court concluded that the Kentucky Supreme Court's holding contravened the FAA because, by imposing an extra hurdle to enforcement of an arbitration agreement, the Kentucky ruling failed to keep arbitration agreements on equal footing with other contracts. [Id.](#) at 1426-27.
- 4 Defendants concede that the font is less than 10 point, as required by the PLA, but do not know its actual size and so cannot agree to the size asserted by the NJAJ.
- 5 In light of sections three (providing for a stay of litigation pending arbitration "in accordance with the terms of the agreement") and four of the FAA, the Supreme Court has "held that parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes." [Concepcion](#), 563 U.S. at 344, 131 S.Ct. 1740 (citations omitted) (emphasis in original).
- 6 In reversing the Kentucky Supreme Court holding in [Kindred Nursing](#), the Supreme Court concluded that Kentucky "did exactly what [Concepcion](#) barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement -- namely, a waiver of the right to go to court and receive a jury trial." [Id.](#) at 1427. The Supreme Court called the Kentucky rule "too tailor-made to arbitration agreements -- subjecting them, by virtue of their defining trait, to uncommon barriers -- to survive the FAA's edict against singling out those contracts for disfavored treatment." [Ibid.](#)
- 1 "We have often declined ... to dismiss a matter on grounds of mootness, if the issue in the appeal is an important matter of public interest." [Nini v. Mercer Cty. Cmty. Coll.](#), 202 N.J. 98, 105 n.4, 995 A.2d 1094 (2010) (quoting [Reilly v. AAA Mid-Atl. Ins. Co. of N.J.](#), 194 N.J. 474, 484, 946 A.2d 564 (2008) ).
- 2 Notably, the nursing home's arbitration clause fully complied with New Jersey law because the clause explained that "[b]inding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s)." See [Extendicare Homes, Inc. v. Whisman](#), 478 S.W.3d 306, 317 (Ky. 2015) (alteration in original), [judgment rev'd in part, vacated in part sub nom. Kindred Nursing](#), 137 S.Ct. 1421.
- 3 Significantly, the United States Supreme Court uses the same language found in our State's waiver-of-rights jurisprudence in determining whether parties have agreed to arbitrate the threshold question of arbitrability. In [Henry Schein, Inc. v. Archer & White Sales, Inc.](#), the Court reaffirmed that "courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'" 586 U.S. —, —, 139 S.Ct. 524, — L.Ed.2d —, 2019 WL 122164 (2019) (slip op. at 8) (quoting [First Options of Chi., Inc. v. Kaplan](#), 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ). In other words, in the absence of clear and unmistakable evidence otherwise, the parties have not waived a court resolution of the issue.
- 4 A "study by the Consumer Financial Protection Bureau similarly concluded that a majority of credit-card consumers whose agreements contained arbitration clauses did not understand that they could not file suit in court." [Morgan](#), 225 N.J. at 308 n.7, 137 A.3d 1168 (citing Consumer Fin. Prot. Bureau, [Arbitration Study Report to Congress, Pursuant to Dodd-](#)

Frank Wall Street Reform and Consumer Protection Act § 1028(a), § 3 at 3 (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf)).

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