



Lum, Drasco & Positan LLC

ATTORNEYS AT LAW SINCE 1870

Law Notes

Fall Newsletter
November 2023

Lum, Drasco & Positan LLC
Attorneys At Law Since 1870

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FIRM NEWS

We welcome the following new associates to the Firm:

ROBERT J. GARCIA who will be working in the Firm's Litigation Department where he concentrates on commercial litigation and medical malpractice. Prior to joining the firm, he served as a judicial law clerk to the Honorable Stephen L. Petrillo, J.S.C., Civil Division, Essex Vicinage. He graduated in 2021 from Seton Hall University, School of Law. At Seton Hall, he was a Student Attorney with the Center for Social Justice, a Research Fellow at the Center for Policy and Research, and an Executive Board Member of the Latin American Law Student Association (LALSA). He has interned with the California Attorney General's Office, the New York State Department of Homes and Community Renewal, and the Honorable John A. Houston in the United States District Court.

NICHOLE R. NUNES who will be working in the firm's Labor and Employment Law Group and represents employers and management-level employees against claims of discrimination, whistleblowing and retaliation, harassment, failure to promote, and other employment-related claims. Ms. Nunes was admitted to practice law in New Jersey in 1999, and the United States District Court for the District of New Jersey in 1999. Ms. Nunes received a B.A. in Communication from Central Connecticut State University, New Britain, CT in 1995 and a J.D. from Suffolk University in Boston, Massachusetts in 1998. Upon graduation from Law School, Ms. Nunes, served as a judicial law clerk to the Honorable Rudy B. Coleman, New Jersey Superior Court, Family Part, Union Vicinage.

CHRISTA J. TOMASULO who will be working in the Firm's Litigation Department, concentrates her practice on commercial real estate and other complex litigation matters, as well as family law. Ms. Tomasulo graduated *summa cum laude* from Rutgers University, New Brunswick with a B.A. in English and Philosophy. She received her J.D. from Drexel University, Thomas R. Kline School of Law where she was an active member of the Trial Advocacy Team and served as a Marshall Brennan Project Teaching Fellow. During law school, Ms. Tomasulo worked for the New Jersey Attorney General's Office as well as an insurance defense firm. Prior to joining the Firm, she served as a judiciary law clerk for the Honorable Mark K. Chase, in both the Chancery Division, Family Part, Camden Vicinage and the Appellate Division.

On October 11, 2023, **DENNIS J. DRASCO** participated on a panel at Rutgers Law School in Newark sponsored by the NJ Chapter of the American College of Trial Lawyers. The program was chaired by recently retired Chief Judge Freda Wolfson of the US District Court for the District of New Jersey. Judge Wolfson, Dennis and two other Fellows of the ACTL, spoke to a large group of Rutgers Law Students on the topic "Alternatives to the Court House in a Post-COVID Environment".

WAYNE J. POSITAN was interviewed by *Super Lawyers Magazine* with respect to best practices to reduce the risk of employment litigation. This interview can be viewed at <https://www.superlawyers.com/resources/employment-litigation/steps-for-employers-to-avoid-employment-litigation/>

PAUL A. SANDARS, III was re-elected for a three (3) year term to the Executive Committee of Legal Netlink Alliance, a national referral service for small to intermediate size law firms. The Lum firm is LNA's New Jersey referral link. The network covers North and South America and there is an International Division as well.

SCOTT E. REISER moderated a Roundtable Discussion on The Evolving Law Firm: How Law Firms Can Change to Survive (and Thrive) in Today's World, at the ABA Section of Litigation's Annual Conference in Atlanta, Georgia on April 19, 2023.

NJ ENACTS ANTI-SLAPP LAW TO COMBAT LAWSUITS SUPPRESSING FREE SPEECH

By: Kevin J. O'Connor, Esq.

On September 7, 2023, Governor Murphy signed the bipartisan "Uniform Public Expression Act" ("UPEA"), which is intended to protect against meritless lawsuits designed to intimidate individuals for exercising their freedom of speech. Such lawsuits are known as "Strategic Lawsuits Against Public Participation" ("SLAPP") and are generally employed against members of the public, journalists, academics and whistleblowers to stifle speech concerning important issues. Often, the goal of SLAPP actions is to intimidate or silence criticism of public officials or powerful individuals or entities.



In enacting the UPEA, New Jersey became the 33rd state to adopt an Anti-SLAPP law. The UPEA addresses situations where threats of lawsuits and filing of litigation are used to threaten or punish individuals who have engaged in public discourse. Recognizing that SLAPP actions can be draining in terms of time and legal fees which has a chilling effect on free speech, the UPEA creates a mechanism for defendants to seek expedited review and dismissal of SLAPP claims. The effective date of the UPEA is October 7, 2023 and the provisions of the Act apply to any civil action filed or cause of action asserted in a civil action on or after the effective date.

Within sixty (60) days of being served with a pleading asserting a SLAPP claim, a defendant may file an Order to Show Cause seeking the dismissal of the claims. Upon the filing of such an application, the court has discretion to stay the proceedings, including discovery, pending a hearing on the Order to Show Cause. Under appropriate circumstances, a defendant may recover attorney's fees if the case is dismissed by the court.

The expedited procedure created by New Jersey's new Anti-SLAPP law provides defendants with the ability to seek dismissal of attempts to chill free expression by permitting the dismissal of SLAPP claims at the outset of the litigation. If properly employed, this would allow dismissal at the early stages of litigation and avoid long and drawn out litigation to vindicate the right to freedom of expression on important issues. As stated by Governor Murphy when signing the UPEA, "[t]his law will expedite the process to get these cases dismissed on behalf of the journalists, small businesses, activists, and countless others who have been unfairly targeted by these lawsuits over the years."¹

Kevin J. O'Connor is a Member of the Firm of Lum, Drasco & Positan LLC and practices in the Firm's Litigation Group.

1. <https://www.nj.gov/governor/news/news/562023/20230907d.shtml>

MUST WE TALK ABOUT THIS: THE NATIONAL IMPLICATIONS OF NEW JERSEY'S HEIGHTENED ENFORCEABILITY STANDARD FOR ARBITRATION AGREEMENTS FOR SMALL AND MEDIUM SIZED BUSINESSES

By: Mark R. Mikhael, Esq.

The stakes for small and medium sized businesses are high with respect to the enforcement of arbitration agreements. The New Jersey Supreme Court's 2014 decision in Atalese¹ set forth a heightened standard for enforceability that has been applied in consumer and employment contract cases due to the imbalance in sophistication typical of parties to those types of contracts. However, the New Jersey Appellate Division's 2023 decision in County of Passaic v. Horizon Healthcare Services² declined to apply this heightened standard to cases involving sophisticated parties. The Supreme Court has granted certification of the Appellate Division's decision and the matter will likely be scheduled for argument in the coming months.



This article reviews Atalese and County of Passaic v. Horizon Healthcare Services as well as decisions by other jurisdictions that applied arbitration provisions that laid venue in New Jersey. The New Jersey Supreme Court's future decision in the County of Passaic v. Horizon Healthcare Services case will be of vital concern to attorneys and their clients who own/operate small and medium sized businesses. The Appellate Division's decision is similar to other decisions which have concluded that sophisticated parties are not within the ambit of the Atalese heightened standard.

Atalese: The New Jersey Supreme Court Raises the Stakes for Small to Medium-Sized Businesses

The New Jersey Supreme Court decision in Atalese provides that arbitration clauses must contain an express waiver of the parties' right to seek relief in a court of law to be enforceable. This heightened standard for enforceability drew national criticism as potentially harmful to small and medium sized businesses that utilized arbitration agreements to keep them out of litigation.³ Small and medium sized businesses often rely on out of state suppliers and arbitration provisions can mitigate the risk of litigation in unfamiliar jurisdictions.⁴ Moreover, the heightened standard presented challenges to the efficiency of the operations of small and medium sized business that often rely on form language in contracts.⁵ As arbitration clauses are a subset of forum selection clauses, the heightened standard for enforcement in Atalese has national and international implications.

The New Jersey Supreme court decided Atalese in the context of a consumer seeking relief relating to a debt adjuster's misrepresentations.⁶ Patricia Atalese sued U.S. Legal Services Group ("USLG") for violations of New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"). USLG moved to compel arbitration and its motion was granted. The arbitration agreement, however, did not mention that consumers waived their rights to relief in a judicial forum. Underpinning this decision, was the notion that an arbitration, like any other agreement, must be the product of mutual assent 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."⁷ While the Supreme Court of New Jersey has not expressly narrowed the scope Atalese, it has only applied the heightened standard "in the context of employment and consumer contract" cases.⁸

The Appellate Division has consistently limited the application of Atalese to consumer and employment contracts.⁹ Moreover, the Third Circuit has recognized the same limitation.¹⁰ Approximately seven years after the New Jersey Supreme Court decided Atalese, the Appellate Division considered whether its requirement of an explicit waiver of access to the courts applied in the context of two sophisticated parties.

County of Passaic v. Horizon Healthcare Services: The Appellate Division Says the Quiet Part Out Loud

In 2021, the County of Passaic (“County”) sued Horizon Healthcare Services, Inc. (“Horizon”) claiming, among other things, that Horizon breached its contract to manage the County’s self-funded health plan by failing to implement certain modified reimbursement rates.¹¹ Horizon moved to compel arbitration based upon a provision in the 2009 agreement that required submission of disputes between the parties to binding arbitration under the commercial rules of the American Arbitration Association.

The Appellate Division held “because the parties are sophisticated and possess relatively equal bargaining power - *Atalese*'s requirement of an express waiver of the parties’ right to seek relief in a court of law is inapplicable and the arbitration agreement is enforceable.”¹² This holding makes sense given the circumstances in *Atalese*: a consumer bound to arbitrate her disagreement with an entity possessing substantially greater resources via a contract of adhesion.

The Appellate Division distinguished that *Atalese* as it involved a consumer contract and focused on the unequal relationship between the parties as well as the adhesional nature of the contracts between such parties. The per curiam opinion noted that *Atalese* relied on the New Jersey Consumer Fraud Act (the “CFA”), which requires consumer contracts “be written in a simple, clear, understandable and easily readable way.”¹³ In those circumstances, agreements to arbitrate require express waivers of the right to seek relief in a court of law.

However, as the Appellate Division observed, those cases tend to arise in the context of employment or consumer contracts where parties are “not versed in the law or not necessarily aware of the fact that an agreement to arbitrate may preclude” the right to seek relief in the court of law or the right to a trial by jury.¹⁴ This concern “vanishes when considering individually–negotiated contracts between sophisticated parties–often represented by counsel at the formation stage–possessing relatively similar bargaining power.”¹⁵ The County and Horizon were both represented by counsel throughout all stages of their negotiations and the formation of the relevant contract instruments over the course of their relationship.¹⁶The opinion is silent as to level of sophistication in relation to the nature of a contract.

Things to Come

Arbitration clauses can lay venue anywhere. Many such provisions lay venue in New Jersey, parties seeking to defeat such a motion have relied on the heightened standard in *Atalese* for enforcement. However, courts deciding cases under New Jersey law have distinguished *Atalese* along the same lines as *County of Passaic v. Horizon Healthcare Services*.

A recent case in New York articulated the same distinction between parties and circumstances made by the *County of Passaic v. Horizon Healthcare Services* court.¹⁷ The *Umeh* case concerned an agreement between an author and publishing house to publish a book of speeches.¹⁸ The agreement contained a boiler plate arbitration provision that laid venue for arbitration in New Jersey. When a dispute as to production and delivery arose, the publisher submitted the matter to arbitration. The author opposed and relied on *Atalese* in so doing. The New York trial court noted the distinctions between the circumstances in that case an arbitration provision “buried on page nine of a twenty-three-page standard form contract of adhesion prepared by a company offering ‘debt-adjustment services’ to consumers.”¹⁹ Whereas the circumstances in that case involved a “three-page, straightforward commercial contract between a book editor and a small publishing company.”²⁰ *Umeh* raises questions as to parties’ level of sophistication in relation to a given agreement or contract. *County of Passaic v. Horizon Healthcare Services* involved two parties represented by counsel with experience negotiating a multiyear agreement, whereas *Umeh* involved an author, arguably a consumer, and a small business and a three page agreement with boiler plate language concerning a one-off service. *Umeh* may have come out more favorably for the author if it was argued in

New Jersey under Atalese, but it may also function as harbinger of the rationale in County of Passaic v. Horizon Healthcare Services.

In the case Gold Mine Jewelry²¹ the United States District Court for the Eastern District of North Carolina addressed the question of whether the agreement between a retailer and an international distributor was a consumer contract subject to Atalese's heightened standard for enforceability. Plaintiff entered into an agreement to market and sell fine jewelry under the Distributor's trademarks.²² Defendant Distributor indicated that it intended to terminate the agreement and the Jeweler sued. Ibid. Subsequently, defendant moved to dismiss and compel arbitration pursuant to a provision that laid venue in New Jersey.²³ Plaintiff argued that the provision was unenforceable because it did not contain the language required by Atalese.²⁴ Plaintiff argued that the agreement was a franchisor/franchisee relationship governed by the CFA.²⁵ Defendant argued the arbitration provision was not part of consumer contract but was contained within a "contract negotiated at arm's length and entered into by two sophisticated commercial entities."²⁶ The court explained that small franchises/distributorships may be protected by the CFA when not covered by the New Jersey Franchise Practices Act ("NJFPA") and offered to the general public.²⁷ The sale of a franchise with under \$35,000.00 in gross sales for the twelve (12) months preceding the filing may fall within the protections of the CFA, while amounts over that threshold trigger the protections of the NJFPA.²⁸ The gross sales in Gold Mine Jewelry preceding the filing amounted to \$369,500.00 in 2014.²⁹ The CFA was inapplicable in those circumstances. Gold Mine Jewelry demonstrates that a commercial entity can argue it is a consumer and entitled to the protections provided by Atalese. Of course, the international distributor likely did not expect to be haled into court given that it included an arbitration provision in its agreement.

Final Thoughts

On May 16, 2023, the New Jersey Supreme Court granted a petition for certification in County of Passaic v. Horizon Healthcare Services, which will accord the opportunity to provide clarity as to whether Atalese standard applies as between sophisticated parties. This decision will have potential national implications for parties who seek to do business in New Jersey, arbitration agreements that lay venue in New Jersey, as well as their attorneys. The Court now has the opportunity to explain whether or not the heightened standard of Atalese applies to sophisticated parties, what constitutes a sophisticated party, and what level of sophistication is required given the nature and scope of a given agreement. Resolution as to these questions will provide all interested parties with certainty as to how to conduct themselves while doing business in New Jersey.

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1. Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014).
 2. County of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498, 501 (2023).
 3. Brief of the Cato Institute et al. as Amici Curiae Supporting Petitioner at 8, Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014) (No. 14-882).
 4. Id. at 2.
 5. Brief of the Chamber of Commerce et al. as Amici Curiae Supporting Petitioner at 4, Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014) (No. 14-882).
 6. Atalese, 219 N.J. at 435.
 7. Id. at 442 (internal citations omitted).
 8. In re Remicade (Direct Purchaser) Antitrust Litig., 938 F.3d 515, 525 (2019).
 9. Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 114 (App. Div. 2015) ("The Court in Atalese has clarified the scope of this requirement in the context of arbitration clauses contained in consumer contracts").
 10. Albany Cty. Fasteners v. Epicor Software Corp., 2019 U.S. Dist. LEXIS 15722, *7 (2019) (finding an arbitration provision enforceable where the plaintiffs were sophisticated, commercial entities not naïve consumers.)
 11. County of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498, 501 (2023).
 12. Id. at 502.
 13. Id. at 502-503.

14. Id. at 503.
15. Id. at 503-504.
16. Id. at 504.
17. Marie Umeh v. Kassahun Checole, Africa World Press, Inc. D/B/A The Red Sea Press, No. 159884/2018, (N.Y. Supreme April 22, 2019).
18. Id. at 2.
19. Id. at 2-3.
20. Id. at 3.
21. Gold Mine Jewelry Shoppes, Inc. v. Lise Aagaard Copenhagen, 240 F. Supp. 3d 391 (2017).
22. Id. at 393.
23. Id. at 394.
24. Id. 395.
25. Id. at 396.
26. Ibid.
27. Ibid.
28. Id. at 397.
29. Ibid.

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Tel: (973) 403-9000 | Fax: (973) 403-9021
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