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Be Careful When Accepting Less than Agreed

By C. John DeSimone, III

In a recent unpublished decision by the United States District Court for the District of New Jersey, *Khafagy v. Jersey Girls Gentlemen's Club et al.*, Magistrate Judge Joseph A. Dickson addressed what results when parties to a settlement agreement deviate from the payment terms reflected in that agreement. The opinion makes rulings concerning claimed modification, waiver, estoppel, and laches.

Khafagy settled a personal injury case against defendants arising from a shooting at the Jersey Girls Gentlemen's Club in Newark. Pursuant to the written Stipulation of Settlement (the "Stipulation"), defendants were to pay Khafagy $30,000 immediately with a $190,000 lump sum payment due some months later. The Stipulation included a provision providing that in the event of a late payment, defendants would pay $5,000 per month until the late payment was cured, to a total of $25,000 in penalties. Rather than paying the $190,000 lump sum payment by the agreed upon date, defendants' counsel ultimately wrote Khafagy's counsel proposing to pay $20,000 per month payable at the end of the month, until the $190,000 was paid in full. Khafagy's counsel never responded to the letter and defendants made monthly payments, which Khafagy accepted. Defendants eventually paid the $190,000 during the course of the following year, though not consistently at the rate of $20,000 per month as the letter claimed. Eight months after receipt of the final payment, Khafagy demanded defendants pay $25,000 in late penalties.

The court found that defendants' letter, a "unilateral statement" purporting to modify the terms of the Stipulation, was agreed to by Khafagy when he accepted

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defendants' payments and remained silent about defendants' amended payment schedule. This bilateral conduct resulted in the Stipulation being modified through mutual assent. However, that finding was not the end of the analysis. The court went on to consider whether, in the face of such modification, Khafagy could still enforce the late penalty provision. The court found that he could.

First, the court found there to be no waiver of the penalty provision. The Stipulation provided that a signed writing would be required for a binding waiver, and there was none expressly waiving enforcement of the late penalty. Second, the court found laches and equitable estoppel to be inapplicable. Laches did not apply because the Stipulation did not specify when Khafagy had to demand the penalty, and the court deemed Khafagy's timing reasonable. In addition, and also in relation to the estoppel argument, the court concluded equitable relief was not warranted because any hardship defendants faced by the application of the late penalty was a product of their failure to remit timely payment.

The court therefore held the penalty provision to be enforceable. However, in calculating the late penalty, the court analyzed defendants' payments according to the modified monthly payment schedule, not the original term in the Stipulation. The court determined the penalty to be imposed was $10,000 rather than the $25,000 Khafagy sought.

Finally, the court denied Khafagy's request for fees, which, according to the Stipulation, were to be paid if plaintiff was forced to undertake legal action to enforce his rights. The court found that fees were not to be awarded because the parties' dispute was in good faith.

* * *

Sometimes circumstances change and a party that once thought it could adhere to a payment schedule suddenly finds that it cannot. If that happens, the parties should consider going back to the drafting board to document those changed circumstances rather than merely letting circumstances unfold. There are two primary lessons to be gleaned from *Khafagy*, and both pertain to the absence of written clarification. First, parties faced with a unilateral attempt to modify the terms of a settlement

agreement, or any contract, should not remain silent. Write a letter. Provide a formal response. No response may be interpreted as acceptance, especially if your conduct evidences acceptance. Second, don't assume that a modification to one part of an agreement spills into other parts of it. Defendants apparently believed, but never confirmed in writing, that the acceptance of their monthly payment plan meant Khafagy could not seek to enforce the late penalty. They were mistaken.

Arbitration Language Should Be Plain And Understandable

By Eliyahu S. Scheiman

Companies must reassess the adequacy of their arbitration agreements in light of the New Jersey Supreme Court's recent decision in *Atalese v. U.S. Legal Services Group*, L.P., 219 N.J. 430 (2014), which held that such agreements must do more than simply state that disputes shall be submitted to final and binding arbitration, but must plainly explain that arbitration is a substitute for the right to litigate in court. Although a consumer contract case - where courts traditionally have been concerned with the sophistication of the average member of the public - *Atalese* has already been extended beyond the consumer context.

Atalese involved claims for fraud by the plaintiff against a debt-adjustment company she had contracted with. The defendant moved to dismiss the complaint and compel arbitration based on the following language found on page nine of a 23-page services agreement:

> **Arbitration**: In the event of any claim or dispute between Client and the USLSG related to this Agreement or related to any performance of any services related to this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party. The parties shall agree on a single arbitrator to resolve the dispute ... Any decision of the arbitrator shall be final ...

In response, the plaintiff argued this language was unenforceable because it lacked express reference to a waiver of the right to sue in court or to arbitration as the "exclusive" remedy.

While no "slam dunk," the trial court enforced the arbitration clause, citing the strong pro-alternative dispute resolution policy imposed by the Federal Arbitration Act ("FAA"), and agreeing with "the [f]ederal [j]udges who have come to the conclusion that this identical language is minimally, barely, but it is sufficient to put the party on notice that if you have any sort of dispute arising out of your agreement, it's going to be heard in Arbitration."

The Appellate Division affirmed, finding that although the clause did not explicitly

state that the plaintiff agreed to waive her right to try her dispute in court, "it clearly and unambiguously stated that ... any dispute relating to the underlying agreement *shall* be submitted to arbitration and the resolution of that forum shall be *binding* and *final*." Accordingly, a "reasonable person, by signing the agreement, [would have understood] that arbitration is the sole means of resolving contractual disputes."

The New Jersey Supreme Court disagreed and reversed. It was skeptical that an average consumer would understand, "without some explanatory comment-that arbitration is a substitute for the right to have one's claim adjudicated in a court of law," and "[n]owhere in the arbitration clause [wa]s there any explanation that plaintiff [wa]s waiving her right to seek relief in court for a breach of her statutory rights ... The provision does not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law. Nor is it written in plain language that would be clear and understandable to the average consumer that she is waiving statutory rights." While no "prescribed set of words" is required, the Court cited the following explanatory language approvingly:

- "[b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes."
- "Instead of suing in court, we each agree to settle disputes [] only by arbitration. The rules in arbitration are different. There's no judge or jury, and review is limited, but an arbitrator can award the same damages and relief, and must honor the same limitations stated in the agreement as a court would."

Ultimately, it is questionable whether *Atalese* will survive challenge in a federal court under the FAA, which proscribes states from subjecting arbitration agreements to more onerous requirements than other contractual provisions. But for now, regardless of business setting, companies should include plain, understandable language in their contracts explaining that the parties are choosing to arbitrate disputes rather than have them resolved in a court of law, as *Atalese* has already been extended to the employment context to invalidate the arbitration clause in a collective bargaining agreement, see *Kelly v. Beverage Works N.Y. Inc.*, 2014 WL 6675261 (App. Div. Oct. 2, 2014) ("discer[ning] no reason to conclude that employees bound by a CBA should be charged with greater understanding of their rights than the average consumer"), and to the real estate context to invalidate the arbitration clause contained in condominium unit purchase agreements. See *Dispenziere v. Kushner Companies*, 438 N.J. Super. 11 (App. Div. 2014) (notwithstanding representation of purchasers by counsel).
