

II. GENERAL LITIGATION

The Court, Not the Arbitrator, Should Determine the Arbitrability of Claims

In *Morgan v. Sanford Brown Institute*, 2016 NJ Lexis 563 (June 14, 2016), plaintiffs filed a lawsuit asserting that misrepresentations and deceptive business practices by defendant Sanford Brown Institute and certain administrators caused them to enroll in Sanford Brown's ultrasound technician program. Plaintiffs claimed that they sustained financial loss and other injury as a result of defendants' wrongful conduct.

Defendants filed a motion to compel arbitration of plaintiffs' claims, but did not make it clear that they wanted the arbitrator, rather than the court, to decide whether the parties agreed to arbitration. The trial court declined to enforce the arbitration provision, finding it unenforceable because it did not inform plaintiffs that they were waiving statutory remedies, and the provision conflicted with the remedies available under the New Jersey Consumer Fraud Act (CFA), *N.J.S.A.* 56:8-1 to -195.

The Appellate Division reversed, dismissed the complaint, and ordered arbitration. The panel held that the trial court improperly failed to enforce the arbitration agreement's delegation clause. The panel found that the parties had clearly and unmistakably agreed that an arbitrator would determine whether the parties agreed to arbitration, and that plaintiffs failed to specifically attack the delegation clause. The Appellate Division remanded the matter for arbitration to enable the arbitrator to decide whether the claims asserted were subject to arbitration under the agreement. However, the panel also made findings on the enforceability of certain provisions in the arbitration clause. The panel concluded that the arbitration agreement is sufficiently clear and unambiguous to provide plaintiffs with reasonable notice of the requirement to arbitrate all claims related to their enrollment agreements, including the CFA claim.

The Court granted certification limited to the issue of "whether plaintiffs can be compelled to arbitrate all claims related to their enrollment agreements, including their Consumer Fraud Act claims, under the terms of this arbitration agreement." The Court provided that "the law presumes that a court, not an arbitrator, decides any issue concerning arbitrability. To overcome the presumption of judicial resolution, there must be clear and unmistakable evidence that the parties have agreed that the arbitrator will decide the question of arbitrability. Silence or ambiguity in an agreement does not overcome the presumption that a court will decide arbitrability." The Court noted that the arbitration provision in this case did not contain a clearly identifiable delegation clause. The provision failed to explain that an arbitrator will decide whether the parties agreed to arbitrate legal claims, including statutory violations, and it did not explain that arbitration is a substitute for bringing a claim before a court or jury.

The Court held that the arbitration provision and purported delegation clause in the enrollment agreement fail to comply with the requirements of *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995), and *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 99 A.3d 306 (2014), *cert. denied*, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015). They also failed to satisfy the elements necessary for the formation of a contract. As such, the court held that whether the parties agreed to arbitrate their dispute is an issue for determination by the court and the arbitration and delegation provisions of the agreement are unenforceable.