

Health Care Providers Should Note Court's Clarification on Jury Waiver

By Robert B. Hille and John Kaveney

On Feb. 8, 2023, in *County of Passaic v. Horizon Healthcare Services*, the New Jersey Appellate Division affirmed the validity of a commercial arbitration agreement that did not contain a jury waiver. While more of a clarification than a radical change in the law, this decision is important. Contracting entities, including those in the health care industry, need to approach language differently depending on whether they are dealing with a consumer or employment agreement or an arm's-length commercial contract.

In this health care setting, the plaintiff contracted with the defendant to manage its self-funded employee health benefit plan. Negotiations were through counsel and the contractual relationship was a longstanding one. The provision requiring arbitration under the Federal Arbitration Act (FAA) was inserted in 2009 and the suit was brought in 2021. The relationship existed over approximately 20 years.

In its decision, the court distinguished Supreme Court precedent requiring an express jury trial waiver. That precedent addressed circumstances in the context of consumer and employment contract cases, not commercial ones. While the basic approach to determining validity of arbitration clauses is the same, consumer and employment contracts pose different considerations.

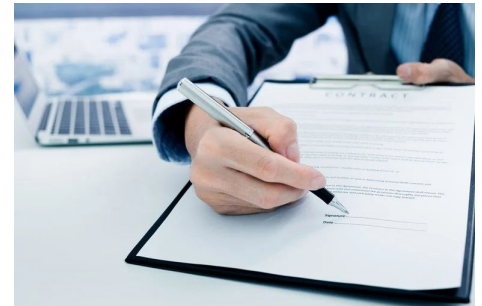
This decision agrees with precedent that the FAA and the New Jersey Arbitration Act favor arbitration but both subject the validity of arbitration agreements to ordinary contract defenses. The most basic of these is mutual assent.

Where the parties are of unequal bargaining power or one lacks sophistication, a serious question exists whether there was mutual assent. In other words, did the parties willingly know what they were doing and freely and voluntarily accept the terms of the agreement.

In the consumer and employment context, precedent imposed an express jury trial waiver as a means to avoid the question of mutual assent. The *County of Passaic* decision references language from that precedent that reinforces its requirement in the consumer and employment context but not across the board.

In the commercial context in this case, those considerations are not present.

Here the parties were not only sophisticated, they were represented by counsel in negotiating terms. They had a long course of dealings and the subject provision was part of their contract for more than a decade before it was challenged. These facts eliminated the fear that the plaintiff government entity was unaware that it was giving up its right to a jury trial or that it was coerced



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into doing so rather than voluntarily agreeing to the terms. Consequently the court noted that an express waiver was unnecessary, nor was it required in this context by New Jersey's Supreme Court.

This distinction in the law is especially important in the health care context. Providers and provider entities regularly enter into commercial contracts that include plan contracts. On the flip side, they regularly enter into employment agreements and patient agreements. The latter two contexts would still require such express waivers in an arbitration agreement. Commercial agreements would not. That is not to say lack of sophistication or unequal bargaining power do not exist in the commercial setting, but those considerations may require a different approach.

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