STATE OF NEW YORK

7445

2017-2018 Regular Sessions

IN ASSEMBLY

April 25, 2017

Introduced by M. of A. TITONE, WEINSTEIN, KAVANAGH, DINOWITZ -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to contracts in small print, procedural reciprocity for arbitration agreements in consumer transactions and consumer arbitration; to amend the general obligations law, in relation to the prohibition of certain contractual agreements to arbitrate personal injury and wrongful death claims; to amend the executive law, in relation to powers and duties of the consumer protection division and contracts of adhesion; and to amend the public health law, in relation to protecting against certain contracts of adhesion in the provision of health care

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known as the access to justice act of 2017: remedying injustices arising out of contracts of adhesion in the context of consumer contracts.

§ 2. Legislative intent. The legislature finds that it is the public policy of this state to ensure access to justice for all New Yorkers. The unified court system in this state supports and encourages arbitration in the civil practice context and arbitration is one of a variety of alternative dispute resolution tools which help parties resolve disputes without a trial. Arbitration has proven to be most successful when agreed to between parties of equal bargaining power as part of an arm's length agreement. A vital component of access to justice is to preserve, when possible, the ability of New Yorkers to choose either arbitration or litigation when seeking a remedy if an injury or dispute has occurred. When an arbitration clause is foisted upon a party to a contract, that choice is precluded; thus access to justice may be denied at the very commencement of the parties' relationship. The legislature further finds that the prevalence of arbitration agreements in contracts

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD09878-01-7

of adhesion in transactions for personal, family or household services New Yorkers cannot do without - e.g., telephone, internet, nursing home, credit cards - and the interpretation of such arbitration agreements by the courts has resulted in conflicting decisions and substantial inequity between the parties. One area of concern is reflected in the effect of recent arbitrations on contracts affecting the rights, remedies or obligations between health care providers and patients relative to personal injuries to, or wrongful death of, patients. This act amends the law to preclude predatory behavior against some of the most vulnerable New Yorkers against the public policy of this state, to protect fairness in consumer transactions and other types of transactions that affect the health and well-being of New Yorkers, to create remedies targeting unconscionable contracts at the state level and to ensure access to justice for consumers.

§ 3. Section 7501 of the civil practice law and rules, as amended by chapter 532 of the laws of 1963, is amended to read as follows:

§ 7501. Effect of arbitration agreement. A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute. **The commencement of an action in a court of law by any person to enforce a contract entered into by, or delivered to, a resident of this state that involves a consumer transaction, as defined in section forty-five hundred forty-four of this chapter, shall constitute a waiver of the enforceability of the arbitration clause in that contract or agreement. Such waiver shall not apply to any action brought to enforce the arbitration clause, to stay arbitration or in aid of arbitration.**

§ 4. The civil practice law and rules is amended by adding a new section 7515 to read as follows:

§ 7515. Arbitration of disputes regarding contracts or agreements in a consumer transaction. (a) 1. This section shall govern arbitrations of disputes regarding contracts or agreements entered into by, or delivered to, a resident of this state or entered into in this state that involves a consumer transaction.

2. Proceedings pursuant to this section shall be commenced and conducted in accordance with this article, except as otherwise provided by this section and in accordance with rules promulgated and approved by the superintendent of the department of financial services.

3. The term "consumer transaction" shall be defined as set forth in section forty-five hundred forty-four of this chapter.

4. Except as provided by an express waiver contained in such contract or agreement, either party to a consumer dispute may seek relief in arbitration by way of class action in accordance with the regulations promulgated by the superintendent of the department of financial services pursuant to article nine of this chapter.

(b) 1. The rules promulgated by the superintendent of the department of financial services shall set forth standards for panels of arbitrators under this section and establish qualifications and compensation of individuals seeking appointment to the arbitration panels. These standards shall require that an arbitrator be impartial and that the arbitrator be competent to arbitrate the subject matter of each arbitration to which he or she is appointed as a panel member.

2. All costs of arbitration shall be paid by the party providing the money, property or service.

3. A consumer that prevails in whole or in part in arbitration under this section shall be awarded reasonable attorney's fees by the arbitrator.

4. A contract entered into, or delivered to, a resident of this state that provides for arbitration of a dispute shall be void if it provides for arbitration by any arbitrator contrary to the provisions of this section.

(c) Decisions by members of the arbitration panel shall: 1. be provided to all parties;

2. contain written findings of fact and conclusions of law and an explanation of the calculation of any damages; and

3. be based on the applicable substantive law of this state or the law of any other jurisdiction that the arbitrator determines, based upon the choice of law principles of this state.

§ 5. The general obligations law is amended by adding a new section 5-336 to read as follows:

§ 5-336. Prohibition of contractual provisions requiring arbitration of claims for personal injuries or wrongful death where the party asserting the contractual right to arbitrate has liability insurance applicable to the claim. Except where otherwise provided by state statute, any contractual provision requiring arbitration of claims for personal injuries or wrongful death shall be deemed without effect where the party asserting the contractual right to arbitrate has liability insurance applicable to the claim.

§ 6. Subdivision a of section 5-702 of the general obligations law is amended by adding a new paragraph 3 to read as follows:

3. Written in clear and legible print no less than eight points in depth or five and one-half points in depth for upper case type. The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print does not comply with this paragraph may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared. No provision of any contract or agreement waiving the provisions of this section shall be effective. The provisions of this paragraph shall not apply to agreements or contracts entered into or agreements effective prior to the effective date of this paragraph.

§ 7. Paragraphs 14 and 15 of subdivision 3 of section 94-a of the executive law, as added by section 21 of part A of chapter 62 of the laws of 2011, are amended to read as follows:

(14) cooperate with and assist consumers in class actions in proper cases; [~~and~~]

(15) (i) determine, upon an application by a consumer, whether a contract or agreement or any provision therein between the consumer and any person, firm, corporation or association or agent or employee thereof violates the public policy of the state of New York under the laws of this state, including but not limited to the provisions of this section, article twenty-two-A of the general business law or section twenty-eight hundred one-h of the public health law, prohibiting unscrupulous or questionable business practices or unconscionable contracts, or requiring the consumer to enter into an unconscionable contract to obtain the benefits of such contract or agreement, and (ii) refer such determi-

nation to the appropriate unit of the department, or federal, state or local agency authorized by law for appropriate action; and

(16) create an internet website or webpage pursuant to section three hundred ninety-c of the general business law.

§ 8. Section 94-a of the executive law is amended by adding a new subdivision 6 to read as follows:

6. Right of action. If within sixty days after an application is made by a consumer under paragraph fifteen of subdivision three of this section an action is not commenced by any federal, state or local agency, the consumer may bring an action in his or her own name on behalf of the state to obtain such a determination and seek to enjoin enforcement of the contract or agreement or any of its provisions determined to be void under such subdivision, recover his or her actual damages or both. In such action, preliminary relief may be granted under article sixty-three of the civil practice law and rules. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars in each instance, if the court finds the defendant willfully or knowingly engaged in an unscrupulous or questionable business practice or required the consumer to enter such contract or agreement to obtain its benefits. Any amount of damages awarded to plaintiff in excess of actual damages shall be payable to the state. The court may award reasonable attorney's fees to a prevailing plaintiff.

§ 9. The public health law is amended by adding a new section 2801-h to read as follows:

§ 2801-h. Prohibition of contractual provisions in health care provider contracts affecting the rights, remedies or obligations between health care providers and patients relative to personal injuries to, or wrongful death of, patients. 1. Any written contract that a health care provider requires a person to sign as a condition to providing health care services which attempts to affect any legal rights, remedies or obligations relative to personal injuries to, or wrongful death of, patients which may be occasioned in connection with the health care services rendered shall be deemed unconscionable and entered into by the person under duress, and is prohibited as against the public policy of the state.

2. For the purpose of this section, the term "health care provider" shall include, but is not limited to: (a) hospitals, nursing homes, and residential health care facilities as defined in section twenty-eight hundred one of this article; (b) home care service agencies as defined in section thirty-six hundred two of this chapter; and (c) physicians, nurses, dentists, podiatrists, chiropractors, orthodontists, nurse midwives, nurse practitioners, physician assistants, acupuncturists, physical therapists, occupational therapists, speech therapists, home health aides, nutritionists, medical technicians and dental hygienists, as well as any groups, corporations, partnerships or joint ventures that provides such services.

3. Nothing herein shall be deemed to prohibit or otherwise invalidate an otherwise legally valid consent form being executed by or on behalf of a person undergoing a medical, dental, podiatric or chiropractic treatment or procedure where such consent is required, provided that the document does not attempt to define any rights, remedies or obligations relative to personal injuries to, or wrongful death of, patients arising or resulting from, or contributed to by, the health care services rendered.

§ 10. If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect any other provisions or application of the provisions of the remainder to any other person or circumstance, and to this end the provisions of this chapter are severable.

§ 11. This act shall take effect immediately and apply to contracts entered into or agreements effective on or after the date on which it shall have become a law; provided, however, that section four of this act shall apply to all pending and future actions in which judgment has not yet been entered.