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The Federal Arbitration Act Might Preempt the New Jersey Legislature's Recent Attempt to Control Infinite Arbitration Clauses

The law prohibits consumer contracts from containing terms that do not apply to the products or services offered pursuant to the contract.

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This summer, the New Jersey Legislature passed, and Governor Murphy signed into law, N.J.S.A. 56:12-2a (Section 12-2a), which becomes effective Jan. 4, 2026. The law prohibits consumer contracts from containing terms that do not apply to the products or services offered pursuant to the contract.

The history of Section 12-2a suggests that it was intended to prevent companies from compelling consumers to arbitrate matters that do not relate to the services provided in the contract containing the arbitration clause, including services provided by affiliates of the contracting company. Courts and scholars have called such agreements "infinite arbitration clauses." But the statute might have limited effect if courts decide it is preempted under Section 2 of the Federal Arbitration Act (FAA Section 2). FAA Section 2 makes "[a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Section 2.

Background

Section 12-2a provides:

> *A consumer contract for a service offered by a company shall apply solely to the service offered by the company and purchased by the consumer. The consumer contract shall not contain provisions that allow or require the contract to govern the circumstances under which the consumer purchases other products or services from the contracting company, or an affiliate of the company, that are not offered pursuant to the contract.*

N.J.S.A. 56:12-2a(a). "Consumer contract" is defined as "a written agreement in which an individual contracts for a service, that is obtained for personal, family, or household purposes," excluding agreements relating to securities and commodities transactions. N.J.S.A. 56:12-2a(b).

The statute does not contain the word "arbitration." Neither does the committee statement on the bill, which explains: "This bill limits the general application of certain consumer contracts." 2025 N.J. Sess. Law Serv. Ch. 93 (S. 3928). But the history of Section 12-2a(a) suggests that the law is intended to

prohibit infinite arbitration clauses in consumer agreements. In a recent opinion piece in the New Jersey Law Journal, an attorney for personal injury plaintiffs, Georgia and John McGinty, explained that a New Jersey Appellate Division decision enforcing a consumer arbitration agreement against his clients led to the statute. *See* Evan J. Lide, "How an Unfavorable Appellate Division Decision Led to a New Law Protecting NJ Consumers," N.J.L.J., Aug. 12, 2025.

In that case, Georgia and John McGinty sued for serious injuries from an accident allegedly caused by an Uber driver while they were passengers in the Uber driver's car. *See McGinty v. Jai Wen Zheng*, No. A-1368-23 (N.J. App. Div. Sept. 20, 2024). Georgia McGinty had an Uber account since 2015. A user must agree to Uber's terms before ordering ridesharing or food delivery. Uber updated its terms in December 2021. The McGintys maintained that their minor daughter clicked to assent to the December 2021 terms and that the arbitration clause in the updated terms was invalid because it did not make clear that customers were waiving their right to a jury trial. The December 2021 terms contained a delegation provision under which an arbitrator was to decide all issues relating to interpretation, applicability, enforceability, or formation of the arbitration agreement.

The Appellate Division held that the arbitration agreement in Uber's terms waived the plaintiffs' right to a jury trial and that the plaintiffs' arguments that they were not otherwise bound by the terms were for the arbitrator to decide under the delegation provision.

The legislature was evidently troubled because the McGintys' alleged consent to arbitration arose from an Uber Eats order while their claims arose from the use of Uber ridesharing. It is not clear, however, that Section 12-2a would even have applied to the McGintys' case. Uber offers both ridesharing and food delivery pursuant to its terms of use, both of which the McGintys utilized. Thus, Uber's terms arguably did "apply solely to the service[s] offered by the company and purchased by the consumer." N.J.S.A. 56:12-2a(a). Courts are likely to struggle with what, exactly, the statute means.

Preemption Under the FAA

FAA Section 2 creates federal substantive law applicable in state and federal courts, *Southland v. Keating*, 465 U.S. 1, 12 (1984), and "places arbitration agreements on equal footing with all other contracts," *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 443 (2006). Under that "equal-treatment principle," "[a] court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like

fraud or unconscionability [under Section 2's so-called saving clause], but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017) (quoting *AT&T Mobility v. Concepcion,* 563 U.S. 333, 339 (2011)). "The FAA thus preempts any state rule discriminating on its face against arbitration" and "also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." FAA Section 2 has broad preemptive effect because it extends to all arbitration agreements within Congress' commerce clause power, and thus "the FAA encompasses a wider range of transactions than those actually 'in commerce.'" *Citizens Bank v. Alafabco*, 539 U.S. 52, 56 (2003). The transaction that the contract governs merely must involve interstate commerce in some way. *See* 57-58 (holding that FAA Section 2 applied to debt-restructuring agreements executed in Alabama by Alabama residents).

In *Kindred Nursing*, the U.S. Supreme Court held that FAA Section 2 preempted the Kentucky Supreme Court's imposition of a rule that required a clear statement in a power of attorney to permit the attorney-in-fact to waive on the principal's behalf the right to a jury trial

and thus to consent to arbitration. *See* 581 U.S. at 250-57. It did not matter that the rule purportedly also applied to waivers of other fundamental rights because it was clear that the Kentucky Supreme Court imposed the rule out of judicial "hostility to arbitration," and not as a truly generally applicable contract principle.

FAA Section 2 therefore preempts state rules—whether statutory, regulatory, or judge-made—even if purportedly applicable to contracts generally if they make enforcement of arbitration agreements more difficult than other contracts.

Section 12-2a appears to be just such a state rule. New Jersey Legislature clearly intended to invalidate particular types of arbitration clauses. It is difficult to see what types of contacts are targeted by Section 12-2a other than infinite arbitration agreements. Saying that Section 12-2a generally applies to consumer contracts and not just to arbitration clauses might have been an attempt to fit the statute into the saving clause in FAA Section 2. But *Kindred Nursing* demonstrates that federal courts will not permit such attempts.

The saving clause in FAA Section 2 is therefore unlikely to protect Section 12-2a. If Section 12-2a is to be enforceable, it is because FAA Section 2 does not apply to infinite arbitration clauses.

Case Law on Infinite Arbitration Clauses

A common broad arbitration clause provides for arbitration of all disputes arising from or related to a contract, or similar language. *See, e.g.*, *Prima Paint v. Flood & Conklin Mfg.*, 388 U.S. 395, 398 (1967) (describing such language as "a broad arbitration clause"). Infinite arbitration clauses, in contrast, "attempt to govern conduct that has nothing to do with the original transaction, such as sexual harassment after the purchase of household goods or 'a punch in the nose during a dispute over medical billing.'" David Horton, "Infinite Arbitration Clauses," 168 U. Pa. L. Rev. 633, 639-40 (2020) (quoting *Med. Staff of Doctors Med. Ctr. v. Kamil*, 33 Cal. Rptr. 3d 853, 857 (Ct. App. 2005)) (footnotes omitted). Courts have addressed the enforceability of such clauses under the FAA, with different results.

In *Mey v. DIRECTV,* 971 F.3d 284 (4th Cir. 2020), a divided panel held that a plaintiff was required to arbitrate claims that DIRECTV violated the Telephone Consumer Protection Act by making telemarketing calls to sell satellite television to her because she had agreed to an arbitration clause in her cell-phone contract with AT&T. That arbitration clause covered any disputes with AT&T and its affiliates, and DIRECTV became an affiliate of AT&T after the plaintiff

signed the agreement.

A divided Ninth Circuit panel reached the opposite conclusion in *Revitch v. DIRECTV,* 977 F.3d 713 (9th Cir. 2020). The majority applied the general principle under California state law that contracts should not be interpreted to lead to absurd results to conclude that the term "affiliates" only extended to "affiliates" at the time the plaintiff executed the contract. In a notable concurrence, Judge Diarmuid F. O'Scannlain relied on the language in FAA Section 2 that the FAA requires enforcement of agreements to arbitrate in a contract evidencing a commercial transaction, "a controversy thereafter *arising out of* such contract or transaction." 9 U.S.C. Section 2 (emphasis added). He explained that "the FAA does not require the enforcement of an arbitration clause to settle a controversy that does *not* arise out of the contract or transaction," and DIRECTV's sending "unsolicited advertisements for ... *satellite television* products ... does not in any way involve the formation or performance of a contract for wireless services" with AT&T.

Similarly, in *Calderon v. Sixt Rent a Car,* 5 F.4th 1204 (11th Cir. 2021), the Eleventh Circuit held that a consumer's claims against a rental-car company for breaching its contract with the consumer and violating state consumer-protection laws did not arise out of the

consumer's agreement to use Orbitz.com to book travel-related services. Thus, FAA Section 2 did not apply to enforce the arbitration agreement in Orbitz's terms as to the consumer's claims against the rental-car company.

The U.S. Supreme Court and Third Circuit have not yet addressed the issue. Whether New Jersey state and federal courts are likely to find infinite arbitration clauses outside the scope of FAA Section 2—thus preserving Section 12-2a—is an open question.

Impact of Delegation Provisions

Finally, although a fulsome discussion is beyond the scope of this article, when and how courts might decide whether Section 12-2a is preempted is further complicated by delegation provisions.

Consumer arbitration clauses often contain delegation provisions like the one addressed in *McGinty*. In *Rent-a-Center, West v. Jackson*, 561 U.S. 63 (2010), the Supreme Court explained that a "delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." The law treats a delegation provision as separate from the arbitration agreement as a whole, and unless a party challenges the delegation provision specifically on grounds within FAA Section 2's

saving clause, a court must enforce the delegation provision. The Court reasoned: “An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.” Because he did not challenge the enforceability of the delegation provision specifically, the plaintiff was required to arbitrate the threshold issue of whether the arbitration clause as a whole was unconscionable under state law.

Thus, if court concludes that there is an enforceable delegation provision in a consumer agreement, it very well might send disputes about the enforceability of the arbitration clause as a whole under Section 12-2a, including whether Section 12-2a is preempted, to arbitration. A district judge in the District of Columbia reached a similar conclusion in a case against Uber earlier this year. *See Christian v. Uber Techs.,* 775 F. Supp. 3d 272 (D.D.C. 2025). The court explained that it had “no power to determine whether a claim is arbitrable, or ‘arises out of’ the underlying contract [for purposes of FAA Section 2], where, as here, there is a delegation clause.”

Conclusion

Infinite arbitration clauses raise issues concerning fairness and knowing consent. But Section 12-2a might have limited effect in preventing enforcement of such clauses in consumer agreements because FAA Section 2 arguably preempts the statute, unless, as explained, courts conclude that FAA Section 2 does not apply to the arbitration clause at issue. In addition, delegation provisions might sometimes require consumers to arbitrate the threshold issue of whether Section 12-2a renders an arbitration clause invalid.

That does not mean, however, that infinite arbitration clauses will go unimpeded in New Jersey. Rather, state-law rules of truly general applicability such as unconscionability and the canons of contract interpretation might limit the enforcement of infinite arbitration clauses as they did in *Revitch*. And public criticism like what occurred after the *McGinty* case might dissuade companies from imposing or enforcing such clauses.

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