

# Sports Litigation Alert

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## Clause and Effect: New Jersey Appellate Court Compels Arbitration in Personal Injury Actions Involving Indoor Trampoline Park

**By Carla Varriale-Barker**

A New Jersey Appellate Court recently enforced an arbitration clause in two participant injury cases involving Sky Zone and other defendants. In doing so, the court highlighted sound contract drafting principles. Both cases involved accidents at Sky Zone's premises in New Jersey and subsequent personal injury lawsuits. Plaintiffs claimed Sky Zone's negligence and intentional conduct in the design and operation of Sky Zone's premises caused the accidents. Plaintiffs also complained about the Participant Agreement (the "Agreement") they admittedly signed and alleged that "misrepresentations" in the Agreement constituted an unconscionable commercial practice. Plaintiffs conceded the Agreement included an "arbitration of disputes" clause, discussed in greater detail below. The appeals followed the dismissal of the two personal injury lawsuits and court orders that compelled the parties to proceed to arbitration.

Sky Zone is a popular "fun fitness" recreational facility designed for "workouts" which include "bouncing, flipping, and landing in a pit with 10,000 foam cubes." Plaintiffs purchased admission and executed a comprehensive agreement that allowed them to use the trampoline and other activities at Sky Zone's premises. The Agreement contained release and assumption of risk language and it must be signed by all patrons (including these plaintiffs) to gain admission to Sky Zone. The Agreement includes an "arbitration of disputes" provision and plaintiffs acknowledged the same with a checkmark, indicating they understood that they were "waiving [their] right, and the right(s) of...minor child(ren) to maintain a lawsuit against [Sky Zone]... for any and all claims covered by th[e] agreement." Importantly, the Agreement also contained a severability clause. This pivotal clause stated the Agreement constituted the entire agreement between Sky Zone

and plaintiffs: if any term or provision should be held illegal, unenforceable, or in conflict with any law governing the Agreement, the remaining portions of the Agreement would not be affected.

The Agreement further referred plaintiffs to a website that contained the "JAMS Arbitration Rules." However, the New Jersey Advisory Committee on Professional Ethics had previously determined JAMS's operating procedure was not compliant with New Jersey law and JAMS could not operate in New Jersey. Plaintiffs argued that meant JAMS was not available to arbitrate the dispute and this fact vitiated the agreement to arbitrate. In other words, they could sue Sky Zone for damages in court. However, defendants successfully parsed the terms and structure of the Agreement and correctly noted that the Agreement did not specify JAMS was the exclusive forum for arbitration. Instead, the provision for arbitration was contained in a separate sentence from the provision selecting JAMS as a forum for arbitration. Moreover, the Agreement contained a severability clause allowed the "remaining portions" of the Agreement to remain unaffected if any part of the Agreement was unenforceable.

The appellate court agreed and cited a preference to enforce arbitration agreements under federal and state law. Significantly, the Agreement did not name JAMS as the parties' exclusive forum for arbitration. In fact, under the Agreement, the court could appoint a substi-

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*Carla Varriale-Barker, Esq. is a Shareholder in the New York office of Segal McCambridge Singer & Mahoney, Ltd. and chairs the firm's Sports, Recreation & Entertainment Practice Group. She also teaches Sports Law and Ethics at Columbia University's Sports Management Program.*



tute arbitrator. The court further noted that the agreement to arbitrate and the selection of JAMS as the arbitrator appeared in separate sentences, so the provisions were severable if one of them failed (as the designation of JAMS as an arbitrator failed because it could not provide such services in New Jersey). The Agreement also specified arbitration was governed by the Federal Arbitration Act. Therefore, the court upheld the arbitration clause, also determined that the lower court made a mistake because it should have stayed plaintiffs' respective personal injury lawsuits pending the arbitrations and not dismissed the cases.

This decision is unpublished and states it is binding on the parties only. However, it provides guidance to the owners and operators of a sports or recreational facility (and those who advise them) to review and update their participant agreements. Important factors here included whether the clauses are clear, distinct from each other, and whether there is a severability clause that can "save" the agreement to arbitrate should other parts of the agreement be deemed unenforceable. The structure of the Agreement emerged as something just as important as the words of the Agreement.

For example, the Agreement designated an arbitral forum (even though New Jersey did not permit JAMS to arbitrate the case) and contained a process with ref-

erence to applicable rules for governing the arbitrating proceedings. This highlighted the fact that the agreement to arbitrate was integral to the parties and it was not an ancillary or boilerplate provision. The Agreement was successful because it contained an unambiguous expression of parties' intention to arbitrate their disputes, including a contingency in the event the designated arbitral forum was not available. The Agreement was also successful because if what it did not say: the Agreement did not state that the parties did not intend to arbitrate if JAMS was unavailable. A successful agreement, therefore, should support a finding that the parties reached a meeting of the minds as to what rights replaced the important right to a jury trial. This Agreement did.

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