Other issues before court: enforcing mandatory arbitration in LAD cases and terminating insurance agents in highloss areas

By Sandy Lovell

APPELLATE WATCH

Compelling LAD Arbitration – At issue in *Garfinkel v. Morristown Obstetrics & Gynecology*, A-52-00, is whether an agreement to arbitrate disputes controls claims lodged under the state Law Against Discrimination.

Dr. David Garfinkel sued his former employer, an otherwise all-female medical practice, claiming he was fired based on his gender. But Garfinkel had signed an employment agreement that included a clause stating "any controversy arising out of, or relating to, this agreement or the breach thereof, shall be settled by arbitration."

The trial court granted the medical group's motion to dismiss and the Appellate Division affirmed, finding the clause enforceable because the doctor made a knowing and voluntary waiver with the assistance of counsel and was in an equal bargaining position.

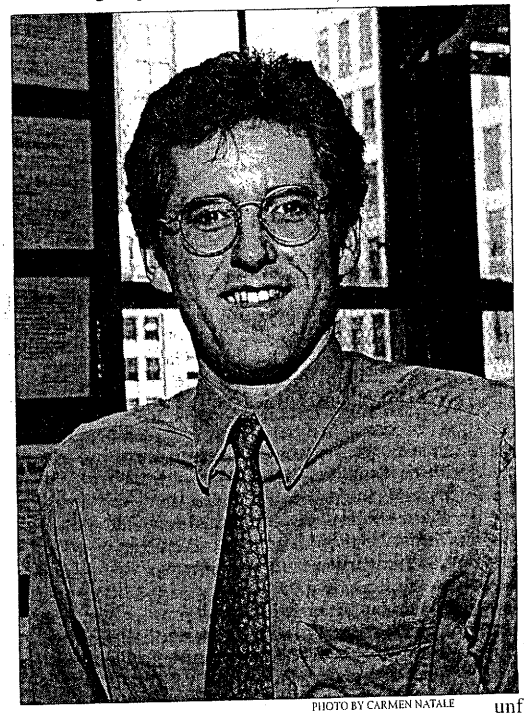

PHOTO BY CARMEN NATALE

JURY PREFERENCE: Andrew Dwyer says an arbitrator might be generally biased against his client and believes he stands a better chance of success with a jury.

Garfinkel's attorney, Andrew Dwyer of Dwyer & Ellis in Newark, argued on Monday that the clause referred only to contractual matters. Garfinkel, he said, is entitled to a full range of remedies for legal claims, such as defamation against the employer for allegedly relaying negative information to patients about why was no longer working there.

"Why don't you want to go to arbitration," Justice James Coleman Jr. asked. Dwyer answered that an arbitrator might be biased and that Garfinkel stood a better chance of success with a jury.

Justice Jaynee LaVecchia pointed out that if the agreement was intended to exclude LAD claims from the arbitration clause, it could have stated so expressly, as it did for breaches of the restrictive covenant not to compete.

Dwyer said that the agreement's silence on that point did not amount to a waiver of legal remedies.

Deputy Attorney General Jeffrey Burstein, appearing amicus curiae, urged the court to apply regular contract principles and take the parties' relative bargaining positions into account. "Employers should not be permitted to extract waivers of LAD rights with the threat of adverse action," Burstein said.

Burstein described the employment agreement as a "one-sided" contract of adhesion that the Court should not enforce. "All we're asking is for this Court to apply case law that has been developed over decades as to whether contacts of adhesion should apply."

Representing Morristown Obstetrics, Glenn Montgomery, a partner with Pollock, Montgomery & Chapin in Bedminster, painted a different picture: that doctors who negotiate professional agreements are sophisticated enough to know what they're doing. "It's not a David and Goliath situation where a worker has something imposed on them against their will," Montgomery said.

If Garfinkel believed he was unfairly waiving his rights, he should have discussed that with his lawyer during the negotiating process, Montgomery said.

Justice James Zazzali questioned whether an arbitrator would be biased toward the employer, who's paying his fee. "On a practical level, when these arbitrators know that one side is paying, I think there are problems," Zazzali said.

But Montgomery said the parties would split the cost of the arbitrator's fee. In addition, he noted that public policy favors arbitration rather than prolonged litigation. "I think there is a compelling inference that all of these doctors agreed to go to arbitration on all issues," Montgomery insisted, "especially since they were all represented by counsel."