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## Arbitration order:

# Litigants gain right to appeal

By Robert G. Seidenstein

Against a backdrop of mandatory arbitration clauses becoming commonplace in employment and consumer situations, the New Jersey Supreme Court has taken a small step that could have major consequences.

The court has ruled that an order compelling arbitration is a final order for which there is a right to appeal.

That means if a party does not want arbitration, it had better appeal within the time limits stipulated in court rules. The flip side is that the party clearly will have the right to appeal.

In *Wein v. Morris*, the justices said such an order is final regardless of whether the judge dismisses the case or stays the matter until arbitration is held.

The Appellate Division had ruled the other way, saying, "There is nothing peculiar about an order compelling arbitration that ought to permit its immediate review by an appeal as of right."

Although the first situation — dismissal — seemed clear to many lawyers, staying the case pending arbitration was much less definitive in terms of whether an appeal could be taken. Now, for all practical purposes, the two situations will be treated the same.

National Employment Lawyers Association of New Jersey had entered as an *amicus*, even though *Wein* did not involve an employee-employer relationship. NELA had argued the court should hold that "dismissal of all claims in favor of arbitration is final and subject to immediate appeal."

Andrew W. Dwyer of the Dwyer Law Firm in Newark, who submitted the NELA brief, praised the Supreme Court for correcting the Appellate Division on the finality issue.

Dwyer said the appeals court had thrown a monkey wrench into the law and its decision would have allowed one side "to hold back in reserve" the argument that the form of arbitration was inappropriate. He said it would have made parties "suffer through an arbitration procedure" even if it was not proper.

*Wein*, perhaps, was an odd vehicle for the court to use in making such a sweeping rule change.

The case involved a dispute over commissions for finding tenants and buyers of properties.

After five years of extensive discovery — five years — a judge surprised the parties by ordering them to binding arbitration in accord with their underlying contracts.

The lawyer for the defendants objected, saying the plaintiffs had waived the arbitration clause. The lawyer for the plaintiffs agreed the clause had been waived.

Nevertheless, the judge was unmoved. The order stood and neither side appealed.

Instead, the parties agreed on an arbitrator, filed the appropriate papers and participated in an arbitration hearing held over 16 days.

The arbitrator awarded the plaintiffs \$1 million. Each side raised an objection, but the trial court confirmed a slightly amended award, and the defendants appealed.



To obtain the full text of the opinion in *Wein*, go to [www.njnews.com](http://www.njnews.com) and click on Decisions. See digest, Page 17.

Now, such a situation can't be repeated in New Jersey courts.

The justices made several rulings in *Wein*. First, they said, the trial court was wrong in ordering the parties to arbitration.

Second, they said, the order compelling arbitration was final and could be appealed. Next, even if the order were not final, the court said, under the circumstances the defendants waived their right to contest the arbitrator's jurisdiction.

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