NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0049-14T2

RON GASTELU, JR.,

Plaintiff-Respondent,

v.

ANDREW M. MARTIN, ESQ.,

Defendant-Appellant,

and

RICHARDS KIBBE & ORBE, LLP, GARY MOTTOLA, MADISON MARQUETTE, MADISON ASBURY RETAIL, LLC, MADISON ASBURY INVESTMENT, INC., ASBURY PARTNERS, LLC, MADISON MARQUETTE RETAIL SERVICES, LLC, MADISON ASBURY INVESTMENTS II, LLC, and MADISON ASBURY OPERATING, LLC,

Defendants.

Argued December 15, 2014 – Decided July 9, 2015

Before Judges St. John and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4067-14.

Mark Allan Berman argued the cause for appellant (Hartmann, Doherty, Rosa, Berman & Bulbulia, LLC. attorneys; Mr. Berman, on the briefs).

Mark J. Heftler argued the cause for respondent (Piekarsky & Associates, LLC., attorneys; Mr. Heftler, on the brief).

PER CURIAM

Defendant Andrew Martin, a New York attorney, appeals from the Law Division's August 12, 2014 order denying his motion to dismiss plaintiff, Ron Gastelu, Jr.'s complaint and compel him to arbitrate his claim against defendant. Plaintiff's complaint alleged his individual claims of professional negligence against defendant and his law firm, and ordinary negligence and intentional wrongful against the other co-defendants.[1] All of the claims arose from plaintiff's entry into an operating agreement (Agreement) for the formation of a limited liability company (LLC), through which plaintiff, his cousin and defendant owned and operated a bar. In seeking to compel arbitration, defendant relied upon a clause in the Agreement, which provided for alternative dispute resolution for claims arising among the LLC's members. The Law Division judge found the clause to be ambiguous and could not find "any authority which allows a malpractice claim to be mediated and/or arbitrated." He also found "[t]he malpractice claim [to be] factually intertwined with all other claims asserted in the Complaint."

[1] Plaintiff did not allege any claims on behalf of the entity of which he was a member.

On appeal, defendant argues the court erred in its determination that the agreement did not "clearly provide[ ] that disagreements shall be resolved outside of [c]ourt." Further, he argues that plaintiff's "purported" malpractice claim is subject to arbitration. Plaintiff responds by asserting the agreement was ambiguous, properly construed against defendant as its scrivener, and the malpractice claim is not subject to arbitration.

We have considered these arguments in light of our review of the record and the applicable legal principles. We affirm in part and reverse in part.

Plaintiff, defendant, and Joseph J. Gastelu (plaintiff's cousin) executed the Agreement in May 2010 forming Aqua Lounge, LLC, the entity through which they owned and operated Aqua, an "upscale restaurant and lounge" in Asbury Park. The Agreement provided that the three were the sole members of the LLC and designated Martin as its Managing Member.

Section 11.5 of the Agreement, entitled "Disagreement Among the Members," provided:

> Disagreement among the Members shall be resolved by mediation or arbitration. The Members shall first attempt to resolve their differences with the assistance of counsel and the Managing Member. If they are unable to do so then the LLC shall retain the services of a mediator or the American

Arbitration Association, Monmouth County, New Jersey.

The parties agree that the Aqua Lounge business venture failed. Plaintiff alleged that the cause of its failure was certain actions taken by defendant. As a result, plaintiff filed a complaint, which in its first count, sought to hold defendant liable for damages arising from defendant's legal malpractice and his breach of "good faith and fair dealing."[2] However, according to plaintiff's complaint, the latter claim was pled as an alternative basis for relief, "if [defendant was] found to not be acting in his capacity as an attorney."

According to his complaint, plaintiff was experienced in the "development and operation" of a restaurant and bar. Based on that experience, defendant approached plaintiff to ask him if he would be interested in "joining [him] and others in opening a bar and restaurant" in Asbury Park. Defendant explained to plaintiff that his law firm would be providing all legal services for the venture so "there would be no legal costs or fees for [p]laintiff." Plaintiff agreed and defendant formed the LLC and prepared the Agreement. Plaintiff alleges, however,

[2] Further, according to plaintiff, he named other defendants, including defendant's law firm, and "other persons and entities bearing relation to the LLC." And, "[t]he remaining counts allege separate claims against defendants not subject to the instant appeal."

the Agreement did not contain certain pages, which defendant later inserted.

After plaintiff assisted and participated in the build out of Aqua's premises, defendant undertook operation of the business. Problems allegedly arose involving defendant, the LLC's landlord and its liquor license, which resulted in the filing of criminal charges against one of Aqua's employees. In addition, plaintiff alleged defendant took various actions to prevent plaintiff's participation in the business and his receipt of his share of the profits, including changing the locks on the premises' doors and never adding plaintiff to the LLC's bank account. Ultimately, according to plaintiff, defendant caused a breach of the LLC's lease and the business ceased operations.

Through his complaint, plaintiff sought to recover his investment and losses related to the business venture. He alleged, although defendant held himself out as counsel for the venture, he was not a New Jersey licensed attorney and "therefore engaged in the unlawful practice of law." Also, despite not being a New Jersey attorney, defendant violated the Rules of Professional Conduct, promulgated by New Jersey's Supreme Court, by not "advis[ing] [p]laintiff in writing of the need to seek independent legal advice[.]" Finally, plaintiff

claims defendant "deviated from accepted standards of legal practice, breached his contract and breached a fiduciary duty to [p]laintiff all of which are . . . substantial factor[s] causing [p]laintiffs economic losses."

In July 2014, defendant moved to compel arbitration. After he filed the motion, plaintiff's counsel wrote to defendant's counsel and explained plaintiff's position:

> The subject clause says the parties shall resolve disputes by mediation or arbitration. There obviously is a choice and [there] must be mutual consent. My client would be happy to mediate but will not agree to arbitration.

In a subsequent letter to the court, plaintiff's counsel also stated:

> It is very clear from the dispute resolution clause that there is a choice of either mediation or arbitration . . . . [W]e indicated that mediation is acceptable. There is a choice and no binding requirement to choose arbitration.
>
> In addition, [defendant] drafted the agreement and the same should be construed against the drafter.

Plaintiff did not file a supporting certification confirming his understanding of the agreement.

After considering the parties' submissions, the court entered its order denying the motion. This appeal followed.

Orders compelling or denying arbitration are deemed final and appealable as of right. R. 2:2-3(a); GMAC v. Pittella, 205 N.J. 572, 587 (2011). Because the issue of whether the parties have agreed to arbitrate is a question of law, we review a judge's decision to compel or deny arbitration de novo. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013). Therefore, "the trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 297 (App. Div. 2013) (citations and internal quotation marks omitted).

Two questions arise in our evaluation of a motion to compel arbitration. The first is whether there is a valid and enforceable agreement to arbitrate disputes. Martindale v. Sandvik, Inc., 173 N.J. 76, 86 (2001). The second is whether the particular dispute between the parties is covered within the scope of the agreement. See id. at 92.

We begin our review by recognizing that "[p]arties enter commercial contracts voluntarily." Tretina v. Fitzpatrick & Assocs., 135 N.J. 349, 362 (1994). Here, there is no assertion by plaintiff he did not enter the agreement voluntarily. Like other parties to commercial contracts, plaintiff and defendant acted "without any compulsion to deal with each other instead of

with some other party." Ibid. "The arbitration clause in their contract[] represents a way to settle disputes informally should any arise . . . . [and] arbitration is [only] produced by a breakdown in the parties' agreement." Id. at 362-63.

"Commercial arbitration has developed as a popular method of dispute resolution for complex business relationships." Hirsch, supra, 215 N.J. at 179. In order to take advantage of this "cost effective and speedy method" of dispute resolution, "parties must waive their right to pursue claims in state or federal court" by entering into "a contract, which provides evidence to a court that the parties agreed to arbitrate disputes." Ibid. "A court then can determine whether a particular claim falls within the scope of the arbitration clause." Ibid.

"'[A]rbitration [is] a favored method of resolving disputes.'" Id. at 186 (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001)). The "New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, enunciate[s a] state polic[y] favoring arbitration." Atalese v. U.S. Legal Services Grp., L.P., 219 N.J. 430, 440 (2014), cert. denied, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ____ (2015). "'[T]he affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of

resolving disputes.'" Ibid. (alteration in original) (quoting Martindale, supra, 173 N.J. at 92); see also Wein v. Morris, 194 N.J. 364, 375-76 (2008); NAACP of Camden Cnty. E. v. Foulke Mgt. Corp., 421 N.J. Super. 404, 424 (App. Div.) certif. granted, 209 N.J. 96 (2011) appeal dismissed, 213 N.J. 47 (2013). "The Arbitration Act, in part, provides '[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.'" Hirsch, supra, 215 N.J. at 187 (alteration in original) (quoting N.J.S.A. 2A:23B-6(a)).

Generally, arbitration agreements "should . . . be read liberally to find arbitrability if reasonably possible." Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 257 (App. Div.) certif. denied, 170 N.J. 205 (2001). A court must resolve all doubts related to the scope of an agreement "in favor of arbitration." Id. at 258 (citations omitted). Courts operate under "a 'presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" Waskevich, supra, 431 N.J.

Super. at 298 (quoting EPIX Holdings Corp. v. Marsh & McLennan Cos. Inc., 410 N.J. Super. 453, 471 (App. Div. 2009)).

In order for an agreement's arbitration clause to be enforceable, it must meet certain conditions, including that the parties understand they are giving up their ability to litigate their claim in court. "The Court in Atalese . . . clarified the scope of this requirement in the context of arbitration clauses contained in consumer contracts." Myska v. New Jersey Mfrs. Ins. Co., __ N.J. Super. __, __ (App. Div. 2015) (slip op. at 38). In Atalese, the Court stated:

> An agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law. A legally enforceable agreement requires a meeting of the minds. Parties are not required to arbitrate when they have not agreed to do so.
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> Mutual assent requires that the parties have an understanding of the terms to which they have agreed. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court. But an average member of the public may not know -- without some explanatory comment -- that arbitration is a substitute for the right to have one's claim adjudicated in a court of law.
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> Moreover, because arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care

> in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.
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> [Atalese, supra, 219 N.J. at 442-43 (citations and internal quotation marks omitted).]

Therefore, "[a]lthough the public policy of this State is to favor arbitration as a means of settling disputes which otherwise would go to court, it is equally true that the duty to arbitrate, and the scope of the arbitration, are dependent solely upon the parties' agreement." Cohen v. Allstate Ins. Co., 231 N.J. Super. 97, 100-101 (App. Div.) (citations omitted), certif. denied, 117 N.J. 87 (1989); see also Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556 (2015). "In evaluating the existence of an agreement to arbitrate, a court 'consider[s] the contractual terms, the surrounding circumstances, and the purpose of the contract.'" Hirsch, supra, 215 N.J. at 188 (alteration in original) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)).

Applying these principles to an arbitration provision in a commercial contract, we still look to the language of the agreement to determine if the parties intended to waive their right to litigate their claim in court. Contract provisions are to be "read as a whole, without artificial emphasis on one section, with a consequent disregard for others." Borough of

Princeton v. Bd. of Chosen Freeholders of Mercer, 333 N.J. Super. 310, 325 (App. Div. 2000), aff'd, 169 N.J. 135 (2001). "Literalism must give way to context." Ibid. (citation omitted). A court must keep in mind "the contractual scheme as a whole," Republic Bus. Credit Corp. v. Camhe-Marcille, 381 N.J. Super. 563, 569 (App. Div. 2005) (quoting Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 426 (1956)), and "the objects the parties were striving to attain." Celanese Ltd. v. Essex Cnty. Imp. Auth., 404 N.J. Super. 514, 528 (App. Div. 2009).

As a general rule, courts should enforce contracts as the parties intended. Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960). It is a basic rule of contractual interpretation that a court must discern and implement the common intention of the parties. Tessmar v. Grosner, 23 N.J. 193, 201 (1957). "The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 492 (App. Div.), certif. denied, 127 N.J. 548 (1991). The court has no right to "remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other." Id. at 493.

The starting point for contract construction is always the language of the contract. Commc'ns Workers of Am., Local 1087 v. Monmouth County Bd. of Soc. Servs., 96 N.J. 442, 452 (1984). Generally, contract terms are to be given their "plain and ordinary meaning." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). "If the terms of a contract are clear, they are to be enforced as written." Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182, 187 (App. Div. 2008) (citing County of Morris v. Fauver, 153 N.J. 80, 103 (1998)). Under certain circumstances, "ambiguous terms are generally construed against the drafter of the contract." Ibid. (citation omitted); see also Pacifico v. Pacifico, 190 N.J. 258, 267-68 (2007).[3] The goal under either circumstance is that,

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[3] In Pacifico, the Court explained those circumstances, which we do not find were established in this case:

> When a contract term is ambiguous, that rule of contract interpretation requires a court to adopt the meaning that is most favorable to the non-drafting party. The doctrine may be utilized after a court has examined the terms of the contract, in light of the common usage and custom, and considered the circumstances surrounding its execution. If, at that time, the court is unable to determine the meaning of the term, contra proferentem may be employed as a doctrine of last resort. The rationale behind that method of interpretation is that where one party chooses the term of a contract, he is likely to provide more carefully for the

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[t]he construction of a written instrument to be adopted is the one which appears to be in accord with justice and common sense and the probable intention of the parties. It is to be interpreted as a business transaction entered into by practical [people] to accomplish an honest and straightforward end. A subsidiary provision should be so interpreted as not to be in conflict with what clearly appears to be the dominant purpose of the contract; where the principal purpose of the parties is fairly discernible, further interpretation of the words of the contract should be such as to attain that purpose, if reasonably possible; [t]he meaning thus adopted is likely to be the meaning that the parties had; [t]his often properly leads to a conviction that the parties have used a particular word or phrase in an unusual sense. Repugnant words may be rejected in favor of a construction which makes effectual the evident purpose of the entire instrument.

The general design is to be kept in view in ascertaining the sense of particular terms. Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. A contract must

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protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Importantly, contra proferentem is only available in situations where the parties have unequal bargaining power. If both parties are equally "worldly-wise" and sophisticated, contra proferentem is inappropriate.

[Id. at 267-68 (citations, internal quotation marks, and alterations omitted).]

> be construed as a whole and the intention of the parties is to be collected from the entire instrument and not from detached portions. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing and every word of it, will, if possible, be given effect; the words are to be given a reasonable meaning rather than an unreasonable one and a court will endeavor to give a construction most equitable to the parties and which will not give one of them an unfair or unreasonable advantage over the other. Undue hardship and undue advantage are elements to be considered where the words are susceptible of different meanings. When it becomes clear that a certain factual result was within the contemplation of the parties, interpretation should be affected by reasonable and necessary implications, so that the legal effect then given to the instrument will be such as to attain the intended factual result; a court may thus, without the necessity of a formal reformation, be able to realize the aims and purposes of the parties, even though their express words would otherwise be interpreted differently and would produce a different legal effect.
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> [Krosnowski v. Krosnowski, 22 N.J. 376, 387-88 (1956) (citations and internal quotation marks omitted) (emphasis added).]

An interpretation of an agreement should not "give[] the literal sense of particular terms, isolated from the context, ascendancy over the reason and spirit of the whole of the contract, . . . assessed in relation to the circumstances and the situation of the parties and the objects they were striving to attain." Id. at 385.

Parties to a commercial contract can express their intention to arbitrate their disputes rather than litigate them in court, without employing any special language. Even in the consumer setting, an arbitration clause is not required "to identify the specific constitutional or statutory right guaranteeing a citizen access to the courts that is waived by agreeing to arbitration. But the clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up [the] right to bring [the] claims in court or have a jury resolve the dispute." Atalese, supra, 219 N.J. at 447.[4]

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[4] The Court instructed that in consumer contracts:

> [no] particular form of words is necessary to accomplish a clear and unambiguous waiver of rights. It is worth remembering, however, that every "consumer contract" in New Jersey must "be written in a simple, clear, understandable and easily readable way." N.J.S.A. 56:12-2. Arbitration clauses -- and other contractual clauses -- will pass muster when phrased in plain language that is understandable to the reasonable consumer.
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> [Id. at 444 (emphasis added).]

In the present case, however, we are dealing with commercial business transaction and, therefore, the standard is not as stringent.

We view the Agreement to clearly indicate the parties' intention to resolve any dispute concerning the LLC through mediation and arbitration, not through the courts. The fact that the process described in the subsequent clause is not precisely logical does not alter our view. We find support in the compulsory language used by the parties and the fact that plaintiff did not oppose participating in alternative dispute resolution as contemplated by the Agreement. He only took the position that it was either mediation or arbitration, and he chose mediation.[5] We find that interpretation to be illogical. Rather, consistent with the parties' expressed intent, we understand the Agreement to require the parties to first attempt to resolve their dispute among themselves, then through mediation and, if not successful, through arbitration. However, this conclusion does not end the discussion.

As noted, a court must also determine the scope of the subject matter to be addressed in the arbitration. "'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not

[5] We assume this was his position, as the only statement in the record as to plaintiff's understanding was his attorney's, which was neither certified nor based on personal knowledge. See R. 1:6-6. His alleged understanding and agreement to pursue mediation as required by the Agreement was belied by the fact he filed suit without pursuing mediation first.

agreed so to submit.'" Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 148-49 (App. Div. 2008) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648, 655 (1986)); Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 324, 344 (App. Div.), certif. denied, 188 N.J. 353 (2006). "'Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be.'" Garfinkel, supra, 168 N.J. at 132 (quoting In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228-29 (1979)).

Applying these rules, we conclude from our review of the Agreement that the parties did not intend to include any disputes that were unrelated to their membership in the LLC. Therefore, although we agree with defendant that there is no per se bar to arbitrating professional negligence claims against attorneys,[6] the Agreement did not include such claims within the scope of its alternate dispute resolution clause.

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[6] We previously held in a case involving "an agreement between an attorney and his client[,] . . . which relationship between the two is a fiduciary one, calling for the highest trust and confidence[, and which] is governed both by the Rules of Professional Conduct and the Supreme Court's exclusive jurisdiction to regulate the conduct of attorneys[,] . . . a subject area . . . in which the courts have a non-delegable, special supervisory function, does not preclude its arbitrability . . . . [as] there is nothing inherent in the attorney-client relationship which would mandate a blanket (continued)

Finally, we disagree with the Law Division's conclusion that plaintiff's claims of professional negligence are so intertwined with his dispute with defendant's conduct as a member of the LLC that both claims must be litigated in court. First, the legal malpractice claim is distinct from the claims arising under the Agreement as it involves specific elements not related to the plaintiff's contract and tort claims.[7] Second, even if they were intertwined to some extent that is not a basis to avoid bifurcation of the claims where, as here, plaintiff did not agree to arbitrate his malpractice claim. See Hirsch, supra, 215 N.J. at 193 ("The Appellate Division in [EPIX

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preclusion of the arbitration of fee disputes." Kamaratos v. Palias, 360 N.J. Super. 76, 84 (App. Div. 2003) (citations and internal quotation marks omitted). In reaching that decision, a majority of the panel rejected and the concurring position that in light of the Court's exclusive jurisdiction over the practice of law, only the Court can sanction as valid the inclusion of arbitration clauses in retainer agreements. The concurring opinion took a general stance against the inclusion of arbitration clauses in client-attorney retainer agreements. See id. at 90 (concurring opinion) ("[A] retainer agreement that contains a commercial arbitration clause which waives the client's right to access the courts to resolve disputes arising out of the attorney/client relationship must be viewed as inherently unenforceable and against public policy.")

[7] "[A] legal malpractice action has three essential elements: '(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.'" Jerista v. Murray, 185 N.J. 175, 190-91 (2005) (quoting McGrogan v. Till, 167 N.J. 414, 425 (2001)).

Holdings Corp.] was mistaken in concluding that the intertwinement of claims and parties in the litigation -- in and of itself -- was sufficient to give a non-signatory corporation standing to compel arbitration."); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 216-17, 105 S. Ct. 1238, 1240, 84 L. Ed. 2d 158, 162-63 (1985) (where the United States Supreme Court expressly rejected the so-called "doctrine of intertwining," pursuant to which some courts claimed they had discretion to deny arbitration of arbitrable claims "[w]hen arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally"); In re Prudential Ins. Co. of Am. Sales Practices Litig., 133 F.3d 225, 234 (3d Cir.) ("inconsistent results and inefficiencies caused by arbitration" are not grounds to "frustrate the enforcement of [an] arbitration clause" under the Federal Arbitration Act), cert. denied sub nom. Weaver v. Prudential Ins. Co. of Am., 525 U.S. 817, 119 S. Ct. 55, 142 L. Ed. 2d 43 (1998).

Affirmed in part and reversed in part. We remand to the trial court for entry of an order directing the parties to arbitrate their claims relating solely to the dispute among members of the LLC but not to any claim of malpractice. We leave it to the arbitrator to determine which of the plaintiff's

claims are subject to arbitration under this direction. We do not retain jurisdiction.