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Employee Arbitration Agreements In NJ Face New Hurdles

By **Benjamin Teris** (December 12, 2018, 1:35 PM EST)

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Arbitration agreements between employers and employees have been a hot topic over the past year. The #MeToo movement led to increased scrutiny of agreements requiring arbitration of sexual harassment claims. Silicon Valley employers, including Facebook, recently grabbed headlines when they yielded to employee pressure to remove arbitration agreements as a condition of employment. Despite the apparent growing negative sentiment toward arbitration agreements, employers scored a legal victory in Epic Systems v. Lewis,[1] when the U.S. Supreme Court held that arbitration agreements can preclude employees from resolving disputes with their employers as a collective or class and instead require them to individually arbitrate their disputes.

New Jersey state courts have been less favorable to employers than federal courts when it comes to enforcing arbitration agreements. The latest example is the Appellate Division's precedential decision in Flanzman v. Jenny Craig Inc.,[2] which invalidated an arbitration agreement for lack of mutual assent because it did not designate an arbitral forum (e.g. the American Arbitration Association or the Judicial Arbitration and Mediation Services) or otherwise provide a forum selection process. Flanzman stretches beyond the Supreme Court of New Jersey's holding in Atalese v. United States Legal Services Group LP[3] — that arbitration agreements must contain clear language indicating employees are waiving their right to a jury trial — and the Appellate Division's holding in Kleine v. Emeritus at Emerson,[4] — that arbitration agreements are unenforceable if the arbitration process agreed to by the parties is unavailable at the time of the execution of the agreement. As it stands, Flanzman likely invalidates numerous existing arbitration agreements between New Jersey employers and their employees.

Background

The plaintiff, Marilyn Flanzman, was a long-time employee of JC USA Inc. (Jenny Craig). According to Flanzman's complaint, in 2017, Jenny Craig gradually reduced her hours then terminated her employment.

During the course of her employment, Flanzman signed an arbitration agreement as a condition of continued employment. Under the agreement, she waived her right to a jury trial in favor of binding arbitration for "all claims or controversies arising out of or relating to [her] employment ... including but not limited to ... discrimination or harassment of any kind." The agreement did not designate an arbitral institution or articulate a process for selecting an arbitrator, but provided that Flanzman "will pay the

then-current Superior Court of California filing fee towards the costs of the arbitration ..."

Following her separation from employment, Flanzman filed a three-count complaint against Jenny Craig[5] in the Superior Court of New Jersey, Law Division, alleging claims under the New Jersey Law Against Discrimination, or NJLAD, for: (1) age discrimination and harassment; (2) discriminatory discharge; and (3) aider and abettor liability.

Trial Court's Decision

In lieu of an answer, Jenny Craig filed what, at the time, was a routine motion to dismiss the complaint and compel arbitration. In her opposition, Flanzman raised the novel argument that the arbitration agreement was unenforceable because the parties did not designate what she described as an arbitral forum. Citing Kleine, Flanzman contended that absent an indication in the agreement designating either an arbitral forum or what forum rules would apply to her claims, there could be no meeting of the minds among the parties — i.e. mutual assent. Flanzman also argued the agreement was unenforceable because: (1) the reference to California filing fees made it ambiguous as to what law would apply to her claims; and (2) it is procedurally and substantively unconscionable if subject to California law.

At oral argument, the trial court ordered supplemental briefing on legal support for the plaintiff's argument that the agreement is unenforceable because it did not designate an arbitral forum and that she could not be compelled to arbitrate her claims in California. In its supplemental brief, Jenny Craig contended that California was the "forum" and requiring arbitration in California is not unconscionable based on well-settled law concerning forum selection clauses.

Following the supplemental briefing, the trial court entered an order granting Jenny Craig's motion. In a rider attached to the order, the court referenced both federal and New Jersey public policy favoring arbitration, which led to the court's presumption that the agreement was enforceable. Under this framework, the court dispelled Flanzman's unconscionability arguments concerning the context in which she signed the agreement, finding "that [she] signed the ... Agreement without any influence pushed onto [her]." As to Flanzman's argument concerning ambiguity of the law that would apply to her claims, the court determined the reference to California filing fees and an admission in a certification she submitted as part of her opposition to the motion that she understood the matter would be arbitrated in California belied this assertion. Finally, the court rejected Flanzman's argument concerning the lack of designated arbitral forum, finding it did not render the entire agreement unenforceable and "in the interest of fairness, the choice of which arbitral body would conduct the arbitration would be turned over to the Plaintiff."

Rather than proceeding to arbitration, Flanzman appealed the trial court's order.[6]

Appellate Division's Decision

The Appellate Division reversed the trial court's order compelling arbitration. It began its de novo analysis with an overview of the Federal Arbitration Act[7] and New Jersey Arbitration Act.[8] It cited both state and federal cases that have found in similar terms that "Congress enacted the FAA to reverse the longstanding judicial hostility towards arbitration agreements and to place arbitration agreements upon the same footing as other contracts."[9]

Accordingly, the Appellate Division focused on New Jersey contract law. Citing Atalese, it noted the fundamental proposition that "[l]ike any contract, the parties must reach ... an agreement [to arbitrate

disputes] by mutual assent."[10] The Appellate Division looked to its holding in Kleine as an example of an arbitration agreement that was deemed invalid under contract law. In Kleine, the parties designated AAA as the arbitral forum in their arbitration agreement. But, at the time they executed the agreement, AAA was not an available forum to arbitrate their disputes.[11] The arbitration agreement in Kleine was ultimately deemed unenforceable for lack of mutual assent. Specifically, "there was no meeting of the minds as to the arbitral forum if AAA was not available."[12] The agreement in Kleine is different from the agreement between Jenny Craig and Flanzman, which did not designate any arbitral forum.

Relying on principles of contract law, Atalese and Kleine, the Appellate Division determined that Jenny Craig and Flanzman failed to reach a meeting of the minds. It pointed to the confusion on where and under what law the arbitration would occur and determined that the trial court's determination that was the chosen forum was erroneous. Rejecting the trial court's ruling that in "fairness" Flanzman could choose the arbitral forum, the Appellate Division determined that the trial court "re-wrote the [A]greement but failed to clarify its inherent ambiguity." Threaded throughout the opinion is a criticism of what the Appellate Division described as attempts by Jenny Craig to negotiate terms of the agreement before the trial court.

The Appellate Division clarified that it was not holding "that the parties' failure to identify a specific arbitrator renders the agreement unenforceable."[13] If the agreement had identified a process for the arbitration, but failed to identify a method for selecting an arbitrator, either party presumably could have filed a motion under the NJAA, which allows the court to appoint an arbitrator "[i]f the parties have not agreed on a method [for appointment of an arbitrator], the agreed upon method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed[.]"[14] However, because the parties did not have a meeting of the minds on the arbitral forum, the Appellate Division determined that process was unavailable.[15]

Next, the Appellate Division addressed "the important consequences of failing to identify in some fashion the process for selecting an arbitration forum, such as by otherwise designating in the contract any arbitral institution or by identifying any general method for selecting an arbitration forum"[16] — most importantly, the need for the parties to understand the rules and procedures that they are using to replace a jury trial. The Appellate Division used AAA and JAMS as examples of arbitral institutions that have procedures governing arbitration of employment disputes. It refrained, however, from requiring specific language or procedures in the arbitration agreements.

In holding that the agreement was unenforceable, the Appellate Division concluded that "[i]n a contract in which one gives up a right — a jury trial for example — expecting to resolve a dispute in some other forum, one must know about that other forum. Without that knowledge they are unable to understand the ramifications of the Agreement."[17][18]

Analysis

Flanzman is consistent with the trend of New Jersey cases, starting with Atalese, to impose escalating requirements on arbitration agreements. In so doing, New Jersey courts are seemingly subjecting the arbitration agreements to greater scrutiny than other contracts. For example, if a settlement agreement contained information regarding the amount of a monetary payment one party had to make to the other, but did not provide the method of payment (e.g. check, wire transfer, etc.), a court would not likely negate the settlement agreement. In other contexts, New Jersey courts have held that "[i]n construing vague or ambiguous provisions of a contract ... courts 'will imply a reasonable missing term or, if necessary, will receive evidence to provide a basis for such an implication.'"[19]

Applied to the facts of Flanzman, the trial court arguably was authorized to make the determination that in the absence of a designated arbitral forum, Flanzman had the right to select the forum. The Appellate Division's reluctance to allow this flexibility may be due in part to the fact Flanzman brought her claims under the NJLAD, over which New Jersey courts are very protective.

Aftermath

Existing arbitration agreements between New Jersey employers and their employees that do not designate or provide a method for selecting an arbitral forum or setting are now invalid. Although the Supreme Court of New Jersey could theoretically overturn Flanzman, employers should not count on it. On Nov. 26, 2018, Jenny Craig filed an answer to Flanzman's complaint, which is an indication they are waiving the white flag on attempting to enforce this particular arbitration agreement. Moreover, considering the Supreme Court of New Jersey's decision in Atalese, it's not clear it would be inclined to overturn Flanzman.

With Flanzman now the law, New Jersey employers who desire to resolve disputes with their employees through arbitration should ensure their arbitration agreements designate a preferred arbitral forum or provide a process for selecting a forum. Although no specific language is necessary, the language must be clear. Employers should ensure the designated arbitral forum is available to comply with Kleine and that the agreement contains language indicating employees are waiving their right to seek relief in a judicial forum to comply with Atalese. Cost should not be a major issue, as the only consideration New Jersey employers need to offer their at-will employees to whom they provide revised agreements is continued employment.[20]

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[1] 584 U.S. __, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

[2] __ N.J. Super. ___, No. A-2580-17T1, 2018 N.J. Super. LEXIS 156 (App. Div. Nov. 13, 2018). The Appellate Division originally issued a nine-page opinion on Oct. 17, 2018, but reissued a more expansive 22 page opinion on Nov. 13, 2018, reaching the same conclusion. Because the November opinion supersedes the October opinion, this article only addresses the November opinion.

[3] 219 N.J. 430 (2014).

[4] 445 N.J. Super. 545 (App. Div. 2016).

[5] The plaintiff named JENNY CRAIG INC., JC USA INC. and two individuals as defendants. Because Flanzman never filed proof of service with respect to the individual defendants, they were administratively dismissed from the action.

[6] Pursuant to N.J. Ct. R. 2:2-3(a)(3), "any order either compelling arbitration, whether the action is dismissed or stayed, or denying arbitration [is] ... deemed a final judgment of the court for appeal

purposes."

[7] 9 U.S.C. § 1, et seq.

[8] N.J.S.A. 2A:23B-1, et seq.

[9] Flanzman, 2018 N.J. Super. LEXIS 156 at *5 (quoting Roach v. BM Motoring LLC, 228 N.J. 163, 173-74 (2017)) (internal quotation marks and citations omitted); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); Atalese, 219 N.J. at 441 (quoting AT&T Mobility v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. , 137 S. Ct. 1421, 1424, 197 L. Ed. 2d 806 (2017).

[10] Flanzman, 2018 N.J. Super. LEXIS 156 at *7 (citing Atalese, 219 N.J. at 442).

[11] 445 N.J. Super at 550-52.

[12] Id. at 552-53.

[13] Flanzman, 2018 N.J. Super. LEXIS 156 at *10.

[14] N.J.S.A. 2A:23B -11(a).

[15] The Appellate Division determined that a similar provision for appointment of an arbitrator under the FAA, 9 U.S.C. § 5 would not be available for the same reasons.

[16] Flanzman, 2018 N.J. Super. LEXIS 156 at *15.

[17] Id. at 21.

[18] Because the Appellate Division determined the agreement was invalid due to lack of mutual assent, it did not reach a determination on whether the agreement was unconscionable.

[19] Twp. of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 76-77 (App. Div. 2011) (quoting Satellite Entm't Ctr. Inc. v. Keaton, 347 N.J. Super. 268, 276 (App. Div. 2002).

[20] Jaworski v. Ernst & Young U.S. LLP, 441 N.J. Super. 464, 474-75 (App. Div. 2015) (citing Martindale v. Sandvik Inc., 173 N.J. 76, 88-89 (2002) ("[I]n New Jersey, continued employment has been found to constitute sufficient consideration to support certain employment-related agreements.")).