Jenny Craig Arbitration Agreement Didn't Measure Up: What Does it Mean to Have the Minds Meet?

by Ashley M. LeBrun

On Oct. 17, 2018, the New Jersey Superior Court, Appellate Division, in *Flanzman v. Jenny Craig, Inc.*,[1] provided additional guidance for employers drafting arbitration agreements.[2] New Jersey, a jurisdiction that continually emphasizes the need to treat arbitration agreements as any other contract, continues to add and clarify what constitutes an enforceable arbitration agreement.[3] *Flanzman* shows that the landscape for New Jersey arbitration agreements continues to grow and may still be incomplete.

The arbitration agreement at issue did not identify any arbitration forum or process for conducting arbitration.[4] The court ultimately held that because of the failure to identify an arbitration forum and process for conducting arbitration, the parties did not understand their arbitration rights under the agreement—that is, they did not understand what rights were replacing the right to a jury trial.[5] The court reasoned that without this understanding, there was no meeting of the minds and, therefore, no enforceable arbitration agreement.[6]

Background

A former Jenny Craig employee, who was 82 years old, alleged that Jenny Craig discriminated against her during the course of her employment by reducing her hours and eventually terminating her because of her age. She brought claims for age discrimination and harassment under the New Jersey Law Against Discrimination (NJLAD), discriminatory discharge and/or constructive termination, and aiding and abetting liability under the NJLAD.[7] In response, Jenny Craig filed a motion to compel arbitration.[8]

Jenny Craig hired Flanzman around 1991.[9] At that time, Jenny Craig did not request Flanzman sign an arbitration clause.[10] Instead, 20 years later, in 2011, Jenny Craig requested she sign the arbitration agreement at issue in order to maintain her employment.[11] The arbitration agreement stated that "[a]ny and all claims or controversies arising out of or relating to [plaintiff's] employment...shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration." It went on to identify that the plaintiff will pay the "then-current Superior Court of California filing fee towards the costs of arbitration..."[12]

The Arguments

The plaintiff argued that there was no meeting of the minds concerning the set of rights that replaced her right to a jury.[13] The plaintiff also argued that the arbitration agreement was unconscionable, as to which the court did not render any analysis or decision.[14]

The Court's Reasoning

The Appellate Division explicitly guided its analysis with New Jersey case law and federal law, including *Atalese v. United States Legal Services Group, L.P.*, all of which requires courts to treat arbitration agreements like other agreements and simply enforce their terms as written, to the extent such terms would be enforced in any other agreement.[15] As with any other agreement, mutual assent must exist in order for courts to enforce the arbitration agreement. For mutual assent to exist in arbitration agreements, though, the waiver and understanding of the ratifications of the waiver of statutory rights must be clear and unambiguous.[16]

The court identified past reasons New Jersey courts invalidated arbitration agreements: failure to clearly identify a jury trial waiver, lack of employee consent to an employee handbook containing an arbitration provision, an ambiguous arbitration agreement, lack of mutual assent because the arbitration process selected in the agreement was unavailable at the time of execution.[17] The court recognized that *Kleine v. Emeritus at Emerson*, was the closest precedent to this case, invalidating the arbitration agreement because the arbitration process/forum was unavailable at the time of execution.[18]

Here, the Jenny Craig arbitration agreement not only contained no references to any forum whatsoever, but it also confusingly made reference to California filing fees.[19]

Magic Words?

The court explained that it is not just the failure to identify an arbitrator that rendered the arbitration agreement unenforceable, but it was also the failure to identify the process or set of procedural and substantive rights that would be replacing the plaintiff's right to a jury trial.[20] The court defined 'forum' as a mechanism or setting for the parties to arbitrate.[21] The court indicated that if the parties agreed that the dispute would be determined by an arbitration institution, group of arbitrators, or a single arbitrator, then the parties agreed on a forum.[22] Actual selection of the arbitrator, at that point, could be completed by application to the court.[23] That is, the arbitration institute provides for the general rules and procedures for arbitration.[24] In order to waive a jury trial, a plaintiff must clearly and unambiguously demonstrate an understanding of the rights replacing the jury trial.[25]

The Takeaway

Notably, the Appellate Division's original decision indicated that the court did not mean to imply that there were "magic words" needed in an arbitration agreement.[26] However, such language was removed from the opinion approved for publication.

While there may not be any exact recital required, the Appellate Division is requiring identification of an arbitration forum as an element of mutual assent. Given the line of cases, identification of an arbitration forum alone is not a 'magic' element either that will guarantee enforcement. Instead, the New Jersey courts are creating the recipe for an enforceable arbitration agreement in a piecemeal fashion.

Flanzman makes clear that although there are not magic words, there is a magic element for arbitration agreements now—identification of the arbitration forum.

Therefore, the arbitration forum in arbitration agreements or provisions is an integral term. The arbitration forum must either identify the forum or some sort of process for conducting the arbitration. The parties must come away from the agreement understanding what rights are replacing the traditional rights to a jury trial and what rules are replacing the traditional court rules. ■

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Endnotes

1. No. A-2580-17T1 (2018).
2. *Flanzman v. Jenny Craig, Inc.*, No. A-2580-17T1, 2018 WL 5914420 (App. Div. Nov. 13, 2018).
3. *Leodori v. Cigna Corp.*, 175 N.J. 293, 302 (2003); *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 132 (2001); *NAACP of Camden Cty. E. v. Foulke Mgmt.*, 421 N.J. Super. 404, 425 (2011); *Atalese v. United States Legal Services Group, L.P.*, 219 N.J. 430, 441 (2014); *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545, 552-53 (App. Div. 2016).
4. *Flanzman*, 2018 WL 5914420, at *2.
5. *Id.* at *2-*3
6. *Id.*
7. *Id.* at *3.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at *3-*4.
13. *Id.* at *5.
14. *Id.*
15. 219 N.J. 430, 441 (2014); *Flanzman*, 2018 WL 5914420, at *6-*8.
16. *Id.*
17. *Id.* at *8-*9.
18. 445 N.J. Super. 545 (App. Div. 2016); *Flanzman*, 2018 WL 5914420, at *9.
19. *Id.* at *9-*10.
20. *Id.* at *10.
21. *Id.* at *11.
22. *Id.*
23. *Id.* at *11-*12.
24. *Id.* at *15.
25. *Id.* at *16.
26. *Flanzman v. Jenny Craig, Inc.*, No. A-2580-17T1, 2018 WL 5914420, at *11 (App. Div. Oct. 17, 2018).