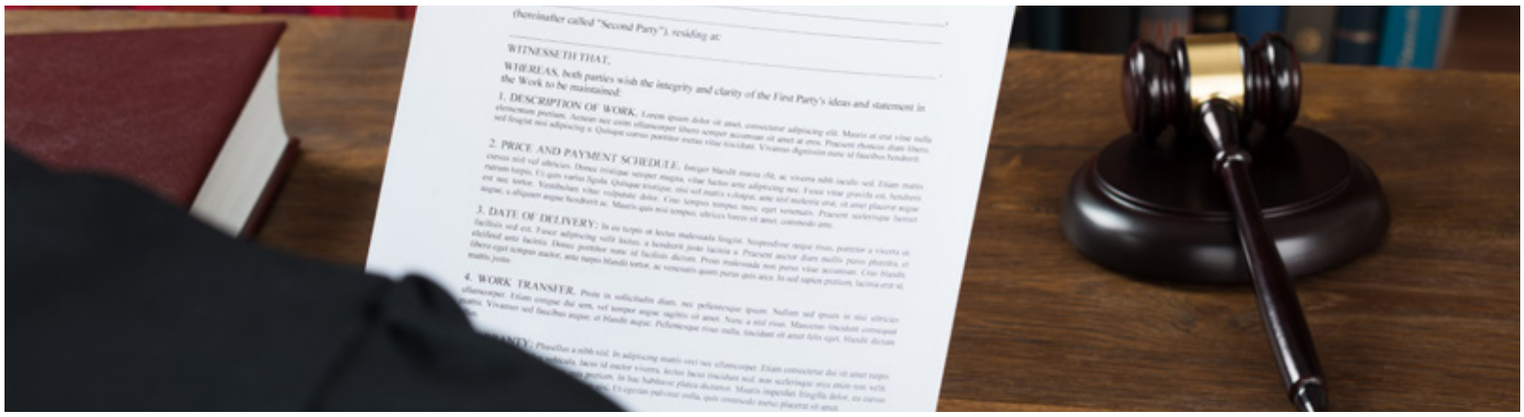

IF DRAFTING AN ARBITRATION AGREEMENT, TAKE YOUR TIME AND DRAFT WISELY[1]

BY MICHAEL J. NEEDLEMAN, ESQ.

Two months prior to *Flanzman v. Jenny Craig, Inc.*, No. A-2580-17T1 (App. Div. Oct. 17, 2018),[2] on August 23, 2018 the New Jersey Appellate Division in an unpublished decision, *D.M. v. Same Day Delivery Service*, A-2374-17T3, approved a forced arbitration agreement in a sexual harassment case. In *Same Day Delivery Service*, the Appellate Division upheld a poorly worded form requiring a claim of sexual harassment and hostile work environment into arbitration.

THE FACTS

Plaintiff accepted a job driving for Same Day Delivery Service in June 2017. On her acceptance of employment, she was instructed to view and accept a set of documents online. One of these documents was an arbitration agreement. The agreement, which was executed after plaintiff's employment technically started, stated that in consideration of employment compensation, future pay raises, and other benefits, she agreed to arbitrate any claim related to her employment under the Federal Arbitration Act and New York law. Importantly, the last paragraph of the agreement stated:

> I also understand that I have a right to consult with a person of my choosing, including an attorney, before signing this document. I am agree to waive my voluntarily and knowingly, and free from any duress or coercion whatsoever to a trial by a trial judge or jury as well as my right to participate in a class or collective action.

[sic]

Plaintiff worked from June 11, 2017 through August 21, 2017. The circumstances of her separation are not known, nor are any details of her working condition. She filed a complaint on September 25, 2017 in which she alleged that she was subjected to a hostile work environment and sexual harassment under the New Jersey Law Against Discrimination. The employer's motion to dismiss and to compel arbitration was granted. Plaintiff appealed, and the Appellate Division affirmed. The Appellate Division found that the arbitration agreement was valid, that it was executed at substantially the same time as the commencement of plaintiff's employment and thus met the consideration test laid out in *Martindale v. Sandvik, Inc.*, 173 *N.J.* 76 (2002). Finally, the Appellate Division found that the agreement was unambiguous in its most important function, even if it was not a "well-crafted document."

THE IMPLICATIONS

As an aside, the Appellate Division previously held that NJLAD cases were non-arbitrable. *See, EPIX Holdings Corp. v. Marsh & McLennan Companies, Inc.*, 410 *N.J. Super.* 453 (App. Div. 2009), *overruled in part, Hirsch v. Amper Fin. Servs, LLC, 215 N.J.* 174 (2013). The degree to which the *Same Day Delivery Service* alters that landscape, if at all, remains to be seen. It merits mention, too, that the agreement at issue in *Same Day Delivery Service* concluded with a paragraph that can only generously be considered the written word. It is well-settled that ambiguities in written documents are construed against the drafter and will invalidate an arbitration clause. *See, NAACP of Camden County East v. Foulke Management Corp., 421 N.J. Super.* 404 (App. Div. 2011). In *Same Day Delivery Service*, however, the Appellate Division opined, "while several sentences in the Arbitration Agreement are poorly drafted, those sentences do not make the agreement ambiguous because the remainder of the document is clearly written."

Trying to harmonize the Appellate Division's seemingly inconsistent decisions in *Flanzman* and *Same Day Delivery Service*, it seems clear that to have a fighting chance at enforcing an arbitration agreement, the agreement language must be clear. The decision in *Same Day Delivery Service* notwithstanding, it is not prudent to rely upon a poorly worded form.

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[2] *Flanzman v. Jenny Craig, Inc.*, No. A-2580-17T1 (App. Div. Oct. 17, 2018) is addressed in the prior New Jersey Defense article entitled "New Jersey Courts Continue Trend of Invalidating Arbitration Agreements".