

Contractual Waivers of Jury Trial in California

By June Lin

Introduction

Imagine a commercial contract that contains an express provision in which the parties waive their respective right to jury trial on any action on the contract. The contract provision waiving the right to jury trial is clearly apparent in the contract and the language is unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties. Such a provision would be enforceable in the majority of state and federal jurisdictions. But is it enforceable in California? Not since 2005.

2005 California Supreme Court Case That Changed the Landscape

Prior to 2005, predispute contractual jury trial waivers were widely used in California and appeared to be enforceable (see *e.g. Trizec Properties v. Superior Court*¹, in which the California Court of Appeal upheld a commercial lease provision waiving the parties' right to a jury trial). However, in the 2005 case *Grafton Partners L.P. v. Superior Court*², the California Supreme Court surprised the business community by holding that prelitigation contractual jury waivers are unenforceable, overturning previous lower court holdings to the contrary. The Court's rationale was based on a literal reading of Article I, Section 16 of the California Constitution, which provides that the right to a jury trial in a civil case may be waived only as provided by statute. California Code of Civil Procedure Section 631, the statute that addresses jury trial waivers, does not specifically authorize predispute jury trial waivers, or at the very least, is ambiguous concerning the validity of waivers entered into prior to the time an action in

¹ 229 Cal.App.3d 1616 (1991).

² 36 Cal. 4th 944 (2005).

court is commenced.³ The Court stated that it had to resolve any ambiguity in favor of preserving the fundamental right to jury trial. The Court disapproved the *Trizec* holding insofar as it permitted a waiver without statutory authorization.

The Supreme Court also distinguished its holding from the long history of cases upholding the validity of arbitration agreements, in which parties are essentially waiving their right to jury trial prior to the filing of an action. The Court pointed out that unlike predispute jury waivers, predispute arbitration agreements are specifically authorized by statute (see California Code of Civil Procedure Section 1280 *et seq.*) expressing a strong state policy favoring arbitration. There was no comparable state policy favoring court trials, as opposed to jury trials, in the judicial forum. The Court found it rational for the State Legislature to promote the use of arbitration by permitting predispute agreements, while not according the same advantage to jury trial waivers, given arbitration conserves judicial resources more than the selection of a court trial over a jury trial.

Conclusion

The *Grafton* decision brought California out of step with the authority in other state and federal jurisdictions, most of which have permitted predispute jury waivers. In his concurring opinion, Associate Justice Chin urged the State Legislature to enact legislation expressly authorizing predispute jury waivers, given there was no apparent public policy against contractual waivers of the right to jury trial. No such legislation has been passed as of the date of this article. Until such legislation is passed, parties contracting in California must be aware that

³ Under Section 631, a party may only waive its right to trial by jury in one of the following ways: (1) By failing to appear at the trial. (2) By written consent filed with the clerk or judge. (3) By oral consent, in open court, entered in the minutes. (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation. (5) By failing to deposit with the clerk, or judge, advance jury fees.

any waiver of jury trial provision, even if knowingly and voluntarily entered into, is not likely to be enforced by a California court.

This article is intended to provide a general summary and should not be construed as a legal opinion nor a complete legal analysis of the subject matter. June Lin is an attorney at Niesar & Vestal LLP in San Francisco, a law firm specializing in business law and corporate finance.