



FENWICK & WEST LLP

Litigation Alert

Pre-Dispute Contractual Waivers of Trial by Jury Ruled Unenforceable under California Law

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On August 4, 2005, the California Supreme Court ruled that pre-dispute contractual waivers of trial by jury are unenforceable under California law.

The Contract Language

The contract in dispute in *Grafton Partners L.P. v. Superior Court*, 05 C.D.O.S. 6887, was an engagement letter confirming two partnerships' retention of PriceWaterhouseCoopers L.L.P. ("PWC") to perform certain accounting services. Under the heading "[r]elease and indemnification," the letter released PWC from certain liabilities and included the following waiver: "In the unlikely event that differences concerning [PWC's] services or fees should arise that are not resolved by mutual agreement, to facilitate judicial resolution and save time and expense of both parties, [both parties] agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to [PWC's] services and fees for this engagement."

The Decision

The clients with whom PWC had entered into this engagement letter later filed a complaint against PWC related to PWC's provision of accounting services under the agreement and demanded a jury trial in California state court. Although the trial court had enforced the waiver in the engagement letter and granted PWC's motion to strike the jury demand, both the Court of Appeal and the California Supreme Court found the waiver unenforceable and reinstated the jury demand.

The California Supreme Court based its decision on a strict interpretation of Code of Civil Procedure Section 631, a statute that limits the ways to waive the right to a jury trial under California law. The Court held that the statute provides that a party can waive the right to a jury trial only after a case is pending in court and only in one of the ways the statute expressly specifies. The Court went on to say that only the California Legislature has the power to expand this statute to include pre-dispute jury waivers by contract. Justice Chin's

concurring opinion urged the Legislature to enact legislation doing so.

Arbitration Agreements

The Court was careful to distinguish contractual arbitration clauses from its holding. Although a pre-dispute agreement to arbitrate in effect waives the right to a jury trial, the Legislature has specifically authorized such arbitration agreements by statute (Code of Civil Procedure Section 1281). As a result, *Grafton* does not change existing law regarding the enforceability of pre-dispute arbitration agreements. Note that under California law, however, certain types of arbitration agreements are not enforceable (for example, arbitration agreements that are one-sided or otherwise unconscionable).

Practical Impact

The Court applied its ruling retroactively, meaning that pre-dispute jury waivers in existing contracts are void under California law (that is, courts will not enforce such waivers but may still enforce other parts of the contract). Once a lawsuit is filed, however, the parties may agree to waive their rights to a jury trial.

The *Grafton* Court did point out that most states other than California and Georgia do enforce pre-dispute jury waivers in contracts. For any contracts that include jury waivers under California law, enforceable alternatives include arbitration clauses and, when possible, choosing to apply the law of a different state.

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