

Litigation Alert

California Court of Appeal Rules Contractual Provisions to Submit Disputes to Judicial Referee Are Enforceable

SEPTEMBER 18, 2006

On August 21, 2006, the California Court of Appeal ruled in *Woodside Homes of California Inc. v. Superior Court (Wheeler)*, 06 C.D.O.S. 7777, that pre-dispute contractual agreements to submit controversies to a judicial referee pursuant to California Code of Civil Procedure sections 638 *et seq.* are enforceable under California law despite the Supreme Court's holding last year in *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944 (2005), that pre-dispute contractual waivers of trial by jury are unenforceable.

Practical Impact

This decision will likely soften the effect of *Grafton* by permitting an alternative method of dispute resolution authorized by the court but without the added costs and uncertainties of the jury trial framework. While particular qualities of judicial reference procedures must be considered, companies and individuals who seek the benefits of California law without the burden of a jury trial have a viable alternative to arbitration agreements.

Background: *Grafton's* Ban on Pre-Dispute Waivers of Trial by Jury

In August 2005, the California Supreme Court ruled that pre-dispute contractual waivers of jury trials are not enforceable under California law. The 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 concluded 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 was careful, however, to distinguish contractual arbitration clauses from its holding, noting that that while a pre-dispute agreement

to arbitrate effectively waives the right to a jury trial, the California Legislature has specifically authorized such arbitration agreements by statute. In distinguishing pre-dispute arbitration agreements, the Court analogized them to pre-trial judicial reference agreements that are also expressly authorized by statute. For more information on *Grafton* and its implications, please see our August 8, 2005 Litigation Alert ("Pre-Dispute Contractual Waivers of Trial by Jury Ruled Unenforceable Under California Law"), [available on our website](#).

The Contract Language at Issue in *Woodside*

Woodside involved a real estate purchase agreement. In May 2004 the buyer commenced an action in San Joaquin Superior Court against the seller alleging harm from construction defects. The seller subsequently filed a motion for appointment of a referee for all purposes, pursuant to the contract. The contract contained a clause under which the buyer and seller agreed that, in the event either party was to file a lawsuit arising under the agreement (or relating to the condition, design or construction of the subject property) that "all of the issues in such action, whether in fact or in law, shall be submitted to general judicial reference pursuant to California Code of Civil Procedure sections 638[] and 641 through 645.1 or any successor statutes thereto."

Section 638 permits the appointment of a judicial referee under several circumstances, including the motion of a "party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee." Once appointed, a referee "may hear and determine any or all of the issues in an action...whether of fact or law, and report a statement of decision." CCP Section 638(a). There are

two kinds of judicial reference, general and special. General referees, like that contemplated in the real estate purchase agreement at the heart of this case, determine all of the issues in a controversy while special referees handle discrete issues, such as discovery disputes. The referee's decision results in a judgment or a binding adjudication after court confirmation of the decision.

The trial court granted the motion for appointment of a referee, and the Court of Appeal denied the buyer's petition to overturn it. After the California Supreme Court issued its opinion in *Grafton*, the buyer moved to invalidate the appointment order on the ground that it was a pre-dispute jury trial waiver. The trial court granted the motion and vacated the order upon a finding that *Grafton* precluded enforcement of a pre-dispute contract for judicial reference. This appeal followed.

The Decision in *Woodside*

The court in *Woodside* extended *Grafton's* logic by finding that if pre-trial arbitration agreements are statutorily approved means of avoiding jury trials then so are judicial reference agreements. This conclusion found support in the *Grafton* Court's comparison of the statutory treatment received by both arbitration and reference agreements. Unlike jury trial waivers, pre-litigation reference agreements are explicitly permitted by statute. In 1982, section 638 was amended to include pre-dispute reference agreements. That amendment gave judicial reference statutory authority missing from section 631 *et seq.* which governs jury trial waivers.

Similarly, the court rejected the buyer's argument that because section 638 failed to expressly use the term "jury trial waiver" pre-dispute reference agreements were unenforceable. Although the statute did not use magic words to expressly authorize the waiver of a jury trial, waiver is the logical consequence of a general referee's decision. Section 638 agreements are therefore within the narrow class of legislatively approved pre-dispute abdications of a jury trial.

For further information, please contact:

Patrick E. Premo, Litigation Partner
ppremo@fenwick.com, 650.335.7963

Jennifer Lloyd Kelly, Litigation Associate
jkelly@fenwick.com, 415.875.2426

Marybeth Milionis, Litigation Associate
mmilionis@fenwick.com, 650.335.7246

THIS UPDATE IS INTENDED BY FENWICK & WEST LLP TO SUMMARIZE RECENT DEVELOPMENTS IN THE LAW. IT IS NOT INTENDED, AND SHOULD NOT BE REGARDED, AS LEGAL ADVICE. READERS WHO HAVE PARTICULAR QUESTIONS ABOUT THESE ISSUES SHOULD SEEK ADVICE OF COUNSEL. © 2006 Fenwick & West LLP. All Rights Reserved.