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Supreme Court Calls Jury-Trial Waivers Invalid

Ruling on Predispute Clauses Angers Business Interests

Unanimous Opinion

By John Roemer

Daily Journal Staff Writer

The California Supreme Court on Thursday upset business interests but restored predictability for lawyers drafting contracts by invalidating predispute clauses waiving jury trials.

The right to a jury is a core constitutional entitlement that cannot be relinquished in advance of a conflict, the high court said in *Grafton Partners LP v. Superior Court (PricewaterhouseCoopers LLP)*, 2005 DJDAR 9387.

The high court's unanimous opinion by the chief justice settled a question left open by conflicting appellate decisions. But it sent an immediate shockwave through business advocacy groups that had lobbied hard to retain the jury waiver.

Many Amici

No fewer than 11 pro-business groups, from the Pacific Legal Foundation to the U.S. Chamber of Commerce, appeared as amici in the unsuccessful effort to persuade the justices the waiver is a valid and valuable tool.

The decision will alter the way commercial practitioners long have written partnership pacts, franchise agreements, real estate contracts and many other business documents.

Until last year, jury waivers were routinely included in many such arrangements so that businesses could avoid the pitfalls of jury trials and take their beefs straight to a judge.

Precedent Reversed

But uncertainty has bedeviled the

practice since a San Francisco appeal court's February 2004 decision, which opposed a precedent favoring jury waivers handed down in 1991 by appellate counterparts in Los Angeles.

The high court agreed with the newer decision and faulted the 1991 holding, *Trizec Properties Inc. v Superior Court*, 229 Cal. App.3d 1616, for inconsistency with earlier case law.

The underlying case out of Alameda County involved investors Grafton Partners and others who sued PricewaterhouseCoopers over a commissioned audit. The plaintiffs accused the accountants of hiding an illegal Ponzi scheme run by a national mortgage lender, PinnFund U.S.A. Inc.

Pricewaterhouse sought a court trial on the claim, citing an agreement in its engagement letter that no party would demand a trial by jury. Alameda County Superior Court Judge Ronald M. Sabraw upheld the agreement. A San Francisco appellate panel reversed Sabraw.

Chief Justice Ronald M. George's opinion held that parties to a civil lawsuit cannot rely on predispute contractual language limiting their remedy to court trials.

Legitimizing predispute jury waivers must be left to the Legislature, the high court decided in affirming the 1st District Court of Appeal. Associate Justice Ming W. Chin wrote a separate concurrence urging lawmakers to rewrite the Code of Civil Procedure to do so.

George explained that California's founding document mandated the court's ruling.

"Our Constitution treats the historical right to a jury resolution of disputes that

have been brought to a judicial forum as fundamental," he wrote, "providing that in 'a civil cause,' any waiver of the inviolate right to a jury determination must occur by the consent of the parties to the cause *as provided by statute.*"

The italics are George's, emphasizing the court's view that lawmakers should be the source for exceptions to such basic rules.

The court reached back to 1855 to find *Exline v. Smith*, 5 Cal. 112, the origin of a line of cases holding that the rules under which the parties to a lawsuit may waive a jury trial must be prescribed by the Legislature.

State lawmakers decreed in Code of Civil Procedure Section 631 that there are six means by which that right can be waived or forfeited. They include failure to appear, failure to pay required fees, oral consent in open court and others. Predispute waivers aren't among them, leading the high court to conclude it is the Legislature's function, not the judiciary's, to amend the code.

Seventy-five minutes after the decision was posted, the pro-business Civil Justice Association in Sacramento e-mailed reporters with a hostile review.

"In a commercial setting, this decision is especially unfortunate," wrote the group's president, attorney John H. Sullivan. "Companies in California will not be able to agree to a lower-cost option that lets them solve a dispute and more quickly get on with their business. An increased drain on court resources will be an additional undesirable result."

In a telephone interview, Sullivan said that although arbitration is important in dispute resolution, some issues should be tried in court.

“Jury waivers are another tool in businesses’ problem-solving kit that should stay there,” he said. As one of the amici on PricewaterhouseCoopers’ side, he added, “we did our best to argue there’s room for it.”

Two of the state’s most prominent attorneys faced off before the high court in the case.

Jerome B. Falk Jr. of San Francisco’s Howard Rice Nemerovski Canady Falk & Rabkin argued on behalf of Grafton Partners for an end to jury waivers.

“The claim the sky is falling is way overblown,” Falk said Thursday. “If there is a legitimate concern, the Legislature will deal with it.”

His research showed that before the 1991 *Trizec* decision, few jury waivers were built into commercial contracts, Falk said.

“The problem with predispute waivers is that you don’t know what problem you’ll be litigating,” he added. “There was no way

for my clients to anticipate that kind of horrible situation.”

Daniel M. Kolkey, the former Sacramento appellate justice who now works a few blocks away from Falk at Gibson Dunn & Crutcher, took the approach that the waiver is indispensable to businesses.

Kolkey, representing PricewaterhouseCoopers, noted that the case remains in litigation.

He said, “The decision may have released Grafton Partners from honoring the jury waiver it signed, but it will not release them from the facts of the case, which we expect will result in a verdict in favor of my client.”

Arbitration remains a strong alternative in resolving disputes, and one attorney predicted the high court’s ruling will encourage the practice.

“We will see a renewed emphasis on arbitration,” said Jeffrey J. Lederman at Winston & Strawn’s San Francisco office, a

real estate and commercial products litigator who was not involved in *Grafton*. “You can’t quarrel with the court’s reasoning, but from my clients’ perspective it’s very different from what we thought the law was for the last 15 years.”

John Marcin, a Century City plaintiffs lawyer at Marcin Barrera, downplayed the distinction businesses draw between jury and court trials.

“Businesses like to point the finger at the plaintiffs bar and how so-called out-of-control jury decisions wreak havoc on the business community,” he said, “but that’s false. Many academic studies show no real difference between jury awards and bench trials. The decision affirms the right to a trial before people who are grounded in the community. Jurors take these matters very seriously, and that’s good for our system of justice.”

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