

The California Supreme Court's Voiding of Contractual Pre-Litigation Jury Trial Waivers: Paradise Lost or a Playing Field Levelled?

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Jury trial waivers in shopping center leases have long been part of the legal landscape in California and throughout the country. Depending on the perspectives of the landlord and tenant, a jury trial waiver in a shopping center lease is either part of a larger bargained-for exchange to allow the parties to expeditiously resolve disputes and minimize the expenses or uncertainties associated with a jury trial, or a one-sided taking of a cherished constitutional right. Either way, the California Supreme Court's 2005 opinion in the case of *Grafton Partners L.P. v. Superior Court*, 36 Cal.4th 944 (2005), has, for the time being, ended the controversy by holding contractual pre-litigation jury trial waivers to be void as against public policy.

The Case

Grafton Partners L.P. ("Grafton") engaged PriceWaterhouseCoopers L.L.P. ("PWC") to perform audits on certain partnership accounts. PWC's engagement letter contained a jury trial waiver applicable to both Grafton and PWC. Several years later, Grafton sued PWC on various theories, including negligence and misrepresentation relating to PWC's failure to disclose and the subsequent cover-up of certain fraudulent business practices uncovered during the course of PWC's audits. When Grafton demanded a jury trial, PWC moved to strike the jury demand based upon the waiver contained in the engagement letter, and the trial court granted the motion. Grafton sought appellate review, and the Court of Appeal reversed the trial court. The California Supreme Court then granted PWC's petition for review and affirmed the decision of the Court of Appeal. In doing so, the California Supreme Court found that the right to a jury trial under the California Constitution trumps the ability of even sophisticated parties to knowingly waive the right to a jury trial. The *Grafton Partners* Court also announced that its opinion applies retroactively, reasoning that litigants never had a contractual right to impose a jury trial waiver in the first instance.

The Reasoning

The California Constitution provides every litigant with the right to a trial by jury.¹ However, even the *Grafton Partners* Court conceded that the right to a jury trial has, as a practical matter, never been absolute. California Code of Civil Procedure § 631(d) specifies six methods by which a litigant may waive the right to a jury trial.²

With the continuing evolution of alternate dispute resolution, at least one California Court of Appeal decision held that because the California Constitution does not specifically prohibit a contractual pre-litigation jury waiver, such waivers are permissible. In *Trizec Properties, Inc. v. Superior Court*, 229 Cal.App.3d 1616 (1991), the California Court of Appeal found a jury trial waiver in a commercial lease to be valid, particularly where it was unequivocal, unambiguous and supported by adequate consideration. The *Trizec* Court looked to the majority of other jurisdictions that upheld express contractual jury trial waivers and prior California cases upholding arbitration agreements. On the issue of the freedom of parties to contract for pre-litigation jury trial waivers, the *Grafton Partners*

Shopping Center Legal Update is published by the Legal Department of the International Council of Shopping Centers, Inc., 1221 Avenue of the Americas, 41st floor, New York, NY 10020-1099; René Tremblay, Chairman; Michael P. Kercheval, President & CEO; Gregory Peterson, General Counsel.

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found that such freedom is not absolute, and must be weighed against the paramount concern of preserving a right to trial by jury.³ As for the *Trizec* Court's analogy of contractual jury trial waivers to arbitration agreements, the *Grafton Partners* Court drew a critical distinction between arbitration clauses and contractual jury trial waivers. According to the *Grafton Partners* Court, arbitration clauses and agreements are enforceable because they have a statutory foundation (see California Code of Civil Procedure § 1280, *et seq.*), and thus satisfy the "prescribed by statute" requirement of Article I § 16 of the California Constitution. Put another way, in the eyes of the *Grafton Partners* Court, the legislature, not the courts, must create the means for contractual pre-litigation jury trial waivers.

The Legislation

Within six months of the *Grafton Partners* decision, AB 2258 was introduced in the California Assembly to amend California Code of Civil Procedure § 631(d) and allow pre-litigation contractual jury trial waivers.⁴ In an apparent response to AB 2258, the Assembly Committee on Judiciary introduced AB 3049 to clarify that California Code of Civil Procedure §§ 631(d)(1) – (6) are the exclusive means by which a jury trial may be waived in California.⁵ AB 2258 never passed out of the Assembly Judiciary Committee. AB 3049 passed out of the Assembly and was referred to the California Senate Judiciary Committee, but failed to progress any further in the 2005–2006 Regular Session. At least for now, it appears that the California legislature has little intention of accepting the California Supreme Court's invitation to provide a statutory method for pre-litigation contractual jury trial waivers, because no legislation comparable to AB 2258 or AB 3049 has been introduced in the 2007–2008 Regular Session.

The Future

The onus now appears to rest with transactional attorneys who draft shopping center leases to provide the parties with the greatest degree of flexibility for dispute resolution. One alternative is to utilize binding arbitration provisions in lieu of or in addition to jury trial waivers. Another is to preface any pre-litigation contractual jury trial waiver with "To the maximum extent permitted by applicable law" or similar language in leases and wait for a legislative solution. Pending any legislative action, it seems certain that standard pre-litigation jury waivers in shopping center leases applying California law will no longer be enforced by California courts. However, it is unclear whether shopping center leases for California properties applying non-California law will dictate a different result. In any event, given the significant changes created by the holding in *Grafton Partners*, attorneys litigating lease disputes in California should counsel their clients accordingly.

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¹ In relevant part, Article I, § 16, of the California Constitution states: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute."

² California Code of Civil Procedure § 631(d) provides: "A party waives trial by jury in any 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 as provided in subdivision (b). (6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in subdivision (c)."

³ The *Grafton Partners* Court noted that jurisdictions where jury waivers are permitted impose a variety of restrictions. "Some (perhaps most) of the courts endorsing predispute jury waivers, pointing to the paramount constitutional standing of the right to jury trial, impose a presumption against finding a waiver of the constitutional right, or at least require that the waiver have been knowing and voluntary." (*Medical Air Technology Corp. v. Marwan Inv., Inc.* (1st Cir. 2002) 303 F.3d 11, 18; *Paracor Finance, Inc. v. General Elec. Capital Corp.* (9th Cir. 1996) 96 F.3d 1151, 1166, fn. 21; *Telum, Inc. v. E.F. Hutton Credit Corp.* (10th Cir., 1988) 859 F.2d 835, 837; *K.M.C. Co. v. Irving Trust Co.* (6th Cir. 1985) 757 F.2d 752, 758; *National Equipment Rental, Ltd. v. Hendrix* (2d Cir. 1977) 565 F.2d 255, 258; *Cooperative Finance Ass'n., Inc. v. Garst* (N.D. Iowa 1995) 871 F.Supp. 1168, 1171 [collecting cases]; *Malan Realty Investors, Inc. v. Harris*, *supra*, 953 S.W.2d at p. 627; *Fairfield Leasing Corp. v. Techni-Graphics* (N. J. Super. App. Essex Co. Law Div. 1992) 607 A.2d 703, 706; 47 Am.Jur.2d (1998) Jury, § 72, pp. 777–778; Annot., Contractual Jury Trial Waivers in State Civil Cases, *supra*, 42 A.L.R.5th § 5, pp. 82–83.)

Many courts, indulging a presumption against waiver and requiring that the waiver be knowing and voluntary, have been forced to examine particular waiver clauses to evaluate font size, use of italics and the position of the waiver clause within the contract. (*National Equipment Rental, Ltd. v. Hendrix*, *supra*, 565 F.2d at p. 258; *RDO Financial Services Co. v. Powell* (N.D. Tex. 2002) 191 F.Supp.2d 811, 813; *Cooperative Finance Ass'n, Inc. v. Garst*, *supra*, 871 F.Supp., at pp. 1171–1172; *Fairfield Leasing Corp. v. Techni-Graphics*, *supra*, 607 A.2d at p. 706 [relying upon the U. Com. Code and refusing to enforce an inconspicuous "non-negotiated jury waiver clause" in a form contract when the resisting party was not represented by counsel]; 7 Standard Pennsylvania Practice 2d (2005 Supp.) § 42:4), and to determine whether the parties were represented by counsel and to examine the parties' relative bargaining power. (*RDO Financial Services Co. v. Powell*, *supra*, 191 F.Supp.2d at p. 813; *Whirlpool Financial Corp. v. Seaux* (N.D.Ill. 1994) 866 F.Supp. 1102, 1105–1106; *Lowe Enterprises, L.P. v. Dist. Ct.*, *supra*, 40 P.2d at pp. 410–411; *Fairfield Leasing Corp. v. Techni-Graphics*, *supra*, 607 A.2d at p. 706.) There is disagreement whether the party seeking to enforce or the party seeking to avoid the waiver clause should bear the burden of proof that the contract was entered into knowingly and voluntarily. (*Medical Air Technology Corp. v. Marwan Inv., Inc.*, *supra*, 303 F.3d at p. 18, fn. 3; *RDO Financial Services Co. v. Powell*, *supra*, 191 F.Supp.2d at p. 813; Annot., Contractual Jury Trial Waivers in Federal Civil Cases, *supra*, 92 A.L.R.Fed. at p. 695.)" *Grafton Partners L.P. v. Superior Court*, 36 Cal.4th at 966, n.12.

⁴ Assembly Bill 2258 amended § 631(d)(2) (added language is in italics) to read: "By written consent filed with the clerk or judge. *Valid written consent may be executed after an action is commenced, or at any time prior to commencing an action by a party to a written contract or lease that provides that the parties to the contract or lease voluntarily agree not to demand a trial by jury in any controversy arising therefrom.*"

⁵ Assembly Bill 3049 amended § 631(d) (added language is in italics; deleted language is stricken) to read: "A party *may waive* trial by jury *only* in any of the following ways:"

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