

Client Alert

Litigation

California Supreme Court Invalidates Pre-Dispute Jury Waivers

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For years, contracting parties in California have thought they could avoid the uncertainty and expense of a jury trial by agreeing in advance that any lawsuit between them would be decided by a judge, sitting without a jury. This view was based in part on a 1991 intermediate appellate decision (*Trizec Properties, Inc. v. Superior Court*) which upheld a pre-dispute contractual jury waiver, at least where the waiver was “clearly apparent in the contract.” Last Friday, however, the California Supreme Court disapproved *Trizec* and held that California law does not permit pre-dispute jury waivers. See *Grafton Partners, L.P. v. PriceWaterhouseCoopers L.L.P.*, 05 C.D.O.S. 6887 (August 5, 2005).

In *Grafton*, PriceWaterhouseCoopers (PWC) was hired to audit the books of two Grafton partnerships. PWC’s engagement letter provided that, in the event that differences concerning PWC’s services or fees could not be resolved by mutual agreement, the 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.”

Three years later, Grafton sued PWC for negligence and other claims arising from PWC’s alleged failure to disclose fraudulent business practices that had been discovered during an audit. The trial court struck Grafton’s demand for a jury trial, but the Court of Appeal reversed. The California Supreme Court unanimously upheld the Court of Appeal decision, holding that pre-dispute jury waivers are invalid. The Court also applied its decision retrospectively, i.e., to pending cases where a party seeks to rely on a predispute waiver.

The Court relied on California’s constitutional mandate that jury waivers in civil cases must be “as prescribed by statute.” Looking to the applicable statute (Code of Civil Procedure § 631), the Court found that the Legislature has authorized waivers only in certain specific instances: by failing to appear at trial or announce that a jury was required, by oral consent in open court, by failing to pay jury fees, or by written consent filed with the court. All of these provisions, however, apply only to written jury waivers entered into **after** a lawsuit is filed.

The Court made clear that its decision does not prevent parties from agreeing in advance to arbitrate their disputes, reasoning that the Legislature had enacted a comprehensive scheme authorizing predispute arbitration agreements. Likewise,



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the Court ruled that parties are free to agree in advance to a “judicial reference,” where a judicial referee is appointed to determine some or all of the issues in a case.

The Landscape after *Grafton*

Parties whose contracts include jury waivers should review those contracts and weigh the importance of avoiding a jury trial. If avoiding a jury is paramount, parties should consider revising their contracts to provide for arbitration or judicial reference.

Contact Pillsbury Winthrop Shaw Pittman For More Details

If you wish to obtain a more detailed explanation of the Court’s decision in *Grafton*, or develop a strategy for updating contracts in order to avoid a jury trial without running afoul of *Grafton*, please contact the Pillsbury Winthrop Shaw Pittman lawyer with whom you work or one of the attorneys below:

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