

by Todd Green

Introduction

Are contractual pre-dispute jury waivers in civil actions enforceable under California law? In early February, the California Court of Appeal handed down an opinion holding that they are not. See *Grafton Partners, LP, v. Superior Court*, 2004 WL 226192 (2004). In doing so, it declined to follow the holding of another panel 13 years earlier. See *Trizec Properties, Inc. v. Superior Court*, 229 Cal.App.3d 1616 (1991).

The right to a trial by jury in civil cases is fundamental in American jurisprudence. It is enshrined in the Seventh Amendment to the United States Constitution and in article I, §16 of the California Constitution. But like most rights, the right to trial by jury can be waived. The questions are when and under what circumstances. Contractual waivers of the parties' right to trial by jury—entered into long before any dispute has arisen—are common. They are

found in many standard contracts such as real property and equipment leases, loan documents and employment agreements. These waivers, it can be argued, are supported by sound policy considerations. Bench trials are typically faster and less expensive than jury trials. The application of the law to the facts may be more predictable. And the risk of excessive jury awards is nullified. Thus, enforceability of such waivers may promote efficiencies in business by reducing transaction costs. On the other hand, such waivers are often procured in contracts between business and consumers where the consumer has virtually no bargaining power and may not even understand the import of the waiver. Thus, while these waivers may be good for businesses, they may not be advantageous to consumers.

The Grafton Opinion

Until *Grafton*, *Trizec* was the only published opinion addressing the enforceability of these contractual waivers under California law. In an opinion that was short on statutory analysis, the Court of Appeal in *Trizec* held that contractual waivers of trial by jury are enforceable. The court found support for its opinion in the

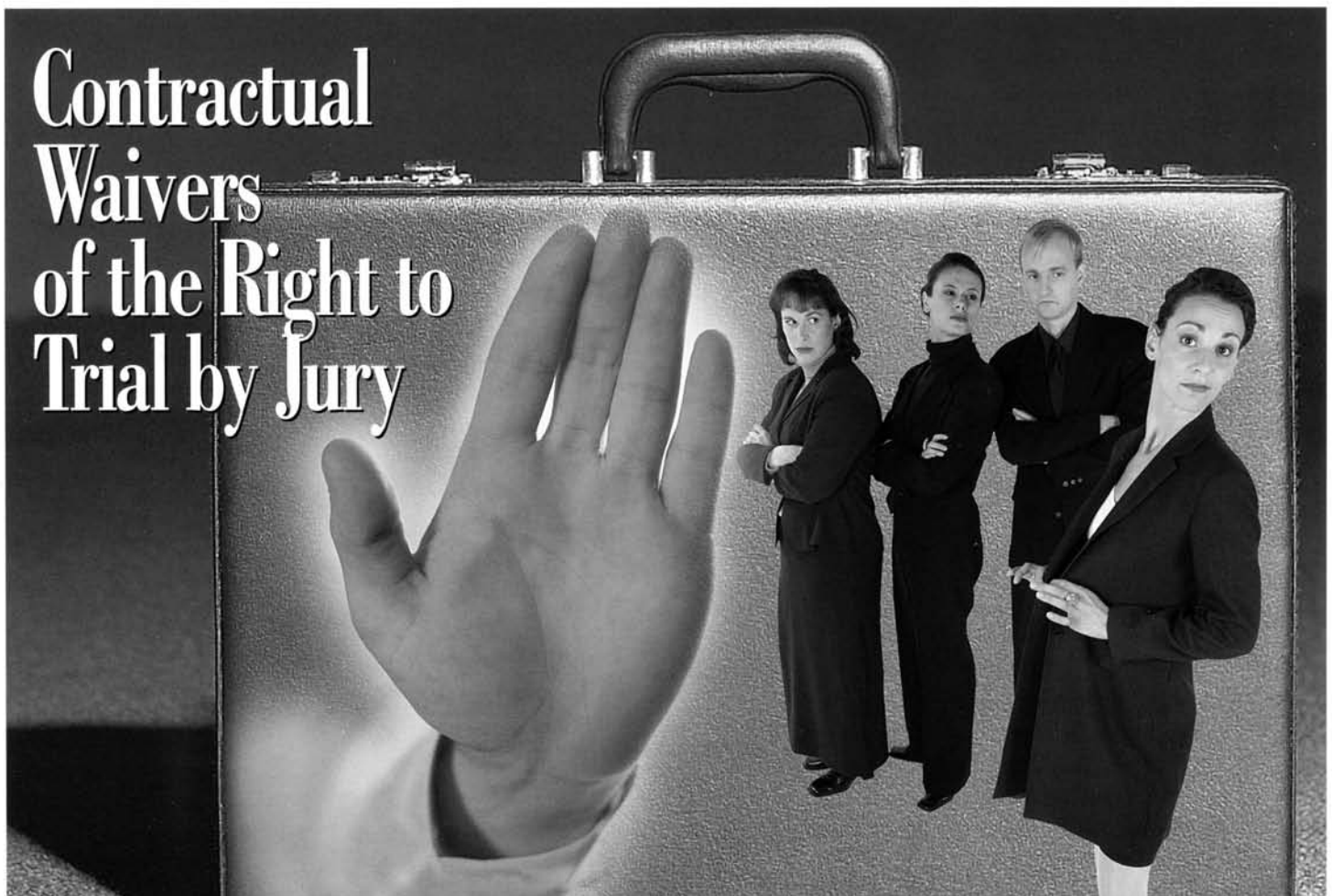
many cases upholding the validity of contractual arbitration agreements. The court's reasoning, essentially, was that if contracting parties (pre-dispute) were free to opt out of the judicial process entirely—thereby waiving their right to *any* trial—surely they were free to take the less drastic measure of remaining within the judicial process but contractually waiving the right to have their case heard by a jury.

In *Grafton*, the court undertook a careful review of California's relevant constitutional history and concluded that *Trizec* was wrongly decided.

The California Constitutional Right to a Jury Trial in Civil Cases

Article I, §16 of the California Constitution provides: "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. . . . In a civil cause a jury may be waived by the consent of the parties expressed *as prescribed by statute*." Cal.Const.Art. I, §16 (emphasis added).

The court in *Grafton* noted that California constitutional history "reflects an unwavering commitment to the principle that the right to a



Contractual Waivers of the Right to Trial by Jury

civil jury trial may be waived only as the Legislature prescribes, even in the face of concerns that the interests of the parties and the courts would benefit from a relaxation of this requirement.” 2004 WL 226192, *3.

Code of Civil Procedure §631

The court explained that, in Code of Civil Procedure §631, the Legislature has prescribed the methods for waiving the right to a jury in a civil case. Section 631 expressly provides that, in civil cases, a jury may *only* be waived by one of the methods enumerated in subdivision (d) of that statute.

(a) The right to a trial by jury as declared by Section 16 of Article I of the California Constitution shall be preserved to the parties inviolate. In civil cases, a jury may only be waived pursuant to subdivision (d). . . .

(d) 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).

Cal.Civ.Proc.Code §631. The court held that §631, the only statute prescribed by the Legislature authorizing the methods for waiving a jury in a civil action, simply did not authorize pre-dispute contractual waivers.

The court rejected the argument that the right of parties to opt out of the judicial process entirely, through a contractual arbitration provision, implies the right to contractually waive a jury while remaining within the judicial system. The court held that the Legislature's authorization of agreements to resolve disputes in a non-judicial forum (through arbitration) did not necessarily imply approval of agreements to modify the judicial forum to eliminate certain

rights, such as the right to trial by jury, while not opting out entirely. 2004 WL 226192, *6. More fundamentally, the court held, this argument is simply inconsistent with §631, itself, which provides that the right to a jury trial may “*only* be waived pursuant to subdivision (d).” Cal.Civ.Proc.Code §631 (emphasis added).

The court recognized that good policy arguments could be made to support or oppose contractual pre-dispute jury waivers. But the court found no legislative authorization for such waivers. The court explained that these policy choices were for the Legislature, not the courts, to make because that is precisely what the California Constitution provides. 2004 WL 226192, *5.

The *Grafton* opinion puts California in the distinct minority of states whose courts have held that pre-dispute contractual jury trial waivers are unenforceable. In fact, Georgia is the only other state to hold these contractual waivers *per se* unenforceable. See *Bank S., N.A. v. Howard*, 444 S.E.2d 799 (Ga. 1994) (holding that Georgia's Constitution contemplated the pendency of litigation at the time of the waiver). By contrast, courts in Florida, Missouri, New York, Texas, Connecticut, Louisiana, and Ohio have held, either expressly or implicitly, that such waivers are valid and enforceable in general.

Contractual Jury Waivers in Federal Court

In federal court, the right to a jury trial (in suits at common law where the amount in controversy exceeds 20 dollars) is embodied in the Seventh Amendment to the Constitution. Federal courts have uniformly held that pre-dispute contractual jury trial waivers are enforceable. See, e.g., *Okura & Co. v. Careau Group*, 783 F.Supp. 482, 488 (C.D.Cal. 1991).

There are some important limitations on the enforceability of contractual jury trial waivers. These waivers must be “knowingly and voluntarily executed.” *Okura*, 783 F.Supp. at 488. There is a split of authority on the issue of whether the burden of proof is on the party seeking to enforce the waiver or the one seeking to avoid the waiver. The majority of courts seem to place the burden on the party seeking to enforce the waiver to prove that the waiver was voluntary and informed. See *Phoenix Leasing*, 843 F.Supp. at 1384. Some of the factors used to determine whether a waiver was knowing and intelligent include: 1) whether there

was a gross disparity in bargaining power between the parties; 2) the business or professional experience of the party opposing the waiver; 3) whether the opposing party had an opportunity to negotiate contract terms; and 4) whether the clause containing the waiver was inconspicuous. *Id.*

In a diversity action the right to a jury trial is governed by federal, not state law. See *Phoenix Leasing v. Sure Broadcasting*, 843 F.Supp. 1379, 1384 (D.Nev. 1994). Thus, in a federal court diversity action in California, on a contract governed by California law and containing a waiver of the right to trial by jury, that waiver will be enforced if knowingly and voluntarily executed, despite the fact that it would not be enforced if the same action were litigated in state court. See *Okura*, 783 F.Supp. at 488-89.



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