

Two Unique Takes on Jury Waiver Clauses

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Risk-averse parties often look for ways to avoid jury trials in disputes arising out of commercial contracts. The concern is that juries can be unpredictable and jury trials generally take longer than bench trials. The additional time, cost and unpredictability add risk to any dispute. Further, juries' sympathy for individuals litigating against institutions often works to the institution's disadvantage.

To avoid jury trials, parties often contractually agree — before any dispute arises — to waive their right to a jury trial.[1] The Seventh Amendment of the U.S. Constitution guarantees the right to a jury trial for civil litigants in federal court. However, since the Seventh Amendment does not apply to the states, each state is allowed to decide whether a civil litigant can waive their right to a jury as to state law claims.

States are split as to whether they will uphold pre-litigation jury waiver agreements. While the majority of states allow civil litigants the freedom to contractually waive their right to a jury trial, two states — California and Georgia — have expressly held pre-litigation jury waivers unenforceable.[2] This article will deal exclusively with case law on whether jury waiver clauses are themselves enforceable.

California and Georgia are the only two states to prohibit pre-litigation jury waiver clauses.

Nine state courts that have directly examined the enforceability of pre-litigation jury waiver clauses found them to be valid: Alabama, Connecticut, Florida, Missouri, Nevada, Rhode Island, Tennessee, Texas and Virginia.[3] Federal courts will also uphold jury waiver clauses.[4]

However, Georgia and California do not follow the majority's approach. In *Bank South NA v. Howard*[5] and *Grafton Partners LP v. Superior Court*,[6] the Supreme Courts of Georgia and California, respectfully, held that pre-litigation jury waiver clauses are unenforceable.

In *Bank South*, the plaintiff sued an individual (Howard) on a guarantee that contained a pre-litigation jury waiver agreement. In order to decide the issue of whether a pre-litigation contractual waiver of a jury trial was enforceable under the laws of Georgia, the Georgia Supreme Court turned to the Georgia Constitution (Art. I, Sec. I, Para. XI) and then to Georgia's jury waiver statute (OCGA § 9-11-39).

The Georgia Constitution guarantees the right to a jury trial and the jury waiver statute lists the specific circumstances in which a party may waive the right to a jury trial after litigation has commenced. Based on these laws, the Georgia Supreme court held that because pre-litigation jury waivers were not provided for in either the Constitution or the statute, they could not be enforced in cases tried under Georgia law.[7]

The court bolstered its holding by comparing jury waivers to confessions of judgment — as both give up “valuable rights.”[8] The court held, “[g]iven the similarity of waivers of jury trial and confessions of judgment, and considering the magnitude of the rights involved and the probability of abuse that exists in both situations, waivers of jury trial are sufficiently analogous to confessions of judgment and that the same rule should apply.”[9]

Writing for the dissent, Justice Leah Sears-Collins noted that the majority’s conclusion stretched the meaning of the Constitution and the jury waiver statute. She wrote:

“These provisions [in the jury waiver statute] do not provide that their methods by which the right to a jury trial can be waived are exclusive, and it is just as likely as not that the drafters of the Constitution and the statute did not even consider whether pre-litigation waivers were appropriate. I find the ambiguity in [the Constitution and the statute] on this issue should be resolved in favor of the right to contract for such waivers.”[10]

Justice Sears-Collins also pointed to public policy reasons for honoring jury waiver provisions: to avoid the delays and expense inherent in jury trials, and therefore to economize litigation for the parties and for an already overburdened court system.[11]

Three months after the Bank South decision, Justice Sears-Collins’ concerns were echoed by another Georgia Supreme Court judge, Chief Justice Willis Hunt, in his dissent in *American Southern Financial Ltd. v. Yang*. [12] In *American Southern*, the contract at issue was a commercial lease agreement entered into between two businesses.

Chief Justice Hunt wrote, “It makes no sense not to allow two parties to agree to resolve their dispute in some forum, of which there are many, other than a time-consuming, expensive jury trial.”[13] Chief Justice Hunt also pointed out that the Georgia Supreme Court has approved the use of mediation and other nonjudicial forums to resolve disputes, and therefore should support, not reject, the agreement between two business entities to resolve their dispute without a jury.[14]

Eleven years after the Bank South decision, the California Supreme Court joined Georgia in rejecting pre-litigation jury waiver clauses. In *Grafton*, a partnership (Grafton) sued its auditor (PriceWaterhouseCoopers or PWC) for breach of contract and other causes of action. PWC’s engagement letter had a pre-litigation jury waiver clause that waived the right to a jury trial for any “proceeding or counterclaim arising out of or relating to [PWC’s] services and fees for this engagement.”[15]

When the trial court granted PWC’s motion to strike Grafton’s demand for a jury trial, Grafton appealed. Like the Georgia Supreme Court in *Bank South*, the California Supreme Court started with the California Constitution (Art. I, § 16) and California’s jury waiver statute (Code of Civil Procedure § 631(d)).

The California Constitution accords the right to a trial by jury, while the jury waiver statute enumerates six ways to forfeit this right after litigation has commenced.[16] Like the Georgia Supreme Court, the California Supreme Court concluded that jury waivers are permissible only to the extent that they are authorized by statute.[17] As the six statutorily authorized methods to waive a jury all occur after litigation is commenced, the pre-litigation jury waiver in PWC's engagement letter was invalid.[18]

Justice Ming W. Chin wrote separately in a concurring opinion to urge the Legislature to enact legislation to expressly authorize pre-dispute jury waivers and to "join other jurisdictions in recognizing there is no abstract public policy against contractual waivers of the right to civil jury trial." [19]

Importantly, the California Supreme Court did not compare pre-dispute jury waivers to pre-dispute arbitration agreements. Pre-dispute arbitration agreements are specifically authorized by California law (California Code of Civil Procedure § 1281) and therefore are enforceable.

Can the parties escape the ban on pre-litigation jury waivers in California and Georgia with a choice-of-law provision in their contract electing to apply a law of a state that has no connection with the contract?

In order to save pre-litigation jury waiver clauses, parties in California and Georgia may insert a choice-of-law clause in their contract so that their contract will be construed under the laws of a different state (i.e., a state that enforces pre-litigation jury waiver clauses). However, if neither the parties nor their transaction has any relationship with the selected state, the courts may invalidate the choice-of-law provision.

Under California law, courts will not enforce a contractual choice-of-law provision where the selected forum has no "substantial relationship" to the parties or the transaction and there is no other reasonable basis for the parties' choice.[20] In *Nedlloyd*, the California Supreme Court adopted the approach of Restatement (Second) of Conflict of Law § 187(2) — that is, the law of the state chosen by the parties to govern their contractual rights and duties will be applied, unless either:

"1) The chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or 2) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of [Restatement] § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." [21]

The court also noted that as for contracts governed by the Uniform Commercial Code, “California Commercial Code Section 1105, Subdivision (1) ... provides that, subject to specified exceptions, the parties may choose the law of a state having a ‘reasonable relation’ to the transaction.”[22] The “reasonable relation” test, however, is “similar” to the “substantial relationship” test from Restatement § 187.[23]

In *Nedlloyd*, the parties chose Hong Kong law to apply to their contractual disputes. The court held that Hong Kong had a “substantial relationship” to the contract because 1) one of the parties was incorporated under the laws of Hong Kong and had a registered office there; and 2) one of the shareholder parties to the contract had an office in Hong Kong.[24] The court upheld the parties’ choice-of-law provision.[25]

Therefore, in California, the parties cannot arbitrarily insert a choice of law provision where the chosen state has no relationship to the parties or to their dispute.

Georgia courts take a slightly different approach than California. Georgia follows the traditional conflicts of law rules.[26] The traditional rule is as follows:

“After first ascertaining that there were significant contacts with the state of Georgia, such that the choice of [Georgia] law was neither arbitrary nor constitutionally impermissible ... [t]he law of the jurisdiction chosen by parties to a contract to govern their contractual rights will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state.”[27]

In *Keener*, the issue before the Eleventh Circuit was whether Georgia law or Ohio law applied to an employment noncompetition agreement (NCA) when the parties entered into the contract in Ohio, the parties selected Ohio law to apply, and the parties expected Ohio law to apply.[28]

The Eleventh Circuit held that Georgia law applied as 1) it was not arbitrary or constitutionally impermissible to apply Georgia law because the former employee was living and working in Georgia; and 2) the NCA, as drafted, was overbroad and therefore was contrary to Georgia public policy as Georgia applies strict scrutiny to restrictive covenants in employment contracts.[29] The NCA was therefore held unenforceable under Georgia law.[30]

Given the holding in *Keener*, even if the parties had a choice-of-law provision, a Georgia court would likely apply Georgia law to invalidate a pre-litigation jury waiver clause given Georgia’s aversion to these waivers.

Other jurisdictions have similarly refused to enforce choice-of-law clauses on the sole ground that the chosen forum lacked a substantial relationship to the dispute.[31]

Conclusion

Contracting parties seeking to escape jury trials should be aware of the laws in California and Georgia which both reject pre-litigation jury waiver clauses. If the parties wish to apply a law outside of California and Georgia to a contract taking place principally within one of those states, they should use caution as well. In California, the parties may not seek to apply the law of a state that has no substantial relationship to the parties or the transaction.

In Georgia, the parties may not seek to apply the laws of a state where that state's laws would contravene the Georgia public policy against these types of waivers. Given the obstacles to enforcing jury waiver clauses, parties in Georgia and California may wish to avoid juries through some other means, such as arbitration.

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[1] This article does not address jury waivers after litigation has commenced.

[2] However, even jurisdictions that will honor pre-litigation jury waiver clauses may still find the clause unenforceable under the particular factual circumstances. For example, courts will find waivers unenforceable when the entire contract is found invalid, the jury waiver clause was vague, ambiguous, overbroad, or the jury waiver clause is unconscionable as it is buried in the contract, printed too small, or is otherwise too conspicuous.

[3] Alabama: *Mall Inc. v. Robbins*, 412 So. 2d 1197, 1200 (Ala. 1982); Connecticut: *L&R Realty v. Conn. Nat'l Bank*, 715 A.2d 748, 754–55 (Conn. 1998); Florida: *Gelco Corp. v. Campanile Motor Serv. Inc.*, 677 So. 2d 952 (Fla. Dist. Ct. App. 1996); Missouri: *Malan Realty Investors Inc. v. Harris*, 953 S.W.2d 624, 626–27 (Mo. 1997); Nevada: *Lowe Enters. Residential Partners LP v. Eighth Judicial Dist. Court*, 40 P.3d 405, 410 (Nev. 2002); Rhode Island: *R.I. Depositors Econ. Prot. Corp. v. Coffey and Martinelli Ltd.*, 821 A.2d 222, 226 (R.I. 2003); Tennessee: *Poole v. Union Planters Bank NA*, No. W2009-01507-COA-R3-CV, 2010 WL 1404416 (Tenn. Ct. App. April 8, 2010); Texas: *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 132–33 (Tex. 2004); Virginia: *Azalea Drive-In Theatre Inc. v. Sargoy*, 214 S.E.2d 131, 136 (Va. 1975).

[4] Federal: *Telum Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) (“The right to a jury trial in the federal courts is governed by federal law ... [a]greements waiving the right to trial by jury are neither illegal nor contrary to public policy.”); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986) (“The Seventh Amendment right is of course a fundamental one, but it is one that can be knowingly and intentionally waived by contract”).

[5] 444 S.E.2d 799 (Ga. 1994).

[6] 36 Cal. 4th 944 (2005).

[7] *Bank South*, supra, 444 S.E.2d at 800.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 801 (Sears-Collins, J., dissenting).

[11] *Id.*

[12] 448 S.E.2d 450 (Ga. 1994).

[13] *Id.* (Hunt, C.J., dissenting).

[14] *Id.*

[15] *Grafton*, supra, 36 Cal. 4th at 950.

[16] *Id.* at 951.

[17] *Id.* at 955.

[18] *Id.* at 961.

[19] *Id.* at 968, 969 (Chin, J., dissenting).

[20] *Nedlloyd Lines BV v. Superior Court of San Mateo County*, 3 Cal. 4th 459, 464–65 (1992).

[21] *Id.* at 465.

[22] *Id.* at 465 fn. 2.

[23] *Id.*

[24] *Id.* at 467.

[25] *Id.*

[26] *Convergys Corp. v. Keener*, 582 S.E.2d 84, 87 (Ga. 2003). However, the Eleventh Circuit has urged the Georgia Supreme Court to adopt the “better rule” of Restatement § 187(2). *Keener v. Convergys Corp.*, 342 F.3d 1264, 1267 fn.1 (11th Cir. 2003).

[27] *Keener*, *supra*, 342 F.3d at 1267 (citing *Convergys*, *supra*, 582 S.E.2d at 85–86).

[28] *Keener*, *supra*, 342 F.3d at 1268 fn.2.

[29] *Id.* at 1268.

[30] *Id.* at 1268–69.

[31] Mississippi: *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So.2d 954 (Miss. 1999) (refusing to enforce a Texas choice-of-law clause in a contract providing for the dismantlement of an Exxon ammonia plant located in Mississippi and for its shipment and reassembly in Pakistan); Iowa: *Curtis 1000 Inc. v. Youngblade*, 878 F. Supp. 1224 (N.D. Iowa 1995) (anti-competition clause in an Iowa employment contract that contained a choice of Delaware law — chosen law not applied because Delaware had no substantial relationship to contract and because the chose law would be repugnant to a fundamental policy of Iowa); New Hampshire: *CCR Data Systems Inc. v. Panasonic Communications & Systems Co.*, No. CIV. 94-546-M, 1995 WL 54380 (D. N.H. Jan. 31, 1995) (choice of law clause not upheld because chose state had no relationship with the contract or the parties); Louisiana: *Robinson v. Robinson*, 778 So.2d 1105 (La. 2001) (one spouse’s brief residence in a state insufficient connection for a choice-of-law clause pointing to that state in a contract regarding the divisions of marital property — even though Louisiana codification does not require the presence of such a connection).

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