

RESOLUTION 10-11-06

DIGEST

Civil Procedure: Pre-Dispute Jury Waivers

Amends Code of Civil Procedure Section 631 to permit waiver of a jury trial in a commercial dispute by written pre-dispute consent.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolutions 10-12-06 and 10-14-06.

Reasons:

This resolution amends Code of Civil Procedure Section 631 to permit waiver of a jury trial in a commercial dispute by written pre-dispute consent. This resolution should be approved in principle so as to permit the parties, before a dispute arises, to agree to alternative means of resolving any potential dispute outside of the jury system.

In *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, the California Supreme Court invalidated pre-dispute jury waivers in all settings, and invited the legislature to address this issue. Hence, litigants are left with two ways of receiving any determination as to their respective claims. They may either go to the time and expense of utilizing the court's resources by means of proceeding to a jury trial, or they may waive their rights to go through the judicial process and agree to mandatory and binding arbitration, without any rights to appeal. This resolution suggests that, in business contexts, the parties should be permitted to contract, pre-dispute, to resolve their differences via a third option – utilize the court's processes and have a court trial. This option is truly the most protective of both court resources and litigant rights.

Parties may be reluctant to agree to mandatory, binding arbitration. The idea that a single arbitrator may make a decision affecting their rights, and that the decision is binding and without any appeal rights, may persuade parties from agreeing to arbitrate any potential disputes. That would channel all of those litigants into the jury system. The jury system is time-consuming and quite costly. If parties could agree to a jury waiver, they could reduce some of the time and expense associated with preparing for and participating in jury trials, litigation could be significantly streamlined, because the judge handling the matter would also evaluate the facts and make factual and legal rulings and determinations, and the parties would still have all rights to appeal the judge's decision.

Because of the streamlined process, the costs both to the court system and to the business parties involved could be significantly less. Hence, if parties were permitted to enter into such agreements pre-dispute, that could have a significant impact on the cost of the contract, and ultimately the costs for both sides of the transaction in doing business. Consequently, the resolution should be approved.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure Section 631 to read as follows:

- 1 § 631.
- 2 (a) The right to a trial by jury as declared by Section 16 of Article I of the California
3 Constitution shall be preserved to the parties inviolate. In civil cases, a jury may only be
4 waived pursuant to subdivision (d).
- 5 (b) Each party demanding a jury trial shall deposit advance jury fees with the clerk or
6 judge. The total amount of the advance jury fees may not exceed one hundred fifty dollars
7 (\$150) for each party. The deposit shall be made at least 25 calendar days before the date
8 initially set for trial, except that in unlawful detainer actions the fees shall be deposited at
9 least five days before the date set for trial.
- 10 (c) The parties demanding a jury trial shall deposit with the clerk or judge, at the
11 beginning of the second and each succeeding day's session, a sum equal to that day's fees
12 and mileage of the jury, including the fees and mileage for the trial jury panel if the trial jury
13 has not yet been selected and sworn. If more than one party has demanded a jury, the
14 respective amount to be paid daily by each party demanding a jury shall be determined by
15 stipulation of the parties or by order of the court.
- 16 (d) A party waives trial by jury in any of the following ways:
- 17 (1) By failing to appear at the trial.
- 18 (2) By written consent, including a pre-dispute consent executed by business parties
19 as part of the parties' commercial agreement, filed with the clerk or judge.
- 20 (3) By oral consent, in open court, entered in the minutes.
- 21 (4) By failing to announce that a jury is required, at the time the cause is first set for
22 trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set
23 without notice or stipulation.
- 24 (5) By failing to deposit with the clerk, or judge, advance jury fees as provided in
25 subdivision (b).
- 26 (6) By failing to deposit with the clerk or judge, at the beginning of the second and
27 each succeeding day's session, the sum provided in subdivision (c).
- 28 (e) The court may, in its discretion upon just terms, allow a trial by jury although
29 there may have been a waiver of a trial by jury.
- 30 (f) For purposes of clause (d)(2) above:
- 31 (1) Business parties specifically exclude, without limitation, consumers acting in
32 such capacity, natural persons renting a residence, and employees and independent
33 contractors contracting their personal services as natural persons or through personal service
34 entities.
- 35 (2) Commercial agreements specifically include, without limitation, contracts
36 between distributors and other resellers of goods and services, and specifically exclude,
37 without limitation, contracts between retailers and natural persons.
- 38 (g) By amending subdivision (d)(2), it is the intent of the Legislature to supersede the
39 decision of the California Supreme Court in *Grafton Partners v. Superior Court*, 36 Cal.4th
40 944 (2005).

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: In *Grafton Partners v. Superior Court*, (2005) 36 Cal.4th 944 (“*Grafton*”), the California Supreme Court invalidated pre-dispute jury waivers, given the lack of statutory authorization for them, and invited legislative action to address the issue.

This Resolution: This resolution would address the lack of statutory authorization and would expressly authorize pre-dispute jury waivers in commercial settings.

The Problem: In *Grafton* the California Supreme Court invalidated pre-dispute jury waivers in all settings, including sophisticated commercial settings, and invited legislative action to address the issue. As a result, parties to a sophisticated commercial transaction, who do not believe that their disputes should be decided by a jury, are forced to choose between arbitration, without meaningful right of appeal, and the possibility that a jury will decide their disputes. Additionally, without the right to avoid a jury contractually, sophisticated commercial parties who would prefer not to have a jury as fact-finder may be forced to elect arbitration as their dispute resolution mechanism, thereby incurring relatively high arbitration fees and suffering unappealable awards that may be arbitrary or capricious.

Since sophisticated parties generally are advised by counsel and otherwise are capable of weighing the costs and benefits of their decisions, no reason exists to deprive commercial contracting parties from the right to make these types of pre-dispute decisions.

This resolution would provide greater contractual freedom to sophisticated commercial parties in their choice of a dispute resolution mechanism. This resolution will not affect the right of consumers to wait until the time a dispute arises to choose between a judge and a jury.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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