

## RESOLUTION 10-14-06

### DIGEST

#### Jury Trial: Waiver by Contract

Amends Code of Civil Procedure section 631 to provide for pre-dispute contractual waiver of the right to trial by jury.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History:

This resolution is similar to Resolutions 10-11-06 and 10-12-06.

#### Reasons:

This resolution amends Code of Civil Procedure section 631 to provide for pre-dispute contractual waiver of the right to trial by jury. This resolution should be disapproved because it does not have sufficient safeguards to assure that waiver of the right to a jury trial is the clear intent of each of the contracting parties.

The right to a trial by jury, as provided by section 16 of Article 1 of the California Constitution, is an important right which “shall be preserved to the parties inviolate.” Pre-dispute contractual arbitration clauses, which necessarily include a waiver of the right to trial by jury, are required by statute to be in specific formats and of specified prominence in various consumer-related contexts. Contrary to arbitration clauses, jury waiver clauses serve no recognized California public policy. The court in the proponent’s cited authority, *Trizec Properties, Inc. v. Superior Court of Los Angeles County* (1991) 229 Cal.App.3d 1616, found that to be valid and enforceable, jury waiver clauses must be “clearly apparent,” unambiguous, and leave no room for doubt as to the intention of the parties; and that the right to a trial by jury will not be taken away from a party who unknowingly signs a document purporting to exact such a waiver.

Unlike Resolution 10-11-06, this resolution does not restrict its applicability to contracts between merchants; and unlike Resolution 10-12-06, this resolution does provide that the parties must separately initial a jury waiver provision. This resolution’s requirement that the parties separately initial the jury waiver provision is not, however, a sufficient safeguard.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure § 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 filed with the clerk or judge.

19 (3) By oral consent, in open court, entered in the minutes .

20 (4) By failing to announce that a jury is required, at the time the cause is first set for  
21 trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set  
22 without notice or stipulation.

23 (5) By failing to deposit with the clerk, or judge, advance jury fees as provided in  
24 subdivision (b).

25 (6) By failing to deposit with the clerk or judge, at the beginning of the second and  
26 each succeeding day's session, the sum provided in subdivision (c).

27 (7) By a written contract which forms a basis for the action to be tried in which all  
28 parties to the contract expressly waive the right to trial by jury by separately initialing that  
29 portion of the contract providing for the waiver of trial by jury.

30 (e) The court may, in its discretion upon just terms, allow a trial by jury although  
31 there may have been a waiver of a trial by jury.

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

PROPONENT: Orange County Bar Association

#### STATEMENT OF REASONS

Existing Law: Existing law sets forth the ways in which a litigant can validly waive trial by jury.

This Resolution: This resolution adds Subsection (d)(7) to specify that parties to a written contract can validly waive their right to trial by jury in the contract, as long as the waiver provision is separately initialed by the parties or their authorized agents.

The Problem: *Trizec Properties, Inc. v. Superior Court* (1991) 229 Cal. App. 3d 1616, 1618-1619, held that parties to a written contract could waive their right to a jury trial. In *Grafton Partners v. Superior Court* (2005) 36 Cal. 4th 944, 956-961 (Cal. 2005), the Supreme Court disapproved *Trizec* and left it to the Legislature to determine when and under what circumstances jury trials could be waived. This ruling has placed in doubt jury waivers contained in thousands of contracts, including many commercial leases. This resolution would resolve the concerns

raised by the court in *Grafton Partners* by specifying that a jury trial waiver in a written contract is valid and enforceable. Although this Resolution would not validate jury waiver provisions in existing contracts, it sets forth a mechanism so that contracts drafted in the future can comply with the statute. In addition, it provides the extra safeguard of an initialed waiver, thereby insuring that the waiver is knowing and understood.

## IMPACT STATEMENT

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

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## COUNTERARGUMENTS

### BAR ASSOCIATION OF SAN FRANCISCO

We believe that the right to a jury trial remains a vital part of our justice system. We do not believe that it is appropriate to allow pre-dispute contractual waivers in situations where there is an inherent inequality in bargaining power. A waiver is an intentional relinquishment of a known right. We do not believe that assent to a waiver of a fundamental constitutional right in an agreement written by one party to a transaction and presented on a take it or leave it basis can be properly said to be either actually intentional or made with the fully informed knowledge required for such a serious decision. We do not believe that the requirement of separate initialing of the waiver clause cures our objections. For these reasons we oppose this resolution and support Resolution 10-11-06, which limits such waivers to business contexts where the parties can be presumed to be on a more equal footing.

### SAN DIEGO COUNTY BAR ASSOCIATION

The proposal does not strike a meaningful balance between the divergent concerns faced by business entities negotiating commercial contracts, on one hand, and consumers presented with form contracts on the other hand.

Under California Constitution Article I, Section 16, the right to a trial by jury is an inviolate right. "Even those jurisdictions permitting predispute waiver of the right to jury trial do not uncritically endorse unregulated freedom of contract; rather, they seek to protect the constitutional right to jury trial with a number of safeguards not typical of commercial law, including requirements that the party seeking to enforce the agreement bear the burden of proving that the waiver clause was entered into knowingly and voluntarily, restrictions on the types of contracts that may contain jury waivers, presumptions against a finding of voluntariness, inquiries regarding the parties' representation by counsel as well as relative bargaining power and

sophistication, and consideration of font size and placement of the waiver clause within the contract.” *Grafton Partners, supra*, 36 Cal 4<sup>th</sup> 944, 965-66.

Requiring the parties to initial the waiver provision does not ensure that a consumer would understand the provision.