

## in this issue:

AUGUST 2005

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## California Edition

A Littler Mendelson California-specific Newsletter

### For The California Supreme Court, Predispute Contractual Waiver of Right to Jury Trial Are Not Enforceable in Civil Actions Under California Law

By Robert S. Blumberg and Ariel D. Weindling

Among the greatest fears of many employers is the chance that a runaway jury could impose a potentially ruinous verdict in a wrongful discharge or harassment matter. Every month the headlines are filled with multi-million dollar jury verdicts. As a consequence, many employers have sought to avoid the great uncertainty which comes with jury trial, while both avoiding the cost of arbitration and retaining the right to appeal which comes from litigating matters in court. They have sought to accomplish these multifaceted goals through the use of predispute jury waivers.

Unfortunately, the California Supreme Court has just foreclosed this option. On August 4, 2005, the California Supreme Court issued a long-awaited decision in *Grafton Partners L.P. v. The Superior Court of Alameda County (PriceWaterhouseCoopers L.L.P.)*, Case No. S123344, and held unequivocally that a predispute contractual waiver of the right to a jury trial is not enforceable in a civil action in California. Although the *Grafton Partners* decision did not come as a surprise to anyone, it will certainly create additional difficulties for California employers trying to avoid the fear which comes from litigating matters in front of a jury.

#### The Facts of *Grafton Partners L.P.*

In March 1999, Grafton Partners L.P. ("Grafton") engaged PriceWaterhouseCoopers L.L.P. ("PwC") to audit certain accounts belonging to two of Grafton's partnerships. PwC's engagement letter confirming the terms of the retainer agreement contained a provision releasing PwC from liability in the event of misrepresentation by the partnerships' management, and specified that PwC would not be liable to the partnerships except for willful misconduct or fraud. In

addition, the letter contained a waiver which provided as follows:

In the unlikely event that differences concerning [PwC's] services or fees should arise that are not resolved by mutual agreement, to facilitate judicial resolution and save time and expense of both parties, [Grafton and PwC] 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.

On June 27, 2002, Grafton filed a complaint against PwC alleging negligence, misrepresentation, and other causes of action based upon PwC's asserted failure to disclose and its cover up of fraudulent business practices that it discovered during its audit.

On March 19, 2003, Grafton filed a third amended complaint and demanded a jury trial. PwC moved to strike the jury demand based upon the contractual language. Grafton contended that a contractual agreement that is entered into prior to any dispute arising between the contracting parties is not one of the means authorized by statute for parties to a lawsuit to waive their right to have their disputes adjudicated before a jury rather than before a judge. The trial court, relying upon the waiver contained in the engagement letter, granted PwC's motion to strike the jury demand.

Grafton filed a petition for writ of mandate or prohibition in the California Court of Appeal. The court of appeal concluded that a predispute waiver of a jury is not authorized by Code of Civil Procedure section 631,<sup>1</sup> and that only those waivers that are authorized by statute are consistent with article I, section 16 of the California Constitution.<sup>2</sup>

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## The California Supreme Court's Analysis

The California Supreme Court granted PwC's petition for review and held that predispute contractual waivers of the right to jury trial are not enforceable in civil actions under California law.

### ***Waiver of the Right to Jury Trial In a Civil Case Is Permitted Only as Explicitly Authorized by Statute***

The court began its analysis by observing that the right to a civil jury trial is found in the California Constitution. The Constitution provides that in "a civil cause," any waiver of the inviolate right to a jury determination must occur by the consent of the parties to the cause if provided by statute.<sup>3</sup>

The Supreme Court rejected the analysis adopted in *Trizec Properties, Inc. v. Superior Court*, 229 Cal. App. 3d 1616 (1991), the only appellate decision to have found that predispute jury trial waivers were enforceable. In the court's view, the California Constitution does not permit nonstatutory authority for waiver of the right to jury trial. The court further noted that California constitutional history reflects an unwavering commitment to the principle that the right to a civil jury trial maybe 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.

Therefore, the court strongly disapproved the *Trizec* decision because it:

- (1) Failed to acknowledge prior judicial decisions and constitutional history;
- (2) Wrongly drew support from decisions enforcing arbitration agreements and thus, its reasoning was unpersuasive:
  - Unlike predispute jury waivers, predispute arbitration agreements are specifically authorized by statute; and
  - Arbitration agreements are distinguishable from waivers of the right to jury trial in that they represent an agreement to avoid the judicial forum altogether.

### ***Section 631 Does Not Authorize Predispute Waiver of the Right to Jury Trial***

In its opinion, the court also explained that section 631 presupposed a pending action. Consequently, by inference, only persons who already are parties to a pending action may enter into a waiver of jury trial as provided by the statute. The court, adopting the court of Appeal's reasoning in the present case, further noted that "[i]f only parties to a pending action may waive a jury under section 631, then it is logical to conclude that both the execution of the written consent and the filing of that consent must occur during the pendency of the civil action." In addition, the court noted that, the language of section 631(d) strongly supports the inference that both the agreement to waive jury trial and the filing of any such agreement must occur subsequent to the commencement of the lawsuit.

The court further noted that while there is a strong state policy favoring arbitration, there is no comparable state policy favoring court trials in the judicial forum. To the contrary, as pointed out in the court's opinion, there exists a long-standing public policy in favor of trial by jury.

The court also rejected PwC's assertion that its decision should only apply prospectively. In the court's view, no right to obtain a predispute jury trial waiver ever existed, and therefore, there was no reason to apply it prospectively only.

In sum, the court concluded that it was for the Legislature, not the courts, to determine whether and under what circumstances a predispute waiver of jury trial will be enforceable in California. In the meantime, the court held that predispute waivers of the right to a jury trial are not enforceable in civil actions under California law.

## **Consequences of Grafton Partners**

The *Grafton* opinion may have implications not only in California but nationwide. Justice Chin, while reluctantly concurring in the majority opinion, wrote separately in order to urge the Legislature to enact legislation expressly authorizing predispute jury waivers. He argues that barring predispute jury waivers places California at odds with other state and federal jurisdictions, most of which have permitted predispute jury waivers.

In summary, the consequences of the *Grafton* decision include:

- Predispute jury trial waivers are unlawful and unenforceable in California.
- The *Grafton* decision will deny to those who might have acted in reliance upon *Trizec* a benefit that they thought or believed they had the right to obtain, namely a predispute waiver to a jury trial.
- In the employment context, the settled expectations of employers who had entered into waivers in reliance of the *Trizec* decision will be nullified.
- California employers will stand alone in being unable to enforce predispute waivers of the right to jury trial.
- *Grafton* will not affect parties' rights to elect to waive a jury trial (as per section 631) and have the matter determined by the court *once a dispute has arisen between them*.
- Even employees who previously waived their jury trial rights will now be able to file suit and obtain a trial by jury in court.
- The only way to avoid a jury trial in a predispute agreement is by implementing an arbitration agreement with legally enforceable provisions in California. See *The California Supreme Court Permits Mandatory Arbitration of California Statutory Employment Discrimination Claims as Long as Procedural Safeguards Are Met* [http://www.littler.com/nwsltr/asap\\_armendariz.html](http://www.littler.com/nwsltr/asap_armendariz.html).

## **Post-Grafton Partners' Recommendations**

All employers with California-based employees should analyze and re-evaluate their policies regarding predispute jury waivers to ensure that such waivers are not sought from California employees. Employers wishing to avoid the uncertainty of a jury trial should reconsider whether implementing an enforceable arbitration agreement better serves their needs.

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**1** Section 631 (d) of the California Code of Civil Procedure provides in pertinent part: "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).

**2** Article I, Section 16 of the California Constitution provides in pertinent part: "Trial by jury is an inviolate right and shall be secured to all, [...] In a civil cause a jury may be waived by the consent of the parties expressed by prescribed by statute."

**3** *Id.*