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## California Court of Appeal Rules that Contractual PreDispute Waivers of Jury Trials are Not Enforceable

By Carl R. Sanchez and Teri E. O'Brien

On February 6, 2004, the California Court of Appeal ruled in *Grafton Partners LP v. Superior Court*<sup>1</sup> that contractual predispute jury waiver provisions are unenforceable in civil actions under California law. A predispute jury waiver provision, quite common in commercial contracts, essentially waives a party's right to a jury trial if a dispute arises under the contract and relegates disposition of the dispute to a court trial. The Grafton Court's ruling, which set aside a Superior Court ruling enforcing a jury waiver provision, effectively invalidates existing predispute jury waivers in commercial contracts governed by California law, even if such contracts were entered into prior to February 6, 2004. Perhaps even more troubling is the proposition that parties to commercial transactions are no longer able to guarantee that disputes that may arise under a contract will be heard and decided by a jury of their peers.

### Jury Trials May Be Waived Only as Prescribed by Law

The case arose out of an engagement letter between Grafton Partners LP (and certain other parties) ("*Grafton*") and PricewaterhouseCoopers LLP ("*PwC*"). The engagement letter contained the following standard jury waiver provision: "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, [the parties] 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."<sup>2</sup> Grafton later brought an action against PwC alleging breach of contract and other causes of action and demanded a jury trial. PwC moved to strike the demand based on the jury waiver provision contained in the engagement letter. Grafton opposed

PwC's motion on the grounds that, "predispute jury waivers are not authorized by statute and, therefore, are invalid under ... the California Constitution."<sup>3</sup>

The Superior Court granted PwC's motion, striking Grafton's demand for a jury trial. In granting PwC's motion, the Superior Court relied on *Trizec Properties, Inc. v. Superior Court*,<sup>4</sup> in which the California Court of Appeal enforced a predispute jury waiver contained in a commercial lease, concluding that the California Constitution "cannot be read to prohibit individuals from waiving, in advance of any pending action, the right to trial by jury in a civil case."<sup>5</sup> The Court of Appeal in *Trizec* reasoned that the interests of contracting parties and the "overburdened judicial system" are best served by providing parties to commercial transactions with "advance assurance that any disputes that may arise will be subject to expeditious resolution in a court trial."<sup>6</sup>

### The California Court of Appeal Sets Aside the Superior Court's Order

The Grafton Court set aside the Superior Court's order based on legislative history and the plain language of Section 631(a) of the California Code of Civil Procedure, which provides that, "[I]n civil cases, a jury may *only* be waived pursuant to subdivision (d)."<sup>7</sup> Subsection (d) identifies six ways in which a party to a civil action may waive its right to a trial by jury: (1) By failing to appear at the trial; (2) By written consent filed with the clerk or judge; (3) By oral consent entered in the court record; (4) By failing to timely announce that a jury is required; (5) By failing to deposit advance jury fees with the clerk or judge; or (6) By failing to timely deposit prescribed amounts with the clerk or judge.<sup>8</sup> Based upon its analysis, the Grafton Court held that, "the right to a civil jury trial may be waived only as

the Legislature [expressly] prescribes, even in the face of concerns that the interests of the parties and the courts would benefit from a relaxation of this requirement.”<sup>9</sup> As the Legislature did not expressly prescribe a predispute waiver as a means of waiving a jury trial, the Grafton Court concluded that such a waiver violates the California Constitution, which guarantees the right to a jury trial in civil cases, except as prescribed by law.<sup>10</sup> The Grafton Court reasoned that Trizec was wrongly decided, as the Trizec court failed to engage in a thorough statutory analysis and, instead, based its holding entirely on a balancing of policy factors that it considered determinative.<sup>11</sup>

In making its determination, the Grafton Court rejected three arguments raised by PwC. First, PwC argued that by filing a copy of the written waiver with the clerk as an exhibit to its motion to strike the Petitioners’ demand for a jury trial, it complied with Section 631(d)(2), which provides that a trial by jury may be waived “[b]y written consent filed with the clerk or judge.”<sup>12</sup> PwC argued that nothing in the statute explicitly provides that the waiver must be executed prior to the commencement of a civil lawsuit.<sup>13</sup> The court rejected this argument in reliance upon the California Supreme Court’s holding in *Madden v. Kaiser Foundation Hospitals*,<sup>14</sup> that “only parties to a pending civil action may utilize the jury waiver methods set out in Section 631.”<sup>15</sup> The Grafton Court reasoned that “[I]f only parties to a pending action may waive a jury trial 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.”<sup>16</sup>

PwC also relied on Section 1281 of the California Arbitration Act, which permits parties to waive a jury trial by entering into an agreement to arbitrate before any dispute has arisen.<sup>17</sup> PwC argued that the right to enter into a predispute jury waiver is implicit in the language of the California Arbitration Act.<sup>18</sup> Citing *Madden v. Kaiser Foundation Hospitals*, the Grafton Court concluded that “[T]he Legislature’s authorization of agreements to resolve disputes in a *nonjudicial* forum, which leads to the loss of a package of procedural rights, does not necessarily imply approval of agreements to modify the *judicial* forum to eliminate one of those rights.”<sup>19</sup>

Finally, the Grafton Court rejected PwC’s argument that by codifying the freedom to contract in Sections 1549, 1550 and 1556 of the

California Code of Civil Procedure, the California Legislature authorized a method by which parties may validly waive their right to a jury trial in a civil action.<sup>20</sup> The Grafton Court reasoned that “it would be illogical to conclude that the Legislature intended the very broad grant of contractual authority in the Civil Code to permit an alternative means for jury waivers, when the specific code provision devoted to that subject matter, Code of Civil Procedure Section 631, is expressly designated as the sole authority for such waivers.”<sup>21</sup>

## What the Decision Means

The Grafton Court’s decision has significant implications in that it renders existing jury waiver provisions, even if received as part of a bargained-for exchange in an arms-length commercial transaction, unenforceable under California law. This is the case even if such contracts were entered into prior to February 6, 2004, the date of the Grafton Court’s ruling.

As a result of the Grafton Court’s ruling, parties seeking to avoid a jury trial must opt out of the judicial forum entirely by agreeing in advance to arbitrate any disputes that may arise under the contract. Judicial history tells us that predispute arbitration agreements will be strictly enforced. If the parties opt for arbitration, certain mandatory arbitration language, carefully tailored in order to achieve the desired result, should be added to the relevant contract. Arbitration language should specify the precise manner in which any disputes that may arise will be resolved, including, without limitation: (i) the rules that will govern the arbitration; (ii) who will conduct the arbitration and how such person or persons will be chosen (including any required credentials); (iii) where the arbitration will be held; and (iv) which party will be responsible for paying fees and costs associated with the arbitration. It is important that the parties fully understand the implications associated with each choice that is made.

Each transaction must be considered individually and the treatment implemented in the case of one transaction may not be appropriate for another transaction. In addition, as the facts and circumstances change, the appropriate arbitration language to include in any particular document will need to be tailored to fit the particular situation. The attorneys in our Mergers & Acquisitions Group have a broad range of experience drafting and negotiating arbitration provisions, and are available to assist you.

## Notes

1 Grafton Partners LP v. Superior Court, 9 Cal. Rptr. 3d 511 (2004).  
2 Id. at 513.  
3 Id.  
4 229 Cal. App. 3d 1616, 280 Cal. Rptr. 885 (1991).  
5 Id. at 1618, 280 Cal. Rptr. at 886.  
6 Id. at 1618-19, 280 Cal. Rptr. at 887.  
7 Cal. Civ. Proc. Code § 631(a) (emphasis added).  
8 Cal. Civ. Proc. Code § 631(d).  
9 Grafton Partners LP v. Superior Court, 9 Cal. Rptr. 3d 511, 515-16 (2004).  
10 Id. at 516.

11 Id. at 513 and 516.  
12 Id. at 517.  
13 Id.  
14 17 Cal.3d 699, 131 Cal. Rptr. 882, 552 P.2d 1178 (1976).  
15 Grafton, 9 Cal. Rptr. 3d at 517.  
16 Id.  
17 Cal. Arbitration Act § 1281.  
18 Grafton, 9 Cal. Rptr. 3d at 520.  
19 Id.  
20 Id.  
21 Id.

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