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California Court of Appeal Holds That Forum Selection Clauses Are Not Enforceable in Contracts That Also Contain Jury Trial Waivers

11 November 2019

A recent decision of the California Court of Appeal held that California courts should not enforce forum selection clauses in contracts that also contain a jury trial waiver. For clients with California ties, this could substantially complicate their ability to litigate with investors, counterparties and customers in a forum of their choice.

In 2005, the California Supreme Court held that California state law does not permit a pre-dispute contractual waiver of the right to jury trial.¹ A jury trial can be waived by selecting a nonjury forum authorized by statute, such as arbitration² or a trial by referee.³ A waiver can also occur through various procedural acts after a case is filed.⁴ But the parties to an agreement cannot validly decide in advance that any dispute will be resolved in only a court trial.

California courts will, however, enforce forum selection and choice of law clauses.⁵ A “forum selection clause is presumed valid and will be enforced unless the plaintiff shows that enforcement of the clause would be unreasonable under the circumstances of the case.”⁶ Similarly, a choice of law clause will be respected so long as there is a substantial connection to the state selected or some other reasonable basis for the selection.⁷

There is, however, an exception to presumptive enforceability: “California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state’s public policy.”⁸ Along the same lines, a choice of law clause will not be enforced if the chosen state’s law is contrary to

a fundamental policy of California and California has the materially greater interest in enforcement.⁹

On October 31, 2019, the non-waiveability of the jury trial right and the public policy exception to forum and law selection collided in a decision by the California Court of Appeal, the state's intermediate appellate court. In *Handoush v. Lease Finance Group, LLC*,¹⁰ the court refused to enforce a contractual selection of New York forum and law because the contract also contained a jury trial waiver that would likely be upheld by a New York court.

According to the court, California law recognizes the right to jury trial as “fundamental,” “inviolable” and “sacred,” and will not permit its waiver in a pre-dispute contract. The court recognized that the prior California cases that refused to enforce forum selections on public policy grounds addressed unwaivable *substantive* statutory rights.¹¹ The California jury trial right, on the other hand, is likely procedural. But the court nonetheless determined that it could not be vitiated through a contractual choice of venue. Quoting a federal case, the court reasoned that the jury trial right is “intimately bound up with the state’s substantive decision making and it serves substantive state policies of preserving the right to a jury trial in the strongest possible terms, an interest the California Constitution zealously guards.”

Handoush concerned a tobacco store owner’s claim that an equipment rental company defrauded him over his lease of a credit card processing machine. But the decision is potentially more far-reaching. Clients desiring to ensure a non-California forum may need to forego jury trial waivers in their agreements.

This should be an easy choice for certain Delaware law agreements that are likely to be litigated in the Court of Chancery – an equity court with no juries. There, jury waivers are largely redundant. Recent California decisions have enforced forum selection bylaws, even when the selected forum was the Court of Chancery, in the absence of a jury waiver.¹² For other agreements, however, the price of avoiding a California forum for claims filed by California residents might require foregoing a jury trial waiver or selecting an alternative dispute resolution procedure such as arbitration.

1. *Grafton Partners v. Superior Court*, 36 Cal. 4th 944 (2005).↵

2. Cal. Code Civ. Proc. § 1281.↵

3. Cal. Code Civ. Proc. § 638.↵

4. Cal. Code. Civ. Proc. § 631.↵

5. *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 494 (1976).↵

6. *Intershop Commc'ns v. Superior Court*, 104 Cal. App. 4th 191, 198 (2002).↵

7. *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 466 (1992).↵

8. *Am. Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 12 (2001).↵

9. *Nedlloyd*, 3 Cal. 4th at 466.↵

10. No. A150863 (1st Dist., Div. 3 Oct. 31, 2019).↵

11. See *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 147 (2015) (contract “purport[ed] to waive the unwaivable wage and hour protections the Labor Code provides to all California employees”); *Am. Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 17 (2001) (forum selection risked non-application of unwaivable provisions in the Consumer Legal Remedies Act); *Wimsatt v. Beverly Hills Weight etc. Internat., Inc.*, 32 Cal. App. 4th 1511, 1520 (1995) (choice of forum risked non-application of an “antiwaiver statute which voids any provision in a franchise agreement which waives any of the other protections afforded by the Franchise Investment Law”); *Hall v. Superior Court*, 150 Cal. App. 3d 411, 418 (1983) (choice of forum risked non-application of anti-waiver provisions in the Corporate Securities Act of 1968).↵

12. *Drulias v. 1st Century Bancshares, Inc.*, 30 Cal. App. 5th 696, 703 (2018).↵

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