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Enforceability of Jury Waiver Provisions in Federal Court

By David Graff and Christopher Paolino

When asserted in federal court, the right to a jury trial is governed by federal law. Since the right to a jury trial is fundamental and highly favored, an express contractual waiver of a jury trial is strictly construed and is not lightly inferred or extended. Indeed, the U.S. Supreme Court has repeatedly held that the right to a jury trial is fundamental, and therefore courts must indulge every reasonable presumption against waiver. Thus, courts have held that, in order to be valid and enforceable, a contractual waiver of a jury trial must be made “knowingly and voluntarily.”¹

Moreover, given the presumption against waiver, the majority of circuits have held that the party seeking to enforce a jury waiver provision has the burden of proving that consent

to the provision was knowing and voluntary. More often than not, the party seeking to enforce a jury waiver provision is the party responsible for drafting the governing contract, lending further credence to placing the burden of proof on that party. To that end, that party can prepare to meet its burden by careful drafting of the provision, conspicuous presentation, and preparation of a record that the provision was explained and reviewed, as set forth below.

Courts undertake a fact-intensive analysis that considers various factors to determine whether the waiver was made knowingly and voluntarily. In general, the analysis looks at (1) whether the waiver provision was conspicuously placed in the contract, and (2) the facts surrounding the contract negotiations.

David Graff is a shareholder in the New York office of Anderson Kill and co-chair of the firm’s Corporate and Commercial Litigation group. Mr. Graff counsels his clients across the full spectrum of their business needs, including commercial litigation and arbitration, corporate and transactional work, and estate and succession planning. He prosecutes and defends all aspects of commercial disputes, including breach of contract, fraud, fraudulent conveyances, fiduciary duty, business tort, employment matters and securities litigation.

212-278-1333 | dgraff@andersonkill.com

Christopher Paolino is an attorney in Anderson Kill’s New York office, where he concentrates his practice in corporate and commercial litigation as well as corporate and transactional work. He has played an integral role in case development, research, and drafting of key documents in cases involving alcoholic beverage, securities, general financial services, construction, debt service, and real estate.

212-278-1752 | cpaolino@andersonkill.com

Whether the Waiver Provision Was Conspicuously Placed in the Contract

As to whether the provision is conspicuous, courts consider a variety of textual arguments that analyze not only the provision itself, but also its relationship to the rest of the agreement. For example, courts consider whether the jury waiver provision is in fine print or in large or bold print. A provision is considered more conspicuous to the reader if it is in all capital letters and/or in bold font. However, if the contract contains numerous other provisions in all capitals and/or bold font, the jury waiver provision loses its noticeability.

A jury waiver provision is also more conspicuous if it is contained in a paragraph of its own, instead of being included within a general provision addressing the waiver of various other rights. Jumbling multiple waivers together makes the jury waiver more susceptible to going unread or unappreciated. The section's heading should clearly indicate that the parties are waiving their right to a jury trial, using language such as "Waiver of Jury Trial."

Courts consider the length of the contract, and the lengthier the contract, the more likely a jury waiver provision will go unnoticed. Case law indicates that contracts and accompanying schedules that are longer than 20 pages make jury waiver provisions more susceptible to going unnoticed.

The waiver provision should also include language that at least tracks the standard that courts will apply, such as:

The borrowers hereby knowingly, voluntarily and intentionally waive any right they may have to a trial by jury.

In addition, the provision should include language expressing that the waiver is a "material inducement" to enter into the business relationship, such as:

The borrowers acknowledged that the bank has been induced to enter into this agreement by, *inter alia*, (i.e., this provision).

The provision should also include an assertion that:

The parties warrant and represent that they have had the opportunity to review this jury waiver with legal counsel.

The court's conspicuousness analysis is centered on whether the contracting party actually read the provision. Thus, it is critical to create a record showing that the provision was explained and reviewed, for example by requiring it to be signed or initialed. If the party seeking to enforce the waiver is a corporation, such as a bank, it should implement internal protocols requiring employees to indicate that they reviewed the jury waiver with the other contracting party, thereby creating a business record. Failure to create such a record opens the door for arguments that the jury waiver provision went unnoticed or unappreciated.

The Factual Circumstances Surrounding the Negotiations of the Contract

As to the negotiations of the contract, courts consider whether the parties were manifestly unequal in bargaining power. In the context of a loan agreement, a borrower may be experiencing financial hardship and in desperate need of financing from a bank. If the loan agreement is considered to be a take-it-or-leave-it, nonnegotiable contract or if the jury waiver was not the subject of negotiations, the borrower's waiver may be considered involuntary and unenforceable. Using a standardized form agreement, as opposed to a newly drafted document, supports the proposition that a contract is nonnegotiable.

If the waiving party is a sophisticated businessperson, it is presumed they read and understood the contract. However, if the party seeking a jury trial has no legal background and does not appreciate or is not aware of the legal consequences of the waiver, his or her level of sophistication becomes less relevant. Moreover, the party seeking a jury trial may not have been the individual responsible for negotiating and reviewing the contract. For example, the person negotiating the contract may have been an employee or representative of the party, and the analysis should focus on that individual's sophistication. Also important is determining whether there was

an opportunity to review all of the terms of the contract and whether the waiving party did so.

If the waiving party is represented by counsel, it is expected that the counsel would represent the rights of the party. However, courts are reluctant to hold that an attorney may waive his or her client's substantial rights, such as the right to a trial by jury, without the client's consent. It is difficult for the party seeking to enforce the waiver to discover those communications (i.e., between the other party and his or her attorney), as they are subject to attorney-client privilege.

Best Practices in Drafting, Negotiating and Executing a Contract with a Jury Waiver Provision

To ensure the enforceability of jury waiver provisions, a party should follow certain best practices in line with the above considerations when drafting, negotiating and executing the contract. The following checklist provides guidelines to protect the enforceability of jury waiver provisions:

- Place the jury waiver provision in a separate paragraph on its own.
- Use all capital letters and/or bold font and avoid placing the provision next to other provisions that are in all capitals and/or bold.

- Use a heading that clearly indicates the parties are waiving their right to a jury trial.
- Include language in the provision that tracks the standard that courts will apply, and include additional language that strengthens the validity of the waiver.
- Create a record that the provision was explained and reviewed, for example, by requiring that the provision be signed or initialed.
- When using lengthy contracts, take extra steps to create a record establishing that the jury waiver provision was read and reviewed.
- Be prepared to provide an affidavit that establishes that the jury waiver provision was reviewed with the contracting party, if contested by that party. ▲

ENDNOTES

¹ While analogizing jury waiver provisions to arbitration provisions appears instructive, the analogy is imperfect. The fundamental differences in these two types of contractual provisions are the presumptions attached to their enforcement. While, as noted above, courts indulge every reasonable presumption against jury waiver, any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration. Thus, cases analyzing the enforceability of arbitration provisions are significantly less persuasive, and a less useful authority in the context of jury waiver enforcement.

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