How Can an Owner Protect His Company From a Jury of Its "Peers"?
(When Arbitration Isn't the Answer)

By

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For many, the movie *Twelve Angry Men* is an American classic that shows how the jury system is supposed to work. But for Corporate America, 12 angry men (and women) is what they fear they will see when they step into a courtroom. In the movie, Henry Fonda—playing "Juror No. 8"—successfully convinces his fellow jurors to suppress their own prejudices and focus only on the evidence. Unfortunately, life doesn't always imitate art. At one point in time, faster and cheaper arbitration was the smart business decision, and for many, it still is. But while arbitration takes the decision out of the hands of 12 potentially angry people, it is not always fast, it can be as expensive as traditional litigation, and then there's the difficulty of overturning a bad result. So if arbitration isn't for you, but the prospect of facing 12 angry jurors also keeps you up at night, what can you do to protect your business before a dispute arises? The answer may be a lot easier than you think.

Beginning in the 1970s, parties began litigating more frequently the issue of whether contractual jury waivers were enforceable. Seems a strange issue. Surely everyone knows even criminal defendants can waive their right to a jury. But contractual jury waivers differ in two significant respects. First, when a criminal defendant waives his right to a jury trial, he's already in litigation. Second, he usually does so with his attorney present. On the other hand, when parties sign a contract, litigation is usually the last thing on their minds, and oftentimes at least one side is not represented by counsel. Thus, as the name implies, a contractual jury waiver is a party's agreement to waive its right to a trial by jury in advance of a dispute related to the contract.

After almost 30 years of litigation, nearly every state and federal court to consider this issue has ruled that they are not *per se* unenforceable, meaning they are typically enforced unless there's a good reason not to, like when there's overreaching. Today, jury waivers are enforced in a variety of contracts—from sophisticated transactions, to business and even consumer loans, to residential leases. Several states, including Alabama, California, Connecticut, Florida, Louisiana, Massachusetts, Missouri, Nevada, New York, New Jersey, Ohio, South Carolina, Texas Utah and Virginia enforce so-called pre-dispute jury waivers. Georgia, however, stands alone in refusing to enforce these. Georgia is actually a bit schizophrenic: it will enforce a jury waiver if the parties' contract is governed by the law of another state and that other state would enforce the waiver, but it will not enforce a waiver if the parties' contract is governed by Georgia law. (Apparently Georgia finds the right to a jury trial fundamental unless another state doesn't think a jury trial is all that fundamental.)

Still, even in those courts that enforce pre-dispute jury waivers, it's a balancing act. Like anything else in the law, the question is one of degree. Generally, the first question asked by the court is, "Was the waiver given voluntarily?" This means did the party give it knowingly and intelligently. In other words, did it know and understand the effect of the waiver? There's a good chance a court will find a waiver was not given voluntarily if your opponent never saw it. Therefore, it's important that the jury waiver reasonably attract the attention of the other party and be written in words a normal person should understand.

There are other drafting considerations a judge will likely consider when he decides whether your jury waiver should be enforced, and the rest of this article focuses on some of those issues.

Some Basic Drafting Tips

Don't bury the jury waiver in the middle of a lengthy contract. Your jury waiver is more likely to be enforced if it is set off by all caps and in bold print, or found in a paragraph with a heading that reads something like, "Waiver of Right to Jury Trial," or "Surrender of Important Rights." Even better, your contract should also include a signature line next to the waiver for the party to initial her acknowledgement of having read and understood the waiver. A jury waiver is more likely to be enforced if it's a mutual waiver, *i.e.*, where both sides agree to waive a jury trial, than is a unilateral waiver, *i.e.*, where the person you don't want in front of the jury is the only one who is bound by the waiver. (Keep in mind, a waiver can be written unilaterally, even though both parties signed the contract.) Some courts call unilateral waivers overreaching, so it's probably better that the waiver be written bilaterally. After all, if the reason you don't want the other side in front of a jury is because you don't expect to find "Juror No. 8" there, then why not just make the waiver a mutual one?

Put the Burden of Proof on Your Opponent

There are other things you can do to ensure the waiver will have its desired effect. For instance, one matter courts struggle over is whose burden is it to prove the waiver was given voluntarily. Some courts say it's the party who doesn't want a jury. Others say it's the party who wants the jury. Make it easier on the court by having your waiver include language allowing you to attach the waiver to your motion as "conclusive proof" that the waiver was given knowingly and intelligently. Most courts don't take "conclusive proof" literally. For instance, that issue was addressed by a Houston court of appeals in *In re Wells Fargo*.[1] The court there ruled that, because the bank "introduced this conclusive evidence that the waivers were knowing and voluntary, the burden shifted to the [borrowers] to show they were not knowing and voluntary." Logically, it makes sense that the burden should be on the party who wants a jury. After all, only she knows what she knew when she signed the contract, but because the right to a jury trial is fundamental, some courts still require the party who doesn't want the jury to prove the waiver was given voluntarily. By including language like this, you can satisfy your burden and shift it to your opponent.

The Waiver Should Cover All Potential Claims and Parties

A good jury waiver should make it clear that the parties are waiving their right to a jury for any claim or counterclaim "arising out of or in connection with" the underlying contract. For instance, in making a loan, a lender probably considers the possibility of filing a lawsuit if the borrower defaults, but he may not consider a counterclaim from the borrower. If your jury waiver is not all-encompassing, you may end up facing 12 angry jurors on the borrower's claim. The "arising out of" language also evinces a degree of reasonableness as to the scope of the waiver. Stated differently, it's probably unreasonable for a jury waiver to encompass negligent conduct unrelated to the parties' agreement, but quite reasonable for the waiver to encompass negligent conduct arising out of that contractual relationship. For instance, after a bank customer signs an agreement that has a jury waiver, she is seriously injured when the bank's armored car runs a red light and strikes hers. It would be unreasonable for the scope of the waiver to include that accident. On the other hand, suppose the customer claims the bank's wrongful foreclosure injured her reputation? Probably that claim should be covered by an all-encompassing waiver.

For the same reason, all potential parties should sign the waiver. This may seem like a no-brainer, but consider this. A partnership, by and through its general partner, signs a loan agreement that contains a caveat that the G.P. could be liable, but only if there was fraud in procuring the loan. If the bank later sues the G.P. for fraudulently submitting false documents to get the loan (conduct clearly "arising out of" the agreement), will the G.P. be bound by your jury waiver? The *Wells Fargo* court said it was, but make it easy by having the G.P. sign the waiver in its own name.

The Belt-and-Suspenders Jury Waiver

You may wonder whether a jury waiver is necessary if the rules of procedure in your state limit a party's right to a jury trial in certain cases. Absolutely, because procedural rules don't cross state lines. The *Wells Fargo* case involved a real estate loan secured by an apartment complex in Louisiana. The general *procedural* rule in Louisiana is that if a bank sues its borrower, the case will be tried without a jury. So what happens when the defendant moves to another state and is sued in that other state? Because Louisiana's procedural rules don't apply (even if the parties chose Louisiana law to govern their dispute), the defendant would now have the right to a jury trial absent a well-written, binding jury waiver.

Use It or Lose It!

The *Wells Fargo* case wasn't the first Texas case to consider whether these waivers are valid. In 1993, the Texas Supreme Court faced the same issue, but refused to consider it because the party who didn't want the jury waited too long (four months after the other side requested a jury). The court based its decision on rules peculiar to Texas appellate practice, but it was rooted in a concept familiar to all courts—fairness. The moral of the story: if you really don't want to face 12 angry men, be sure your outside law firms are aware of your contracts' jury waiver language and if the other side requests a jury, they should move to enforce the waiver immediately.

Careful drafting is the key to an enforceable, pre-dispute jury waiver. Make sure the language is noticeable to a reasonable person and don't draft it in legalese. Have a space for the other party to initial next to the jury waiver. It should cover any claim that could arise out of the parties' contractual relationship, and everyone should sign it in their own name. Make it easier on the court by including language permitting you to file a copy of the waiver as proof that it was given voluntarily. And above all, use it . . . because "Juror No. 8" exists only in the movies.

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