

## Texas Supreme Court Clarifies Enforceability of Contractual Jury Waivers

The Texas Supreme Court issued an important decision last month, clarifying the enforceability of contractual jury waivers under Texas law. In *In re Bank of America, N.A.*, the Court held that a contractual waiver of a jury trial does not create a presumption against waiver, or place a burden on the party seeking enforcement to prove the opposing party knowingly and voluntarily agreed to waive his or her right to a jury trial. Employers should take particular note of this decision, as jury waiver provisions are appearing in employment and services contracts with increasing regularity.

In 2004, the Texas Supreme Court held that contractual jury waivers are enforceable, so long as they are entered into knowingly and voluntarily. In *re Prudential*, 148 S.W.3d 124 (Tex. 2004). Following *Prudential*, a disagreement arose among the courts as to whom bears the burden of proving the jury waiver was entered into knowingly and voluntarily. In *Mikey's Houses, LLC v. Bank of America, N.A.*, the Fort Worth Court of Appeals imposed this burden on Bank of America, the party seeking to enforce the jury waiver, by inferring a presumption against contractual jury waiver. According to the appellate court, the jury waiver was presumed to be invalid unless Bank of America could prove Mikey's Houses entered into the waiver knowingly and voluntarily. Bank of America appealed this decision to the Texas Supreme Court, which in turn held that as long as there is a conspicuous waiver provision, the parties to a contract are presumed to know what they are signing. Accordingly, there is no presumption against contractual jury waiver, so the party resisting enforcement of the waiver bears the burden of showing the waiver was not entered into knowingly and voluntarily.

*Bank of America* is significant for employers for at least two reasons. First, employers who include jury waivers in employment or services contracts can have confidence that such waivers will be enforced, so long as the other party to the contract knowingly and voluntarily agrees to waive their right to a jury trial. Second, in crafting a contractual jury waiver, an employer should take great care to ensure the waiver is conspicuous. In *Bank of America*, the Court had little trouble finding the waiver at issue was conspicuous, noting that the waiver appeared in the agreement as a separately-spaced paragraph, included a bolded introductory caption, and the words "waiver" and "trial by jury" were underlined. By including a conspicuous, clearly-worded jury waiver in employment and services contracts, employers can protect themselves from a jury trial unless the opposing party can prove the waiver was not entered knowingly and voluntarily.

Jury waivers also present employers with an alternative to mandatory arbitration agreements for those employers who seek to avoid the expense of a jury trial. Judges tend to be more conservative than juries; it is easier to appeal a judge's order than an arbitrator's order, and many of the formalities that make jury trials so expensive are eliminated.

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