

Trends in M&A Provisions: Waiver of Jury Trials

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Jury Trial Waiver Provisions

The Seventh Amendment of the U.S. Constitution guarantees the right to a jury trial for civil litigants in federal court. Most waivers of constitutional rights at the federal level must be knowing, voluntary, and intelligent. [2] In applying this standard, as it pertains to a jury trial waiver, the federal courts normally review, among other things, (1) the negotiability of the transaction terms and, specifically, the negotiations between the parties concerning the jury trial waiver; (2) the conspicuousness of the waiver within the agreement [3]; (3) the parties' relative bargaining power; and (4) the business knowledge of the party opposing the waiver. [4] Under the principles of constitutional law, each state is allowed to decide whether a civil litigant can waive their right to a jury as to state law claims. While the majority of states allow civil litigants the freedom to contractually waive their right to a jury trial, three states — California, North Carolina, and Georgia — have expressly held pre-litigation jury waivers unenforceable. [5] Most state courts in jurisdictions that allow jury trial waivers apply tests generally consistent with the federal test to determine enforceability (i.e., determining whether the waiver was entered into knowingly and voluntarily). [6] However, some state courts apply a more traditional contract-law analysis to determine the waiver's validity (e.g., presuming the contract is valid unless the opposing party can show fraud, duress, or unconscionability). [7]

A jury trial waiver in an M&A purchase agreement means that, prior to any dispute, the parties agree to waive their rights to a jury trial in any dispute arising out of the M&A agreement. Depending upon the scope of the waiver provision some agreements extend the waiver to disputes arising under documents related to the M&A transaction. Courts are split on the issue of which party bears the burden of proving that a jury trial waiver in an M&A purchase agreement was entered into "knowingly, voluntarily and intelligently." Some district courts place the burden on the party seeking enforcement [8], two circuits are split over the issue [9], and most other appellate courts have declined to resolve the question.

Arguments for Including a Jury Trial Waiver Provision

In a negotiation, the arguments for requesting a jury trial waiver provision may include:

1. Jury trials are more costly and time-consuming than bench trials. Procedural requirements like *voir dire* and the submission of jury instructions, which can take weeks of preparation, can be avoided with a waiver provision.
2. Juries are perceived as more sympathetic to individuals or smaller “mom-and-pop” institutions litigating against larger institutions. Judges are perceived as better equipped at focusing on intricate legalities, leaving prejudices and biases out of the verdict.
3. Jury trials are viewed as producing more reversible verdicts due to error than bench trials. This may be due to juries’ perceived propensity to award excessive damages, faults in *voir dire* or jury instructions, or breaches in the heightened evidentiary standards of a jury trial.

Arguments Against Including a Jury Trial Waiver Provision

In a negotiation, the arguments for resisting a jury trial waiver provision may include:

1. The right to a jury trial has been recognized for centuries as an important aspect of our judicial system. Why should any party be asked to waive such an important right?
2. A jury trial waiver may be unenforceable. Although the choice-of-law clause in the M&A purchase agreement may select a jurisdiction that permits waiver, courts may invalidate the parties’ choice-of-law selection if neither the parties nor the transaction has a sufficient relationship with that state.
3. The jury trial waiver provision may itself be the subject of litigation if a party claims that the waiver was entered into involuntarily or unknowingly.

Trends in Usage of Jury Trial Waiver Provisions

Every other year since 2005 the American Bar Association (“ABA”) has released its Private Target Mergers and Acquisitions Deal Point Studies (the “ABA studies”). The ABA studies examine purchase agreements of publicly available transactions involving private companies that occurred in the year prior to each study (and in the case of the 2017 study, including the first half of 2017). These transactions range in size but are generally considered as within the “middle market” for M&A transactions; the average transaction value within the 2017 study was \$176.3 million.

The six most recent (of seven total) ABA studies examined jury trial waiver provisions. [10] These six studies highlight a steady increase of jury trial waiver provisions, which as of the 2017 study, are included in nearly 9 of 10 reported transactions. This is significant considering that in the 2007 study jury trial waiver provisions appeared in only half of the reported transactions.

Conclusion

Today, jury trial waivers are increasingly common in M&A purchase agreements. Determining whether to include a jury trial waiver is an important consideration in M&A negotiations. Especially because the choice may materially impact the outcome of post-closing claims between the parties. Counsel on both sides of an M&A transaction should consider these issues carefully when negotiating an M&A agreement.

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[2] See, e.g., [*Schiro v. Landrigan*, 550 U.S. 465, 484 \(2007\)](#); [*Maryland v. Shatzer*, 559 U.S. 98, 104 \(2010\)](#).

[3] This standard helps explain why jury trial waiver provisions are often bolded or written in an uppercase font within the purchase agreement.

[4] See generally, 8 Moore's Federal Practice Section 38.52 (3d ed.); see e.g., [*Mikey's Houses, LLC v. Bank of Am., N.A.*, 232 S.W.3d 145, 147 \(Tex. App. 2007, orig. proceeding\)](#), mand. granted, *In re Bank of Am., N.A.*, 278 S.W.3d 342 (Tex. 2009).

[5] See [*Bank South, N.A. v. Howard*, 444 S.E.2d 799 \(Ga. 1994\)](#); [*Grafton Partners L.P. v. Superior Court of Alameda Cnty.*, 116 P.3d 479 \(Cal. 2005\)](#); [*N.C. Gen. Stat. § 22B-10*](#) (1993).

[6] See, e.g., [*Bonfield v. Aamco Transmissions, Inc.*, 717 F. Supp. 589, 595 \(N.D. Ill. 1989\)](#) (upholding waiver on grounds it was knowing and intelligent); [*Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court*, 40 P.3d 405, 410 \(Nev. 2002\)](#); [*Malan Realty Investors v. Harris*, 953 S.W.2d 624, 626-27 \(Mo. 1997\)](#); [*In re Prudential Ins. Co.*, 148 S.W.3d 124, 132-33 \(Tex. 2004\)](#).

[7] See, e.g., [*L&R Realty v. Conn. Nat'l Bank*, 715 A.2d 748, 753 \(Conn. 1998\)](#); [*Gelco Corp. v. Campanile Motor Serv.*, 677 So. 2d 952 \(Fla. Dist. Ct. App. 1996\)](#).

[8] See, e.g., *Morris v. McFarland Clinic P.C.*, 2004 WL 306110, at *1 (S.D. Iowa 2004).

[9] See *Chuang, Chester S.*, *Assigning the Burden of Proof in Contractual Jury Waiver Challenges: How Valuable is Your Right to a Jury Trial?*, 10 *Emp. Rts. & Emp. Pol'y J.*, 205 (2006); compare [*Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 \(4th Cir. 1986\)](#) (holding that "the party seeking enforcement of the [jury] waiver must prove that consent was both voluntary and informed"), with [*K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 \(6th Cir. 1985\)](#) (holding that "in the context of an express contractual [jury] waiver the objecting party should have the burden of demonstrating that its consent to the provisions was not knowing and voluntary").

[10] An analysis of jury trial waiver provisions was not included in the 2005 ABA study.