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MERGER AGREEMENTS

Trends in M&A Provisions: Waiver of Jury Trials



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Introduction

In private company mergers and acquisitions (“M&A”) transactions, the definitive purchase agreement (whether asset purchase agreement, stock purchase agreement, or merger agreement) usually includes representations, warranties, covenants and indemnities that survive the closing of the transaction. The purchase agreement also typically includes various provisions that impact the manner in which claims arising in connection with the transaction are to be dealt with, including those relating to choice of law, choice of venue, alternative dispute resolution, and waivers of jury trials. This article examines the use of jury trial waiver provisions in private company M&A transactions, and trends in that usage as reported by American Bar Association (ABA) studies.

The Seventh Amendment of the Constitution guarantees the right to a jury trial for civil litigants in federal

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court. Most waivers of constitutional rights at the federal level must be knowing, voluntary and intelligent.¹ In applying this standard, as it pertains to a jury trial waiver, courts will normally review, among other things, (1) the negotiations between the parties concerning the jury trial waiver, specifically, and the negotiability of the transaction terms, in general; (2) the conspicuousness of the waiver within the agreement;² (3) the parties’ relative bargaining power; and (4) the business knowledge of the party opposing the waiver.³ 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.⁴ Most state courts in jurisdictions that allow jury trial waivers apply tests generally consistent with the federal test described above to determine enforceability (i.e., determining whether the waiver was entered into “knowingly” and “voluntarily”),⁵ although some state courts have adopted a more traditional “contract-law”

¹ See, e.g., *Schiro v. Landrigan*, 550 U.S. 465, 484 (2007); *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010).

² This standard helps explain why jury trial waiver provisions are often bolded or written in an uppercase font within the purchase agreement.

³ 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), mand. granted, *In re Bank of Am., N.A.*, 278 S.W.3d 342 (Tex. 2009) (orig. proceeding).

⁴ See *Bank South, N.A. v. Howard*, 444 S.E. 2d 799 (Ga. 1994); *Grafton Partners v. Superior Court*, 116 P.3d 479 (Cal. 2005); NC Gen Stat § 22B-10.

⁵ 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 LP 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. of Am.*, 148 S.W.3d 124, 132–33 (Tex. 2004).

analysis to determine if the waiver was invalid – e.g., presuming the contract is valid unless the opposing party can show fraud, duress, or unconscionability.⁶

As the name suggests, a jury trial waiver in an M&A agreement means that the parties agree to waive—before any dispute arises—their rights to a jury trial in any dispute arising out of the M&A agreement and, depending upon the scope of the waiver provision, under other documents related to the M&A transaction. Were a dispute to occur, the judge would determine the outcome of the case.

In terms of enforcing the waiver, courts have split on the issue of determining which party bears the burden of proving the waiver was entered into “knowingly, voluntarily and intelligently.” Some district courts have placed the burden of proof on the party seeking enforcement,⁷ two circuits have expressly split over the issue,⁸ and most other appellate courts have declined to resolve the question.

A typical jury trial waiver provision could read as follows:

Each of the Parties hereby waives, to the fullest extent permitted by law, any right to trial by jury of any claim, demand, action, or cause of action (a) arising under this Agreement or (b) in any way connected with or related or incidental to the dealings of the Parties in respect of this Agreement or any of the transactions related hereto, in each case whether now existing or hereafter arising, and whether in contract, tort, equity, or otherwise. Each of the Parties hereby agrees and consents that any such claim, demand, action, or cause of action shall be decided by court trial without a jury and that the Parties may file an original counterpart of a copy of this Agreement with any court as written evidence of the consent of the Parties to the waiver of their right to trial by jury.

Arguments for a Jury Trial Waiver In a negotiation, the arguments for requesting a jury trial waiver provision may take the form of one or more of the following:

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 viewed as being more likely to express their sympathy for individuals or smaller “mom-and-pop” institutions litigating against larger institutions. Judges are perceived to be 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 can be due

⁶ 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).

⁷ See, e.g., *Morris v. McFarland Clinic P.C.*, 2004 WL 306110, at *1 (S.D. Iowa 2004).

⁸ See Chester S. Chuang, *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 Service 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”).

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 a Jury Trial Waiver In a negotiation, the arguments for resisting a jury trial waiver provision may take the form of one or more of the following:

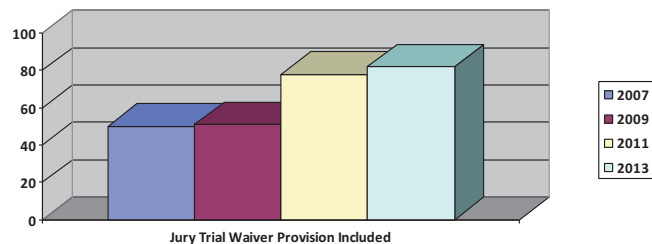
1. The right to a jury trial has been recognized for centuries as a very important aspect of our judicial system. Why should any party be asked to waive such an important right?

2. A jury trial waiver may be unenforceable within the jurisdiction chosen by the parties. Although a choice-of-law clause may be added to the agreement whereby the transaction will be governed by the laws of a state that enforces a jury trial waiver provision, courts may invalidate the choice-of-law if neither the parties nor the transaction has a sufficient relationship with that state.

3. As discussed above, there is potential for the jury trial waiver provision itself to be the subject of litigation, were a party to claim that the waiver was entered into involuntarily or unknowingly.

Trends in Usage of Jury Trial Waiver Provisions In 2005, 2007, 2009, 2011 and 2013, the American Bar Association released its Private Target Mergers and Acquisitions Deal Points Studies. These studies looked at the M&A agreements of transactions that occurred in the year prior to each study. In each year, the studies reviewed 128, 143, 106, 100 and 136 private company transactions, respectively. These transactions ranged in size from \$17 million to \$4.7 billion, across a broad range of industry sectors.

Over the past four studies,⁹ jury trial waiver provisions were included in 82 percent, 78 percent, 51 percent, and 50 percent of the reported agreements, respectively, which reflect a moderate trend to increasingly include the provision and provides clear evidence that the provision is very common in private company M&A agreements. This information is also provided below in chart form.



As is evident from the chart above, jury trial waivers have become an increasingly common provision in M&A agreements over the course of the last several years.

Conclusion Assuming that the ABA studies reasonably reflect general practice in private company M&A transactions, it appears that jury trial waiver provisions are often used in M&A agreements and have become even more common over the study period.

Determining whether or not to include a jury trial waiver is an important consideration in the overall M&A negotiation. That choice may well have a material

⁹ An analysis of jury trial waiver provisions was not included in the 2005 ABA study.

impact on the outcome of post-closing claims between the parties. Counsel on both sides of an M&A transac-

tion should consider these issues carefully when negotiating an M&A agreement.