83086_ICSC-Fall.qxd 12/13/04 2:11 PM Page 9

The Runaway Jury Trial

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Introduction

It is becoming common, in many commercial agreements, including leases, for each party to the agreement to waive its right to a jury trial in connection with any dispute that may arise between them. This is accomplished, in some cases, by agreeing to binding arbitration. In other cases, the parties expressly waive their right to a jury trial, agreeing instead to hear all disputes before a trial judge. This waiver is often contained in form leases. Many parties enter into such agreements, believing the agreements are not enforceable. Additionally, some parties to the agreements, such as guarantors, are finding that they have "agreed" to such a waiver without their express consent. The Texas Supreme Court was recently faced with this issue, and concluded that a party can be deemed to have waived a jury trial without ever agreeing in writing to do so.

The *Prudential* Case

In an original mandamus action, the Court in *In Re The Prudential Insurance Co. of America and Four Partners, LLC d/b/a Prizm Partners, Realtors,*[1] considered a retail lease that contained the following jury-trial waiver:

> **Counterclaim and Jury Trial.** In the event that Landlord commences any summary proceeding or action for nonpayment of rent or other charges provided for in this Lease, Tenant shall not interpose any counterclaim of any nature or description in any such proceeding or action. Tenant and Landlord both waive a trial by jury of any and all issues arising in any action or proceedings between the parties hereto or their successors, under or connected with this Lease, or any of its provisions.

The lease was personally guaranteed by the owners of the tenant, a limited partnership that operated a restaurant in a shopping center.[2] The guaranty did not contain a waiver of the right to a jury trial; however, it guaranteed the tenant's "full and timely performance and observance of all the covenants, terms, conditions, provisions and agreements" in the lease. Less than a year after occupying the premises, the tenant and the guarantors sued the landlord apparently for breach of the implied warranty of suitability based on the persistent "odor of sewage" entering the restaurant. Prudential counterclaimed for amounts due under the lease and guaranty.

The tenant and guarantors requested a trial by jury. The tenant argued, *inter alia*, that such a waiver was against public policy and was not effective in an action to rescind the lease. The guarantors argued that the guaranty they signed was a separate agreement and did not contain a waiver.

The Court's 5-4 Decision

The majority first addressed the tenant's general arguments based on public policy.[3] The court reasoned that personal rights are routinely waived.[4] It was also persuaded by the fact that of the six (6) state Supreme Courts to address this issue, courts in Alabama, Connecticut, Missouri, Nevada and Rhode Island found such waivers to be enforceable, and only Georgia had reached a contrary conclusion.[5] Interestingly, the *In Re The Prudential* Court found that agreeing to such a waiver was less onerous than agreeing to arbitration.[6] In an unusual twist, the court notes that the parties are saving the expense of arbitration. We have become accustomed to courts routinely citing the high cost of judicial proceedings as a reason for the public policy of favoring enforcement of agreements to arbitrate.

The tenant raised some interesting defenses to the waiver: (i) the waiver was contained in the 53rd paragraph of a 67 paragraph lease; (ii) the clause was entitled "Counterclaim and Jury Trial," not "Waiver of Jury Trial"; and (iii) there was disparate bargaining power based on the size and expertise of Prudential, vis a vis, the owners of the tenant (who were also the guarantors) who did not read the lease carefully enough to know that there was a waiver contained in it. The court noted that while it accepted the fact the owner/guarantors did not read the jury trial waiver, they were "charged with knowledge of all the lease provisions absent some claim that they were tricked into agreeing to them."

Finally, while not arguing that they were "tricked" into signing the lease, the tenants did argue that they were fraudulently induced into signing it. The owners argued that if they were found by a judge to be entitled to rescission, based on this theory, it would be anomalous to enforcing a jury waiver contained in the fraudulently induced lease. The court compared this argument to an attack on an agreement that contained an arbitration clause or a choice of law provision. It held that since these types of "waivers" were uniformly enforced when the agreements that contained them were attacked, then a waiver of jury trial should be treated no differently. But what about the guaranty that did not contain a waiver of jury trial?

The Guaranty

The final argument centered on the absence of a jury-trial waiver in the separate guaranty agreement. Surely, the guarantors argued, they would not be bound to a provision waiving a jury trial, which was contained in a separate lease agreement that

was signed by them only in a representative capacity. The court found that the guaranty "incorporated" the lease's jury-trial waiver since the guarantors promised to "faithfully perform and fulfill all of the terms, covenants, conditions, provisions and agreements" of the lease in the event the tenant defaulted. The court looked to the supreme courts of Rhode Island and Connecticut[7] to support this conclusion.

The Dissent

The case was decided by a 5-4 majority and interestingly the dissent did not appear to have an issue with the holding itself. Rather, the dissent felt that Prudential should not have been allowed to proceed by mandamus. The chief justice who authored the dissent observed that the "error" of allowing a jury trial to proceed could have been corrected on appeal. In addressing the issue of added costs to Prudential having to endure a jury trial, the dissent opined that the tenant and the guarantors could be sued for breach of contract and respond in damages for such breach.[8]

The Vanishing Jury Trial?

One wonders if the jury trial's days are numbered, at least in cases where the party with the stronger bargaining position insists on a waiver of this right. Consider the following standard: Although the right of trial by jury in civil actions is protected by the United States Constitution,[9] that right, like other constitutional rights, may be waived by prior written agreement of the parties. However, most courts require that the waiver be made knowingly and voluntarily, and courts will indulge every reasonable presumption against a waiver of that right. The factors used by federal courts to decide whether a waiver was made knowingly, voluntarily and intelligently include: (1) whether there was gross disparity in bargaining power between the parties; (2) the business or professional experience of the party opposing the waiver; (3) whether the opposing party had an opportunity to negotiate contract terms; and (4) whether the clause containing the waiver was inconspicuous.[10]

Since Texas state courts have traditionally followed the federal standard listed above, it is striking to find that the court in *In Re The Prudential* gave little consideration to the issue of the "conspicuousness" of the waiver.

Despite this pendulum swing away from protecting constitutional rights, it is not very likely that the decision will have a significant impact on the commercial real estate industry. However, this decision will impact the negotiation process, and lawyers everywhere will no doubt be comparing their standard forms against the language from this case.

While not an entirely unexpected result, the *In Re The Prudential* Court's summary treatment of the guarantor's arguments does raise some concern for tenants who have guaranteed leases by agreeing to language similar to the broad language in the guaranty analyzed by the Court. One also wonders if the guaranty had merely been one of performance of the tenant's obligations, rather than the broad language employed, if the court would have ventured as far it did in this case. For example, had the guaranty simply read "full and timely payment of Tenant's Rent under the Lease only," it would have been quite a stretch for the court to "incorporate" the lease's jury-trial waiver into the guaranty.

The outcome, at least for the guarantors, was surprising—considering that the jury waiver was hardly conspicuous; in fact, it is somewhat ambiguous as argued by the tenant. Moreover, it isn't even contained within the four (4) corners of the guaranty.

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[1] 47 Tex. Sup. J. 1004 (2004 Tex. LEXIS 789) (No. 02-0690 decided Sept. 3, 2004).
[2] The owners were described as immigrants who had no high-school education and operated two restaurants in Dallas, Texas.
[3] The tenant argued that the waiver violated the Texas Constitution, and was inconsistent with the Texas Rules of Civil Procedure that provided for jury trials.
[4] For instance, a party waives rights by agreeing to choice of law provisions, forum selection and *in personam* jurisdiction.
[5] *Mall, Inc.* v. *Robbins,* 412 So. 2d 1197, 1200 (Ala. 1982) (applied in *Ex parte Cupps*, 782 So. 2d 772 (Ala. 2000); *L&R Realty* v. *Connecticut Nat'l Bank*, 715 A.2d 748, 754-755 (Conn. 1998); *Malan Realty Investors, Inc.* v. *Harris*, 953 S.W.2d 624, 626-627 (Mo. 1997) (en banc) (per curiam); *Lowe Enters. Residential Partners, L.P.* v. *Eighth Judicial Dist. Court*, 40 P.3d 405 (Nev. 2002); *Rhode Island Depositors Econ. Prot. Corp.* v. *Coffey and Martinelli, Ltd.*, 821 A.2d 222, 226 (R.I. 2003); *In re Wells Fargo Bank Minnesota N.A.*, 115 S.W.3d 600, 606–608 (Tex.App.—Houston [14 Dist.] 2003); *Bank South, N.A.* v. *Howard*, 444 S.E.2d 799 (Ga. 1994).
[6] "Furthermore, if parties are willing to agree to a non-jury trial, we think it preferable to enforce that agreement rather than leave them with arbitration as their only enforceable option. By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal."
[7] *L&R Realty* v. *Connecticut Nat'l Bank*, 715 A.2d 748, 756 n.11 (Conn. 1998): *Rhode Island Depositors Econ. Prot. Corp.* v. *Coffey and Martinelli, Ltd.*, 821 A.2d 222, 227 (R.I. 2003).
[8] "The Court confuses the adequacy of Prudential's appellate remedy with the damages Prudential may suffer as a consequence of its tenant's breach of contract. The purpose of the appellate remedy is not to compensate Prudential for this contractual breach, but to correct the trial court's error. If Prudential has been otherwise damaged, it should seek damages directly from the breaching party as in any other contract case."
[9] U.S. Const. amend. VII.
[10] *RDO Fin. Servs* v. *Powell,* 191 F. Supp. 811 (N.D. Tex. 2002).