

Are Jury Trial Waivers Enforceable in Wisconsin?

New Case Finds Jury Trial Waiver Unenforceable Under Wisconsin Law

In *Parsons v. Associated Banc-Corp*, No. 2014AP2581, 2016 WL 2637446 (Wis. Ct. App. May 10, 2016), a recent Wisconsin Court of Appeals case, the Court found a jury trial waiver in form loan documents to be unenforceable.^[1] It remains to be seen whether Wisconsin courts would reach the same conclusion in a more typical commercial transaction. There are a few states, including California and Georgia, that have held pre-litigation waivers of the right to trial by jury to be unenforceable^[2], but the vast majority of states have upheld the enforceability of contractual jury trial waivers if given knowingly and voluntarily.^[3] This case introduces some doubt as to whether Wisconsin follows the majority approach on the enforceability of contractual jury trial waivers, although there certainly should be a number of ways to distinguish an ordinary course commercial transaction from the case at issue.

Factual Background

An analysis of the facts is helpful here because the nature of the underlying transaction seems to have significantly influenced the Court's analysis.

The Court states the facts of the incident underlying the litigation as follows, based on the complaint filed by the Parsons, the loan documents referred to below, and an affidavit of Taft Parsons, Jr.: In 2002, Taft Parsons, Jr. and Carol Parsons (the "Parsons") planned to build a series of 12 townhouses in their neighborhood, starting by converting their home and the adjacent properties that they owned to townhouses. The Parsons engaged Central City Construction ("CCC") as the general contractor for the project through an acquaintance, Joseph Bowles, CCC's vice president. Mr. Bowles introduced them to Michael Woyan, the head of an organization called People's Action Redevelopment Commission, who told them he would assist with locating financing for the project. Mr. Woyan later presented the Parsons with commitment papers for two loans from State Financial Bank^[4] (the "Bank"), each signed by Aaron Moeser, the loan officer in charge of the matter. In 2011, Mr. Moeser, Mr. Woyan and Mr. Bowles were indicted on federal charges relating to a separate but similar loan transaction.^[5]

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The Parsons signed the commitment papers which provided for a home equity loan in the amount of \$40,000 and a construction loan in the amount of \$774,000. The Parsons subsequently entered into a "Standard Form of Agreements Between Owner and Design/Builder" with CCC (the "Contract"). CCC failed to complete any of its obligations under the Contract during the succeeding six months. Approximately seven months after executing the Contract, Mr. Bowles, Mr. Woyan and Mr. Moeser presented Mr. Parson with a set of pre-printed loan documents, including a note, a disbursing agreement, a loan agreement, a mortgage and a closing statement. The complaint alleges that the Parsons were not given any time to review the documents or consult with an attorney before signing the documents, and that Mr. Moeser threatened to withdraw the construction loan if the documents were not signed right away. The documents signed by the Parsons provided that the loans were secured by the Parsons' home, and that only the Bank and the title company, not the Parsons, could approve disbursements of the loans to CCC. The promissory note included in the packet contained a fairly standard waiver of the right to trial by jury in any transactions arising out of the loan documents or out of the relationship between the Parsons and the Bank. After the loan documents were signed, multiple construction draws were approved and disbursed despite the fact that the Parsons objected to the disbursements and that no work had actually been done on the townhouses.^[6] In 2005, a tax levy was imposed on the assets of CCC, the Bank stopped funding construction draws and the Parsons filed for bankruptcy.

In 2011, five years after Associated Bank ("Associated") acquired State Financial Bank, the Parsons filed suit against Associated alleging a pattern of racketeering activity, and alleging negligent hiring, supervision and training of Mr. Moeser. The Parsons' complaint and subsequent amended complaint contained a jury demand. The litigation proceeded for three years, with Associated participating in the litigation, filing multiple pleadings and participating in two pre-trial hearings without objecting to the jury trial demand. However, at the third pre-trial hearing in 2014, Associated raised an off-the-record objection to the jury trial and subsequently filed a motion to strike the jury trial demand, citing the jury trial waiver in the promissory note signed by Mr. Parsons.^[7] The Circuit Court granted Associated's motion and the Parsons appealed.

The Court of Appeals Concludes the Bank Waived

its Right to Object to a Jury Trial

The Court states that the right to a trial by jury is a constitutional right that can be waived. The Court also states that Associated's failure to object to the jury trial waiver for three years constitutes Associated's forfeiture of the right to object and waiver of the right to contest the manner in which the case would be tried. The Court holds that Associated is equitably estopped from raising an objection to a jury trial three years into the litigation. This holding could have been sufficient to dispose of the case; however, the court goes on to analyze the underlying enforceability of the jury trial waiver.[\[8\]](#)

The Court of Appeals Invalidates the Jury Trial Waiver Because it Was Not Knowing and Voluntary

Acknowledging that there was no Wisconsin authority addressing the validity of a pre-litigation jury trial waiver, the Court looked to analogous Wisconsin law and the law of other jurisdictions for guidance. The Court states that a contractual pre-litigation jury trial waiver is not enforceable if not given knowingly and voluntarily. The Court analyzes four factors in determining whether the waiver was given knowingly and voluntarily in this case, while noting that these factors are not the only factors that can be considered in making this determination. The four questions the court considered were: (1) Was the clause negotiated? (2) Was the clause conspicuous? (3) What was the bargaining power between the parties? (4) Was the party against whom the waiver is being enforced given the opportunity to have counsel review the provision? The Court found that the waiver was not given knowingly and voluntarily even though the clause was conspicuous and stated by its terms that it was given knowingly and voluntarily. The determining factors seem to have been that the clause was not negotiated, the borrower was not given time to review the documents or seek the advice of counsel, and that the borrower essentially had no bargaining power in this particular situation.[\[9\]](#)

The Court of Appeals Finds the Jury Trial Waiver to Be Unconscionable

Finally, although the Court had already stated that the waiver was unenforceable because it was not knowing and voluntary, the Court proceeded to an unconscionability analysis and found that the jury trial waiver was both

procedurally and substantively unconscionable. In light of the facts alleged, the finding of procedural unconscionability is unsurprising, but the discussion of the substantive unconscionability is potentially applicable to a wide range of commercial transactions involving parties with unequal bargaining power. The Court appears to object to the breadth of the waiver because it applies to all loan documents as well as any other transaction between the Bank and the borrower. The Court notes that the provision was not negotiated and that the bank gave up nothing of value in exchange for the waiver, and in finding the jury waiver to be unconscionable, the Court states that a provision is substantively unconscionable if it unreasonably favors the more powerful party.^[10]

Note that the 7th Circuit (in a split from other federal circuit courts) applies state law in diversity jurisdiction cases in determining whether a jury trial waiver is enforceable, rather than federal law.^[11] Under federal law, jury trial waivers are generally enforceable.^[12] Therefore, the effect of this decision cannot be avoided by litigating in federal court rather than in state court.

Alternative Approaches for Lenders

In light of this decision, lenders (and other institutional parties that include these provisions in their standard form documents) should consider making their jury trial waivers conspicuous and captioned with an easily understood heading. An additional alternative approach would be to specify in term sheets that the jury trial waiver will be included in the underlying loan documentation, thus giving borrowers advance notice of the waiver and the opportunity to seek alternative financing before the loan documents are prepared. In forbearance agreements, where the lender is agreeing not to take action it is otherwise entitled to take, lenders could include the following, or other similar language, in the jury trial waiver provision: "This jury trial waiver constitutes a substantial consideration for and inducement to the lender to enter into this agreement." In many commercial loan transactions, borrowers will have engaged counsel to assist with the financing documentation. In cases where the borrower does not appear to have the assistance of counsel, lenders may want to forward the loan documents with a cover e-mail indicating that the loan documents contain important provisions affecting the borrower's rights, including a waiver of the right to trial by jury, and that the bank advises that its borrowers consult with counsel prior to executing the documents. Obviously, borrowers should be given time and opportunity to review the loan documents prior to signing them, and the opportunity to have counsel review and comment on the documents. If the loan documents are

signed in person, lenders may want to consider obtaining written evidence that such opportunity was given to the borrower.

Reinhart will continue to monitor this important issue and will provide additional alerts as further developments occur. If you have questions about this update, or loan documentation issues generally, please contact your Reinhart attorney or any member of the Reinhart [Banking and Finance team](#).

[1] This case was recommended for publication, but is as yet unpublished. Until published, it may be cited as persuasive, but not controlling authority.

[2] See, e.g., *Bank S., N.A. v. Howard*, 444 S.E.2d 799 (Ga. 1994); *Grafton Partners L.P. v. Superior Court*, 116 P.3d 479 (Cal. 2005).

[3] See, e.g., *Uribe v. Merchants Bank*, 642 N.Y.S. 2d 23 (App. Div. 1996), *GreatAmerica Leasing Corp. v. Cozzi Iron & Metal, Inc.* 76 F. Supp. 2d 875 (N.D. Ill. 1999) (relying on Illinois state law); Jay M. Zitter, Annotation, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R.5th 53, WESTLAW (database updated May 2016).

[4] In 2006, State Financial Bank was acquired by Associated Bank. References to the Bank after 2006 are to Associated Bank, as successor to State Financial Bank.

[5] *United States v. Moeser*, 758 F.3d 793 (7th Cir. 2014).

[6] At a certain point after Mr. Parsons objected, a new disbursing agreement was signed that required Mr. Parsons to approve disbursements; however, CCC continued to submit disbursement requests directly to the Bank, with Mr. Bowles's signature in place of Mr. Parsons's signature, and the Bank continued to approve the disbursements.

[7] *Parsons*, 2016 WL 2637446, ¶¶ 2-13.

[8] *Id.* ¶¶ 16, 21-23.

[9] *Id.* ¶¶ 26, 28-31.

[10] *Id.* ¶¶ 33-39.

[11] *IFC Credit Corp. v. United Business & Indust. Fed. Credit Union*, 512 F.3d 989, 991-992 (7th Cir. 2008).

[12] See, e.g., *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212 (3d Cir. 2007).

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