

Predispute Jury Trial Waivers in Leases Now Unenforceable in California

For years, California shopping center owners have routinely included a waiver in their leases requiring tenants to agree to give up their right to a jury trial. A jury trial waiver authorizes a judge to try the case without a jury, resulting in a speedier, less costly trial that avoids the possibility of a jury's pro-tenant bias and runaway damage verdicts, explains California attorney Martin H. Orlick. But because of a landmark ruling by California's top court on Aug. 5, 2005, those jury trial waivers are no longer enforceable in California, he warns.

California's top court ruled that California law doesn't permit parties to waive their right to a jury trial until *after* a lawsuit has been filed and the issues have been clearly framed [*Grafton Partners LP v. Superior Court*]. As a result, the only enforceable jury trial waivers in California are those signed and filed during a dispute, not before the dispute happens, explains Orlick. Because few tenants are likely to agree to sign a jury trial waiver *during* a dispute, owners can now expect to face more jury trials in California, unless the state's legislature decides to authorize predispute jury trial waivers, he notes.

Alternatives to Jury Trials in California

Is there any way to avoid litigation by a jury trial in California if you have a dispute with a tenant? Bear in mind that if you choose to litigate your dispute, it won't automatically be heard by a jury; that would require you or the tenant to make a formal request. But instead of pinning your hopes on a tenant's not requesting a jury trial, you can draft your lease so that disputes are resolved in other ways. The court noted that California law authorizes arbitration as one alternative method of dispute resolution; it authorizes a judicial reference procedure as another method. A judicial reference procedure is similar to arbitration in that the owner or the tenant files a lawsuit to compel a lease dispute to be resolved by a "referee," says Orlick. The

court then appoints the referee, who will act as the decision-maker. Typically, the lease requires the referee to be a former judge with real estate expertise, he notes.

When to Require Alternative Dispute Resolution

You won't want your lease to refer all disputes to arbitration or judicial reference, only some of them. Certain lease disputes may best be resolved with litigation in court, says Orlick. For example, you'll still want to take advantage of a summary "unlawful detainer" action, even though it may involve a jury, because it's the best and quickest way to evict a defaulting tenant from its space, he notes. Also, cases where a party seeks an "injunction" against another party are typically handled by trial courts, Orlick adds.

Other lease disputes, though, are better handled through alternative forms of dispute resolution that will help you avoid a jury. For instance, if your dispute concerns fair market rent issues, arbitration (especially, "baseball" arbitration) may be your better choice, says California attorney Susan Fowler McNally.

You'll need to specify in your lease which disputes you want to resolve by an alternative to litigation, which may involve a jury trial. You should discuss these different forms of dispute resolution with a California lawyer so you can determine which procedure may work best for a particular type of lease dispute, advises McNally.

And though predispute jury trial waivers are no longer enforceable in California, consider leaving the waiver in your lease, but add the proviso "to the extent permitted by law," McNally advises. After all, in the future the California legislature may pass a law permitting those waivers or California's top court may reverse its decision and allow those waivers, she explains. If you keep the jury trial waiv-

er in your lease, you can automatically take advantage of that change, she notes.

Insider Says: Even if your center isn't located in California, you may not be safe from the predispute jury trial waiver ruling, warns Orlick. If you've agreed in the lease that California law governs your lease, you'll be subject to the ruling. Also, the California predispute jury trial waiver ruling might influence jury trial waiver rulings by the courts of your state, he notes. n

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