Judicial Reference as an Alternative to Jury Trial Waivers in California

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September 8, 2005

Background
In the same case in which it found that predispute jury trial waivers were unenforceable, the California Supreme Court recognized that the California Legislature had permitted the use of predispute agreements concerning arbitration and judicial reference, both of which, in effect, provide for the waiver of jury trials. Grafton Partners, L.P. v. Superior Court, 36 Cal. 4th 944, 964 (2005). California’s judicial reference procedures, contained within California Code of Civil Procedure Sections 638 et seq., provide an alternative to contractual arbitration.

Holding of Trend Homes Case
In a case decided two days before the Grafton decision, the California Court of Appeal for the Fifth Appellate District found that a mandatory judicial reference clause in a homebuilder’s standard purchase and sale contract was enforceable. Trend Homes, Inc. v. Superior Court, 131 Cal. App. 4th 950 (2005). After holding that the particular judicial reference clause was not unconscionable, the Trend Homes court noted “that when the parties agree to judicial reference, as opposed to arbitration, they retain nearly all of their procedural and constitutional rights, since the rules of evidence apply to the proceeding, which is conducted like a trial, and the parties retain appellate rights. The only right the parties agree to give up is the right to a jury trial.”

Significance of Judicial Reference as an Alternative
California law allows parties to avoid trial by jury by contractually choosing to decide any future dispute by arbitration or judicial reference. While arbitration is more well-known, judicial reference also provides an alternative to litigation. California’s judicial reference law allows parties to “a written contract or lease” to provide for the appointment of a referee to hear and determine “any controversy” arising from those agreements. The referee then reports to the applicable trial court his or her statement of decision, which becomes the “decision of the court.” That decision then becomes the judgment of the court “as if the action had been tried by the court.” As opposed to mandatory arbitration, the decision of the referee is appealable. This is in contrast to an arbitration award which may only be vacated under very limited circumstances.

The judicial reference procedures allow the parties to choose their own referees, up to a total of three, to decide their dispute. If they cannot agree, then the court will be required to make that selection from among nominees provided by the parties or, if the parties fail to provide any nominees, the court will be required to make its own appointment subject only to any legal objections raised by the parties. Either party may object to the appointment of a referee based primarily upon a contention of bias or a conflict of interest. The referee has a deadline of 20 days after the hearing on the dispute to provide his or her statement of decision to the court. After that, the referee’s powers typically end, and all subsequent arguments are presented to the trial court and, then, if appropriate, the appellate court.

In making a decision as to whether to employ judicial reference as the parties’ choice for dispute resolution, factors to consider include: (1) the parties will have waived a trial by jury; (2) the parties can select their own referee who need not be a retired judge or lawyer, but can be an individual with expertise in the relevant business area; (3) the timing of the proceedings can be agreed upon, avoiding a delayed resolution of the dispute; and (4) the losing party retains the ability to appeal the decision. As with an arbitrator, the parties must pay for the referee’s time.

If you have any questions concerning alternate dispute resolution, please feel free to contact any member of our Litigation Group in Los Angeles at:
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