

Legislature Needs to Unwrite Jury Waiver Paradox

By Michael A.S. Newman

According to G.K. Chesterton, an early 20th century English writer, "Man is most comforted by paradoxes." This may be true, but not in the area of law, where paradoxes are anything but comforting.

In law, we are more apt to agree with Francis Bacon, who said that consistency is the foundation of virtue. Indeed, the American system of common law, based upon precedent, represents a continual judicial effort to apply the law consistently. Where inevitable contradictions occur, the appellate courts try to iron out the wrinkles. Where that is not possible, and where public policy so requires, we rely upon the Legislature to re-tailor the law to eliminate the paradoxes.

Of course, not every legal contradiction requires legislative intervention. But where the paradox is both unjustified and harmful, it is the role of the Legislature to remedy the matter.

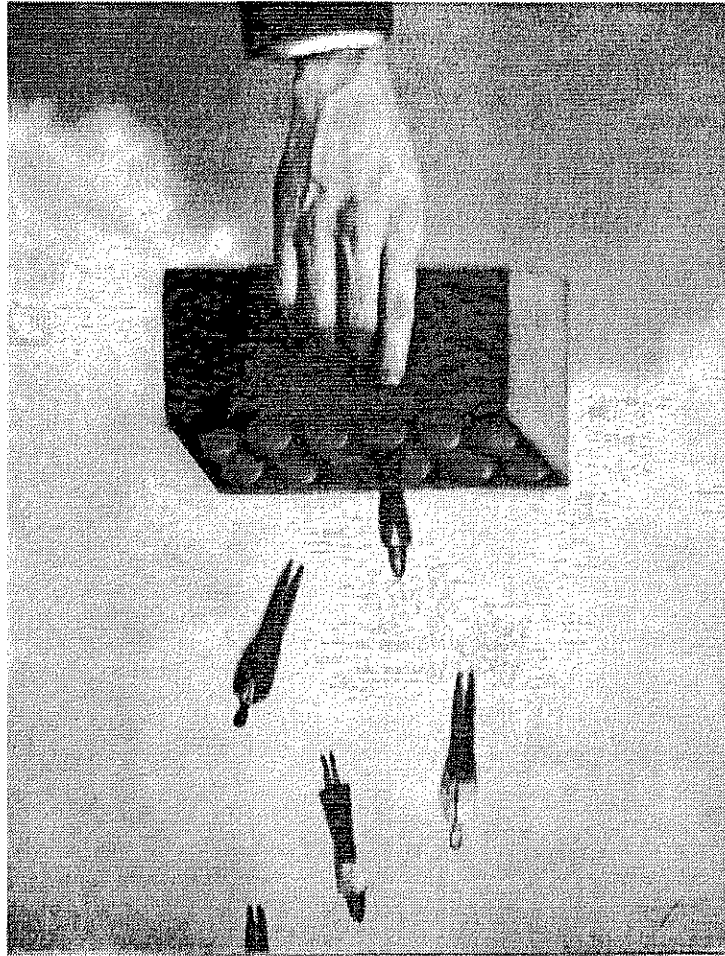
One such paradox became evident last year when the California Supreme Court issued its opinion in *Grafton Partners v. Superior Court of Alameda County*, 36 Cal. 4th 944 (2005). In *Grafton Partners*, the Supreme Court ruled that parties to a contract may not enforce a pre-dispute agreement to waive the right to a jury trial. The court based its ruling on the California Constitution and on statutes implementing the provisions of the constitution.

The relevant statute permits parties to waive the right to a jury only under very specific circumstances. Because a pre-dispute waiver is not one of the enumerated methods of waiving the right to a jury trial, the California Supreme Court ruled that a provision in a contract providing for such a waiver is not enforceable.

In *Grafton Partners* this meant that the plaintiff was permitted to have a jury trial, even though, prior to the lawsuit, it had expressly agreed with the defendant to have any disputes tried by a judge alone. In its interpretation of the law, the California Supreme Court was clearly correct. But the result here creates a very strange paradox.

California statute expressly permits the enforcement of pre-dispute contractual provisions to arbitrate disputes, rather than submit them to a court. In arbitration, the parties essentially pick their own private judges, adopt their own rules of procedure and evidence and agree to be bound by the determination of the arbitrator (or arbitrators). Not only are agreements to arbitrate enforceable, but courts almost never disturb the verdict.

California courts have repeatedly articulated a strong public policy in favor of arbitration. "Under both California and federal law," the Court of Appeal has stated, "arbitration is strongly favored and any doubts concerning the scope of arbitrable issues should be resolved



in favor of arbitration." In another context, the Court of Appeal noted that California has a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." Arbitration is "expeditious, inexpensive, avoids the delays of litigation, and relieves overburdened courts."

The paradox of *Grafton Partners*, however, is that all arbitrations, by their very nature, constitute a waiver of the right to a trial by jury. So how is it that parties may waive the right to a jury by means of an arbitration agreement, but are not permitted to do so where their action is before a judge?

The Supreme Court recognized this anomaly in *Grafton Partners* (although it tried somewhat half-heartedly to minimize and justify the apparent contradiction), but correctly observed that this was really none of their business; the court was not permitted to alter clear statutory language. The laws they were interpreting "form part of a considered procedural scheme intended to create a balanced adversarial system and a fair system of public administration of justice — a system that can be altered by legislation after due deliberation."

In short, the job of the California Supreme Court was to interpret California statute. Having done so, it was the job of the Legislature to change the law if it saw fit.

In his concurring opinion in *Grafton Partners*, Justice Ming W. Chin wrote separately "to urge the Legislature to enact legislation expressly authorizing predispute jury

waivers." As Chin observed, almost every other state allows for predispute jury waivers; only California and Georgia do not permit them. California, therefore, is clearly out of step with the rest of the country.

Moreover, Chin continued, allowing parties to agree to the waiver of a jury offers an "attractive middle ground" between jury trial and arbitration; agreements between parties to resolve future disputes by court trial would minimize fears of excessive jury awards while affording greater procedural safeguards than those available in arbitration." Finally, permitting parties to agree to waive a jury trial but remain in a court system preserves the right to appeal, which in turn protects both the parties' rights and "the orderly development of the law."

There are really no compelling counterarguments to Chin's concurring opinion. Some may argue that the right to a jury trial is sacrosanct; is accorded particular protections under both the California and U.S. constitutions, and therefore the holding of *Grafton Partners* should not be disturbed. That jury trials are highly favored and protected is certainly true, but this observation only goes so far.

The most direct retort to this argument is that California law already allows parties to freely waive the right to a jury when they agree to arbitrate. Furthermore, as the losing parties argued in *Grafton Partners*, statute permits a party to waive its right to a jury trial by neglecting to take the proper steps to secure a jury. If mere negligence in the course of litigation can lead to a waiver, why then should it be

impermissible for a party to waive voluntarily prior to the dispute?

Moreover, it is not always clear when a jury trial is even appropriate. California law permits a jury trial only where such a right existed under the common law of England in 1850 (the year the California Constitution was adopted). Generally, this means that matters of law are tried to juries and matters of equity are tried without a jury. As was noted recently in these pages (in columnist John A. Sturgeon's article, "If The Gist of a Cause of Action is Legal, Then a Jury Is Proper," March 15 Daily Journal), it is often extremely difficult as a practical matter for a court to determine what kinds of actions merit a jury trial, or whether the matter, in its essence, is one of law or equity.

Indeed, the issue is so muddled that California courts have, in an apparent fit of good-humored frustration, adopted the following rule: Where the "gist" of the matter arises in law, rather than equity, a jury trial is mandated. The gist? If jury trials are sacred, then the borders between the sacred and the profane are astonishingly unclear.

This all belies the argument that jury trials are too important for the Legislature to touch. In fact, there is nothing to bar the California Legislature from heeding Justice Chin's suggestion that it pass a statute modifying the law at issue in *Grafton Partners*. As a matter of sound public policy, there is every reason to do so and no good reason not to do so.

The Legislature has begun the process in the form of two bills, one introduced in the Senate, the other in the Assembly. California Senate Bill 1386, (introduced by Bill Morrow), and Assembly Bill 2258 (introduced by Michael Villines), would both expressly authorize pre-dispute jury waivers, superseding the holding of *Grafton Partners*.

Unfortunately, many predict that neither of these measures will ever become law because those who profit from high jury verdicts (such as the plaintiffs bar) will exercise their considerable influence in Sacramento to defeat them. Ironically, if these measures are both defeated, businesses may become more likely to include arbitration clauses in their contracts. This is a result the trial lawyers probably would not want, as it is generally thought that plaintiffs have a better chance of achieving a large verdict in a court.

That SB 1386 and AB 2258 have little chance of becoming law is unfortunate. *Grafton Partners* is a good example of justices correctly and responsibly resisting the urge to act as legislators. It would be sad if the Legislature, contrary to both logic and public policy, likewise failed to legislate. In that case, we may find little comfort in this absurd paradox of California law.

Michael A.S. Newman is a litigation associate in the Los Angeles office of Barger & Wolen.