

Pre-Dispute Jury Waivers are Enforceable in Tennessee

Lenders have traditionally included jury waiver provisions as a standard provision in their loan documents. Over the last few years, a number of states have held that borrowers cannot waive their constitutional right to a jury trial prior to litigation, essentially negating the effect of any waiver provision included in the loan documents. However, the Tennessee Court of Appeals recently determined that pre-dispute jury waivers are enforceable in Tennessee and provided guidance as to the necessary requirements for making these provisions enforceable.

In *Gregory Poole v. Union Planters Bank, N.A.*, Mr. Poole, a truck owner and operator, entered into a note, disclosure, and security agreement with Union Planters Bank (the "Bank") for the purchase of a tractor-trailer truck in Alabama. Mr. Poole alleged that the Bank failed to convert the vehicle's title to a Tennessee certificate of title and filed suit to recover damages resulting from the Bank's failure to make the necessary conversion. The three agreements between Mr. Poole and the Bank contained waiver provisions under which Mr. Poole waived his right to a jury trial in the event of any future dispute. The Bank invoked these provisions in a motion to strike Mr. Poole's jury demand four years after the suit was commenced. The trial court granted the Bank's motion to strike and Mr. Poole appealed the decision.

The waiver provisions in each of the relevant agreements between Mr. Poole and the Bank were not highly conspicuous, appearing in the same font as the rest of the agreement, were not underlined, and did not require Mr. Poole's separate signature or initial. However, each of the documents did include a capitalized, sometimes bolded, statement to the effect that the signatory had read and understood the provisions of the agreement. In light of these acknowledgements, and the relative brevity of the agreements, the court imputed knowledge of the waiver provisions to Mr. Poole. Therefore, the only issue before the court was whether Tennessee law and public policy permitted the enforcement of a pre-dispute jury waiver.

Although the Tennessee Rules of Civil Procedure expressly provide for certain types of post-dispute jury waiver, prior to this case, no Tennessee authority had addressed the validity of pre-dispute jury waiver. As such, the enforceability of a pre-dispute jury waiver provision was a matter of first impression for the court. Affirming the trial court's decision, the Court of Appeals ultimately held that the contractual pre-dispute jury waiver was enforceable in Tennessee.

In reaching its decision, the Court of Appeals distinguished Tennessee's constitutional right to a jury from similar provisions in California and Georgia's constitutions, two states whose high courts have held that their respective constitutions prohibit pre-dispute jury waiver. The court distinguished Tennessee law from the laws of the other two states on the grounds that (i) Tennessee's constitution does not expressly limit an individual's ability to waive his right to a jury, (ii) Tennessee possesses no statute limiting the means of waiver, and (iii) Tennessee's procedural rules, while providing for post-dispute waiver, neither expressly endorse nor expressly deny any form of pre-dispute waiver.

The court noted that Tennessee has historically ensured that "parties to an agreement have the right and power to construct their own bargains," and stated further that waiver of a jury trial prior to litigation does not violate any public policy in Tennessee. The court

stated that Rule 39.01 of the Tennessee Rules of Civil Procedure, while not expressly permitting pre-dispute waiver, could not be construed to prohibit any form of pre-dispute waiver.

Rebutting Mr. Poole's claim that the Bank had lost its right to raise the waiver, the court noted that, unlike affirmative defenses, a contractual pre-dispute waiver need not be raised in the defendant's initial answer, but rather may be raised at any time prior to the "eve of trial." Although the court concluded that the defendant's entering into a scheduling order setting trial did not waive the defendant's right to enforce the waiver provision, the court did state that, under different circumstances, a similar action may constitute such a waiver.

The court stated that even if the bank had the initial burden of demonstrating the enforceability of the provisions, the presentation of the three agreements at issue would satisfy any such burden. Thus, in concluding that the waiver provisions in the instant case would be enforceable under any standard, the court chose neither to provide a specific standard by which the enforceability of a pre-dispute waiver provision will be measured, nor to address the question of burden of proof. The court did however provide the following list of factors typically considered in the waiver context:

- The conspicuousness of the jury-waiver provision;
- The parties' business acumen and experience;
- The representation, or lack thereof, of counsel;
- The negotiations had concerning the agreement and the waiver provision;
- The relative bargaining power of the parties;
- The nature of the contract; and
- The existence of fraud, overreaching, or unconscionability.

What does this case mean for you?

Despite no official validation previously existing to support them, the provisions in the three agreements have been standard in loan documents for a number of years. The court's decision in Poole simply certified that these provisions are enforceable and will be enforceable in the event that litigation involving a loan subject to such a waiver provision happens to arise. Lenders can move forward with confidence, knowing that waiver provisions in existing loan documents will be enforced and that placing these waiver provisions in future loan documents will accomplish their desired objective.

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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