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Pre-Litigation Contractual Waivers of the Right to a Jury Trial Are Unenforceable Under Georgia Law

In a recent decision, *Bank South v. Howard*,¹ the Georgia Supreme Court held pre-litigation contractual waivers of the right to a jury trial are unenforceable in Georgia.² This decision is particularly interesting in light of two factors: (1) of the jurisdictions considering this issue, Georgia is the only one to hold such waivers unenforceable; and (2) contractual arbitration agreements, which essentially waive the right to a jury trial, are enforceable in Georgia. In *Bank South v. Howard*, Bank South filed suit against Howard to recover over two million dollars under 1985 and 1988 guaranties.³ Howard raised several defenses and also counter-claimed against Bank South for fraud and violation of the Georgia RICO Act. The 1988 guaranty contained an express provision waiving the right to a jury trial in any action on the guaranty. Despite the waiver clause, Howard demanded a jury trial. The trial court denied his demand. Howard appealed, arguing that the jury trial waiver provision was void because the guaranty was fraudulently induced, and because the waiver did not specifically apply to his counter-claim against Bank South.⁴ The Georgia Court of Appeals reversed the trial court's decision, holding the provision in the guaranty waiving the right to a jury trial unenforceable against Howard.⁵ The court of appeals stated that Georgia's Civil Practice Act,⁶ which requires a jury trial except when a party by written stipulation consents to a non-jury trial, implies the waiver must be knowing and voluntary.⁷ The court of appeals held Howard could not have knowingly and voluntarily waived his right to a

1. 264 Ga. 339, 444 S.E.2d 799 (1994).

2. *Id.* at 340, 444 S.E.2d at 800.

3. 209 Ga. App. 407, 408, 433 S.E.2d 625, 626 (1993), *aff'd*, 264 Ga. 339, 444 S.E.2d 799 (1994).

4. 209 Ga. App. 407, 408, 433 S.E.2d 625, 626 (1993), *aff'd*, 264 Ga. 339, 444 S.E.2d 799 (1994).

5. 209 Ga. App. at 410-11, 433 S.E.2d at 628.

6. O.C.G.A. §§ 9-1-1 to 9-15-14 (1993).

7. 209 Ga. App. at 410, 433 S.E.2d at 628; O.C.G.A. § 9-11-39 (1993).

jury trial when he signed the guaranty, because he was not then aware of the basis and circumstances surrounding a future claim on the guaranty.⁸ Bank South appealed. The Georgia Supreme Court granted certiorari to decide whether a pre-litigation contractual waiver of the right to a jury trial is enforceable under the laws of Georgia.⁹ The supreme court held that since such waivers are not provided for by Georgia's Constitution or Code, they are unenforceable in cases tried under the laws of Georgia.¹⁰ In Georgia, pre-litigation contractual waivers of the right to a jury trial are unenforceable.¹¹

The Constitution of Georgia provides: "The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party."¹² The phrase "shall remain inviolate" refers to the right to a jury trial as it existed at common law at the time of incorporation of this provision into Georgia's Constitution. Thus, the right to a jury trial, as it existed in England, should be inviolate or unaltered.¹³ This right is also codified in Georgia's Civil Practice Act¹⁴ which states: "The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate."¹⁵ However, this right may be waived expressly or impliedly.¹⁶ Parties or their attorneys can waive the right to a jury trial "by written stipulation filed with the court, or by an oral stipulation made in open court and entered in the record."¹⁷ Voluntary participation in a non-jury trial results in an implied waiver of the right.¹⁸ In *Raintree Farms, Inc. v. Stripping*

8. 209 Ga. at 410, 433 S.E.2d at 628; O.C.G.A. § 9-11-39 (1993).

9. 264 Ga. at 340, 444 S.E.2d at 799.

10. *Id.*, 444 S.E.2d at 800.

11. *Id.*

12. GA. CONST. art. I, § 1, ¶ 11(a).

13. *Wright v. Davis*, 184 Ga. 846, 852, 193 S.E. 757, 760 (1937).

14. O.C.G.A. §§ 9-1-1 to 9-15-14 (1993).

15. O.C.G.A. § 9-11-38 (1993).

16. *Howard v. Bank South*, 209 Ga. App. at 410, 433 S.E.2d at 627. *See also Phillips v. Meadow Garden Hosp., Inc.* 139 Ga. App. 541, 544, 228 S.E.2d 714, 716 (1976).

17. O.C.G.A. § 9-11-39(a) (1993).

18. 209 Ga. App. at 410, 433 S.E.2d at 627. In *Redding v. Commonwealth of America, Inc.*, 143 Ga. App. 215, 237 S.E.2d 689 (1977), the court of appeals held participation in a bench trial did not waive the right to a jury trial where there was no oral consent to a bench trial in the record, since Code Ann. § 81A-139 (now codified at O.C.G.A. § 9-11-39) requires consent to a non-jury trial by written stipulation filed with the court or oral stipulation made in open court and entered in the record. *Id.* at 216, 237 S.E.2d at 689-90. However, in *Holloman v. Holloman*, 228 Ga. 246, 184 S.E.2d 653 (1971), the Georgia Supreme Court held a party may waive the right to a jury trial, even though a demand has

Center, Ltd.,¹⁹ a local court rule provided a party who fails to file a demand for a jury trial by the last business day before docket call is presumed to have waived the right to a jury trial.²⁰ The court of appeals held the local rule was void to the extent it conflicted with the express waiver requirement in the Civil Practice Act, O.C.G.A. section 9-11-39.²¹ The local rule conflicted with the Civil Practice Act because it required a pretrial demand for jury trial, whereas the Civil Practice Act provides for a jury trial as a matter of right unless the parties consent to a non-jury trial.²² Consent to a non-jury trial must be by express stipulation or by voluntary participation in a bench trial.²³ In *Manderson & Associates, Inc. v. Gore*,²⁴ the court of appeals upheld a jury trial waiver provision contained in an employment and stock transfer agreement.²⁵ However, the court did so under the laws of Alabama, since the agreement also contained an Alabama choice of law provision.²⁶ The court stated that in Georgia "waiver of jury trials is statutorily recognized, although carefully controlled, under the laws of this state."²⁷

The Georgia Supreme Court based its decision in *Bank South v. Howard* on the Georgia Constitution, article I, section 1, paragraph 11 and on O.C.G.A. section 9-11-39(a).²⁸ The court determined that the terms of the Constitution and of the statute clearly envision the pendency of litigation at the time of the waiver.²⁹ The Constitution

been made, where voluntary actions negate the demand. *Id.* at 247, 184 S.E.2d at 654. Then, in *Wise, Simpson, Aiken & Assocs., Inc. v. Rosser White Hobbs Davidson McClellan Kelly, Inc.*, 146 Ga. App. 789, 247 S.E.2d 479 (1978), the court of appeals, recognizing the right to a jury trial can be impliedly waived, stated, insofar as its decision in *Redding* may be construed to stand for the proposition that a party can voluntarily participate in a bench trial, without demanding a jury trial or objecting to the trial court's rendering judgment on the merits, and then have the unfavorable judgment on the merits set aside because no jury trial was had, the decision must yield to the supreme court's decision in *Holloman*. *Id.* at 795-96, 247 S.E.2d at 483-84. See also *Servisco, Inc. v. R.B.M. of Atlanta, Inc.*, 147 Ga. App. 671, 672, 250 S.E.2d 10, 11 (1978) (holding active participation in a non-jury trial without demanding a jury trial until after adverse judgment on the merits has been entered, constitutes a waiver of the right to a jury trial).

19. 166 Ga. App. 848, 305 S.E.2d 660 (1983).

20. *Id.* at 848, 305 S.E.2d at 661.

21. *Id.* at 849, 305 S.E.2d at 661-62.

22. *Id.*, 305 S.E.2d at 662.

23. *Id.*

24. 193 Ga. App. 723, 389 S.E.2d 251 (1989).

25. *Id.* at 729-30, 389 S.E.2d at 257-58.

26. *Id.* at 730, 389 S.E.2d at 257-58.

27. *Id.*, 389 S.E.2d at 257; O.C.G.A. § 9-11-39(a).

28. 264 Ga. at 340, 444 S.E.2d at 800.

29. *Id.*

explicitly provides two circumstances in which the right may be waived: when no issuable defense is filed and when the parties fail to demand a jury trial.³⁰ The statute provides for waiver by express stipulation, either written or oral.³¹ In support of its decision, the supreme court analogized the waiver of a jury trial to a confession of judgment:³² both involve giving up valuable rights, and both are governed by statutes which, by their terms, contemplate the pendency of litigation.³³ As to both acts, the court of appeals has held foreign judgments based on pre-litigation contractual provisions are not contrary to the public policy or laws of Georgia.³⁴ However, waiver of a jury trial and confession of judgment differ in that the Georgia Supreme Court has held a confession of judgment must arise after litigation is initiated to be enforceable, while it has been silent concerning pre-litigation jury trial waivers.³⁵ The supreme court stated that the same rule should apply to jury trial waivers, due to the importance of the rights involved and the likelihood of abuse which exists in both situations.³⁶ This decision seemingly conflicts with Georgia cases upholding the enforcement of contractual arbitration provisions.³⁷ However, the supreme court explicitly

30. *Id.*

31. *Id.*

32. Confession of judgment refers to the "act of the defendant whereby he admits or confesses the right of the plaintiff to take judgment against him, and not to the entering up, or rendition of, the judgment itself which is rendered upon the defendant's confession of judgment." *Thomas v. Bloodworth*, 44 Ga. App. 44, 46 160 S.E. 709, 711 (1931). Pendency of a valid action, which requires the court to have jurisdiction of the parties, is a prerequisite to a confession of judgment by either party. *Wade v. Combined Mut. Casualty Co. of Chicago*, 201 Ga. 318, 321, 39 S.E.2d 681, 683 (1946). At common law, a confession of judgment was one made in an action after it was begun, and not a confession made before the action was commenced. *Information Buying Co. v. Miller*, 173 Ga. 786, 791, 161 S.E. 617, 620 (1931). The confession "amounts to no more than an admission of indebtedness, and an agreement to take judgment thereon when it can properly be rendered." *Id.* at 791, 161 S.E. at 620.

33. 264 Ga. at 340, 444 S.E.2d at 840.

34. *Id.* See *Melnick v. Bank of Highwood*, 151 Ga. App. 261, 259 S.E.2d 667 (1979) (for confessions of judgment); *Manderson & Assocs. v. Gore*, 193 Ga. App. 723, 389 S.E.2d 251 (1989) (for jury trial waivers).

35. 264 Ga. at 340, 444 S.E.2d at 800. See *Information Buying Co. v. Miller*, 173 Ga. 786, 161 S.E. 617 (1931). In *Information Buying Co.* the court held a confession of judgment is a substitute for a verdict, and no confession of judgment, made before a suit is filed, can be entered in an action commenced after the confession is made, and no valid judgment can be rendered upon such confession so made and entered. *Id.* at 791, 161 S.E. at 619. To be valid, a confession of judgment must be made in an action after it has been instituted in a court of law. *Id.*

36. 264 Ga. at 340, 444 S.E.2d at 800.

37. See *Weyant v. MacIntyre*, 211 Ga. App. 281, 438 S.E.2d 640 (1993). The court held that where the parties agree in writing to arbitrate, they are bound by O.C.G.A. § 9-9-2

reserved this issue for the General Assembly to reconcile.³⁸ The court stated that the General Assembly has expressly approved arbitration contractual provisions by repealing the common-law arbitration and construction contract arbitration statutes, and by enacting the Georgia Arbitration Code.³⁹ In the absence of similar legislative action allowing contractual provisions for waivers of jury trial or confessions of judgment, the court declined to hold otherwise.⁴⁰ Thus, unless and until the General Assembly enacts legislation allowing contractual waivers of the right to a jury trial, the Georgia courts will continue to hold such provisions unenforceable under the laws of Georgia. In her dissenting opinion, Justice Sears-Collins found an ambiguity created by the silence of the Georgia Constitution, article I, section 1, paragraph 11 and O.C.G.A. section 9-11-39, since the provisions do not provide that their methods of waiver are exclusive.⁴¹ Justice Sears-Collins believes this ambiguity should be resolved by upholding the right to contract for such waivers.⁴² In support, Justice Sears-Collins emphasized the parties' freedom to contract as to any terms and any subject matter.⁴³ The court of appeals has held any "impairment of the [right to contract] must be specifically expressed or necessarily implied by the legislature in a statutory prohibition and not left to speculation."⁴⁴ Since neither Article I, section 1, paragraph 11 nor section 9-11-39 explicitly or implicitly impairs the right to contract for pre-litigation jury trial waivers, they should not be construed to impair that right.⁴⁵ The

and § 9-9-3. *Id.* at 282, 438 S.E.2d at 642. In enacting the Georgia Arbitration Code, the General Assembly intended to extend enforcement of arbitration in Georgia from construction contracts to all contracts in which the parties have agreed to arbitration in a written agreement. *Id.*; 1988 Ga. Laws 903.

38. 264 Ga. at 341, 444 S.E.2d at 800.

39. *Id.*; O.C.G.A. §§ 9-9-1 to 9-9-83 (Supp. 1994). O.C.G.A. § 9-9-3 provides:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit any controversy thereafter arising to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.

O.C.G.A. § 9-9-3 (Supp. 1994).

40. 264 Ga. at 341, 444 S.E.2d at 800.

41. 264 Ga. at 341, 444 S.E.2d at 801 (Sears-Collins, J., dissenting).

42. *Id.*

43. *Id.* See *Duffett v. E & W Properties, Inc.*, 208 Ga. App. 484, 487, 430 S.E.2d 858, 960 (1993) (stating that "[p]arties are free, except as prohibited by statute or public policy, to contract on any terms and about any subject matter they so desire").

44. 264 Ga. at 341, 444 S.E.2d at 801 (Sears-Collins, J., dissenting) (quoting *Porubiansky v. Emory Univ.*, 156 Ga. App. 602, 603, 275 S.E.2d 163, 164 (1980), *aff'd*, 248 Ga. 391, 282 S.E.2d 903 (1981)).

45. 264 Ga. at 341, 444 S.E.2d at 801 (Sears-Collins, J., dissenting).

dissent also found the majority's analogy of confession of judgment and waiver of jury trial inappropriate, since confession of judgment is "the substitute for a verdict" which cannot be taken away until suit is filed; whereas, the right to a jury trial is not a substitute for a verdict and therefore, the reasoning of *Information Buying Co. v. Miller*⁴⁶ is not applicable in this case.⁴⁷ Confessions of judgment and jury trial waivers differ significantly because a confession of judgment is decisive of the case, ending litigation of the controversy; whereas, a waiver of the right to a jury trial is not conclusive but merely limits litigation of the issue to a non-jury trial.

The majority of courts considering this issue have held pre-litigation waivers of the right to a jury trial are valid and enforceable.⁴⁸ In *Gaylord Department Stores of Alabama, Inc. v. Stephens*,⁴⁹ the Alabama Supreme Court considered the issue of whether a jury trial waiver provision contained in a contract between a pharmacist and a department store was enforceable.⁵⁰ In accordance with a number of jurisdictions, including Connecticut, Massachusetts, New Jersey, New York, and Ohio, the Alabama Supreme Court upheld pre-litigation contractual waivers of the right to a jury trial as enforceable.⁵¹ However, the court held the waiver in question was not enforceable where it appeared in boiler plate language, buried in paragraph thirty-six, and where the equality of the bargaining power of the parties was questionable.⁵² The court followed the general rule: the right to a jury trial is a fundamental and important one, and therefore, contractual waiver of this right will be strictly construed.⁵³ The waiver must be clear and explicit, leaving

46. 173 Ga. 786, 161 S.E. 617 (1931).

47. 264 Ga. at 342, 444 S.E.2d at 801-02 (Sears-Collins, J., dissenting) (quoting *Information Buying Co. v. Miller*, 173 Ga. at 791, 161 S.E. at 619).

48. 264 Ga. at 342, 444 S.E.2d at 801 (Sears-Collins, J., dissenting). See *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835 (10th Cir. 1988); *Gaylord Dep't Stores of Ala., Inc. v. Stephens*, 404 So. 2d 586 (Ala. 1981); *Nowey v. Kravitz*, 51 A.2d 495 (Conn. 1947); *Central Inv. Assocs., Inc. v. Leasing Serv. Corp.*, 362 So. 2d 702 (Fla. Dist. Ct. App. 1978); *Chase Commercial Corp. v. Owen*, 588 N.E.2d 705 (Mass. App. Ct. 1992); *Edsaid Realty Corp. v. Samuels*, 92 N.Y.S.2d 897 (N.Y. City Court 1949); *Union Commerce Bank v. Kimbro*, 162 N.E.2d 926 (Ohio 1959); *Azalea Drive-In Theatre, Inc. v. Sargoy*, 214 S.E.2d 131 (Va. 1975); 73 A.L.R.2d 1332, 1333 (1960).

49. 404 So. 2d 586 (Ala. 1981).

50. *Id.* at 587.

51. *Id.* at 588.

52. *Id.*

53. *Id.* See *Edsaid Realty Corp. v. Samuels*, 92 N.Y.S.2d 897 (N.Y. City Court 1949); *National Equip. Rental, Ltd., v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (holding a presumption exists against contractual jury trial waivers. The right to a jury trial can only be relinquished knowingly and intentionally. Contractual waiver of the right to a jury trial

no room for doubt as to the intention of the parties.⁵⁴ In *Telum, Inc. v. E.F. Hutton Credit Corp.*,⁵⁵ the Tenth Circuit Court of Appeals upheld the waiver of a jury trial contained in a lease agreement under federal law.⁵⁶ The court stated that agreements waiving the right to trial by jury are enforceable and are not illegal nor contrary to public policy.⁵⁷ In *Telum*, the appellant contended the waiver should be invalidated on the ground of fraud in the inducement as to the whole contract.⁵⁸ The appellant argued by analogy for the court to accept federal cases which have held fraud in the inducement may suspend the enforceability of contract arbitration clauses.⁵⁹ The court stated, although fraud in the inducement relating specifically to an arbitration provision may invalidate the provision, allegations of fraud in the inducement going to the entire contract generally have been held not to affect an arbitration agreement provision.⁶⁰ Furthermore, this analogy of contractual arbitration clauses and waivers of the right to a jury trial was especially important to the court because "arbitration involves a greater compromise of procedural protections than does the waiver of the right to trial by jury."⁶¹ Therefore, the court held fraud in the inducement as to the whole contract generally did not invalidate the jury waiver provision, in light of the strong federal policy favoring enforcement of contract arbitration clauses.⁶² In several of the jurisdictions upholding contractual jury trial waivers, the right to a jury trial is waived in any action unless a timely demand is made. Thus, the right

was held ineffective where the clause was buried deeply and inconspicuously in the contract and where there was gross inequality in bargaining power between the parties).

54. 404 So. 2d at 588. See *Edsaid Realty Corp. v. Samuels*, 912 N.Y.S.2d at 899.

55. 859 F.2d 835 (10th Cir. 1988).

56. *Id.* at 837. See also *Simler v. Conner*, 372, U.S. 221, 222 (1963) (per curiam) (right to jury trial controlled by federal law to insure uniformity in exercise required by the Seventh Amendment of the United States Constitution).

57. 859 F.2d at 837. See *McCarthy v. Wynne*, 126 F.2d 620, 623 (10th Cir. 1942) (holding that agreements waiving the right to a jury trial are neither illegal nor contrary to public policy); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986) (holding that right to a jury trial, although fundamental, may be knowingly and intentionally waived by contract); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985) (parties to a contract may by prior written agreement waive the right to a jury trial).

58. 859 F.2d at 837.

59. *Id.*

60. *Id.*

61. *Id.* at 838. See *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971) ("[a]rbitration differs radically from litigation, and one who chooses it must be content with its informalities and looser approximations as to the enforcement of their rights").

62. 859 F.2d at 838.

to a jury trial may also be waived by contract.⁶³ However, in Georgia a party does not waive the right to a jury trial by failing to demand a jury trial; a jury trial is a matter of right unless the parties consent to a non-jury trial by express stipulation before the court or by voluntary participation in a bench trial.⁶⁴ Although Georgia law also favors contractual arbitration clauses, the Georgia Supreme Court declined to treat jury trial waivers similarly, even though arbitration provides less procedural protection than a bench trial. This decision, though, seems consistent with the court's historical protection of the judicial process. Before the 1988 amendment to the Georgia Arbitration Code, Georgia courts were reluctant to enforce contractual arbitration clauses because they allowed the "astute party to oust the courts of jurisdiction. By first making the contract and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy."⁶⁵ In amending the Arbitration Code, the General Assembly established the public policy of Georgia regarding the enforceability of arbitration agreements, thus, rescinding case law which refused to enforce contractual arbitration provisions.⁶⁶ Similarly, the Georgia courts will not enforce contractual jury trial waivers to protect the right to a jury trial which is constitutionally protected and provided for as a matter of right by O.C.G.A. section 9-11-39. Perhaps the difference in treatment between arbitration and jury trial provisions might also be justified by the types of agreements which contain these provisions. Jury trial waivers are often included in lease agreements, promissory notes, and guaranties where a higher potential for inequality of bargaining power exists and which involve parties to whom a jury might be more sympathetic towards the plaintiff. The Georgia Supreme Court has left any inconsistency between arbitration provisions and jury trial waivers to the General Assembly to change. The supreme court's decision in *Bank South* could possibly lead to more arbitration resolution in contractual disputes if parties who have previously used jury trial waiver provisions in their contracts, replace the unenforceable provision with arbitration provisions. However, parties may be reluctant since arbitration involves giving up the whole judicial process, rather than just

63. See FED. R. CIV. P. 38(b); *Nowey v. Kravitz*, 51 A.2d at 495-96; *Chase Commercial Corp. v. Owen*, 588 N.E.2d at 707-08.

64. *Raintree Farms, Inc. v. Stripping Center, Ltd.*, 166 Ga. App. at 849, 305 S.E.2d at 662.

65. *Freeman v. C.W. Redfern Enterprises, Inc.*, 182 Ga. App. 205, 206, 355 S.E.2d 79, 81 (1987) (quoting *Parsons v. Ambos*, 121 Ga. 98, 101, 48 S.E. 696, 697 (1904)).

66. *Weyant v. MacIntyre*, 211 Ga. App. at 282, 438 S.E.2d at 642.

the right to a jury trial. Given the inconsistency of enforcement between contractual jury trial waivers and arbitration provisions, the number of jurisdictions that have upheld jury trial waivers as enforceable, and Georgia law which supports freedom to contract, the General Assembly might be inclined to address this issue and overturn the court's decision in *Bank South* through legislation. Unless the General Assembly explicitly establishes the public policy of Georgia regarding the enforceability of pre-litigation contractual waivers of the right to a jury trial, such waivers will remain unenforceable under the laws of Georgia.

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