

Calif. High Court Ruling Has Lessons For Waiving Jury Trials

By **Steven Fleischman and Nicolas Sonnenburg** (March 28, 2024)

A recent ruling from the California Supreme Court addressing relief from jury trial waivers teaches two lessons.

First, parties should properly request a jury and pay appropriate fees, even if the other side does the same. And second, they should seek interlocutory appellate review if the trial court denies their client a jury trial, whether in the first instance or by refusing to grant relief from a waiver.

Californians enjoy the right to trial by jury in civil cases. As the California Supreme Court articulated in its 2020 decision in *Nationwide Biweekly Administration Inc. v. Superior Court*, that right extends to all civil cases "as it existed at common law in 1850 when the jury trial provision was first incorporated into the California Constitution."^[1]

Although the right to a jury trial in civil cases is a constitutional right, it can be waived by, for example, failing to timely request one or pay required jury fees.

When civil litigants waive the right to a jury trial, they must ask the court for permission to be relieved from their prior waivers if they ultimately decide they do want a jury trial.^[2]

The judge's decision in this context is discretionary. They may consider a number of factors when deciding to grant relief: whether a jury trial would prejudice either party, whether scheduling issues would inconvenience witnesses, the timeliness of the relief request, whether the requesting party will pay required fees, and other reasons supporting the request to be released from waiver.

When it is obvious that neither party will suffer harm if relief is granted and a jury trial unfolds, it might seem that a judge should be required to grant relief from waiver, but the California Supreme Court has rejected that idea.

Emphasizing the discretionary nature of a waiver relief request, the court held in its *TriCoast Builders Inc. v. Fonnegra* decision on Feb. 26 that a showing of no hardship doesn't force judges' hands; they can still consider other relevant factors when considering a relief request.^[3]

The court also held that a litigant who appeals the denial of a request for relief from waiver must show prejudice in order to secure a reversal.

The facts in *TriCoast* are simple and straightforward. *TriCoast* involved a construction contractor that sued a homeowner, Nathaniel Fonnegra, for terminating its contract in the middle of a project.^[4] *TriCoast*, the plaintiff, waived its right to jury trial by failing to demand one and posting the required fees.^[5] Fonnegra, on the other hand, did demand a jury trial and post fees.^[6]



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During the years of pretrial proceedings, TriCoast prepped to present its case before a jury.[7] But on the morning the trial was set to begin, the defendant homeowner waived his right to a jury.[8]

TriCoast immediately objected.[9] It demanded a jury trial and offered to post fees.[10] TriCoast argued that it wasn't fair to suddenly move to a bench trial, as it had based its trial strategy on appearing before a jury, and that a jury trial would harm neither side as both had prepared for one.[11]

The Los Angeles County Superior Court denied TriCoast's request,[12] and TriCoast declined the opportunity to seek interlocutory writ review of the order.[13] It went to trial, lost, and moved for a new trial by arguing that the court had abused its discretion by denying the jury trial request.[14]

On appeal, a divided panel of the Court of Appeal of California, Second Appellate District, affirmed the decision, and the California Supreme Court granted review to resolve a split of authority on two issues:

- Is prejudice to the nonmoving party required in order to deny relief from a jury trial waiver under Section 631 of the California Civil Procedure Code; and
- If a trial court errs in denying relief from a jury trial waiver, is that ruling reversible per se, or must the appeal party still demonstrate prejudice?[15]

The Supreme Court affirmed.

On the first issue, the court held that Section 631's "open-ended grant of discretion does not direct courts to narrow their focus to any single factor." [16] Instead, "courts should consider all factors relevant to whether granting relief in the particular situation before them would be 'just.'" [17]

The court said that judges should consider whether litigants could be engaged in gamesmanship, but also held that, where a party has clearly attempted to invoke the right to jury trial, but missed some technical point of compliance, "lack of hardship to the other parties or the court is generally controlling, absent other factors that weigh against relief." [18]

The court noted that there previously was a statutory right to "pick up" jury fees in similar circumstances, but that right was eliminated by statute in 2002. [19]

The justices also addressed whether appellants like TriCoast need to establish prejudice to secure a reversal, or whether prejudice was presumed, as when there is a total denial of a jury trial right in the first instance.

The court held that appellants in this circumstance did have to demonstrate prejudice. [20] The constitutional right to a jury trial is separate from statutory protections to reverse the waiver of that right, the court explained. No constitutional right at issue meant no structural error justifying a reversal per se standard.

Additionally, the court explained that TriCoast's alleged prejudice — wasted time preparing for a jury trial — was not sufficient for reversal. It wrote, "Wasted effort is unfortunate, but it is often an inevitable fact of litigation." [21] The court continued, "TriCoast's concerns do not implicate the fairness of the trial it did receive, nor could they be remedied by reversing the judgment and setting the case for a new trial." [22]

So, what are the practical implications of this decision?

First, a litigant whose opponent demands a jury trial and posts fees on time should likely follow suit, even if they don't necessarily want a jury trial. Years of preparation for a jury can go down the drain if, like here, the other side suddenly waives the right to a jury.

Plus, demanding a jury doesn't lock a litigant in — they can always waive the jury later if the other side does.

Second, this decision suggests that a litigant in TriCoast's position should file a petition for writ of mandate to challenge any denial of a jury trial, whether in the first instance or as a result of the denial of a request for waiver. TriCoast describes "writ review as the preferred method for securing an erroneously denied jury trial" because it avoids repetitive litigation. [23]

More importantly, though, a party that pursues writ review of an order denying relief from waiver only needs to show legal error, while the party who waits to seek appellate review after judgment will have to show "error in the conduct of proceedings and 'prejudice occasioned by the error.'" [24]

Finally, the opinion gives trial courts specific factors to consider when reviewing a request for relief from jury waiver. Litigants should raise as many of these as are relevant when moving for relief. This will encourage the judge to address them on the record, which may come in handy on appeal.

Despite affirming the lower court, the California Supreme Court disapproved of the lower court's ruling, writing, "It is ... unclear whether the trial court in this case exercised its discretion in a manner consistent with the law." [25]

TriCoast did not seem to be operating out of tactical advantage, and it offered to post fees as soon as it tried to invoke the right to a jury. Still, the trial court denied the motion simply because TriCoast had not paid its fees prior to that point.

That, however, "is not a sufficient reason for denying relief from waiver," the court said. [26] Had TriCoast sought a more comprehensive ruling and filed a writ petition, things could have turned out differently for the contractor.

The exact circumstances in this case are rare, but TriCoast is still instructive on general jury demand and waiver practices. Post jury fees as soon as possible, and seek writ review if the court denies relief from waiver.

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Southern California Defense Counsel in TriCoast Builders Inc. v. Fonnegra.

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[1] Nationwide Biweekly Admin., Inc. v. Super. Ct. of Alameda Cnty., 462 P.3d 461, 480 (Cal. 2020).

[2] Cal. Civ. Proc. Code § 631(g) (West 2022).

[3] TriCoast Builders, Inc. v. Fonnegra, No. S273368, 2024 WL 763422 (Cal. Feb. 26, 2024).

[4] Id. at *2.

[5] Id.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Id.

[14] Id.

[15] Id. at *3 – 4.

[16] Id. at *5.

[17] Id. (citation omitted).

[18] Id. at *7.

[19] Id. at *6 n.6.

[20] Id. at *9.

[21] Id. at *12.

[22] Id.

[23] Id. at *9.

[24] Id. (citation omitted).

[25] Id. at *8.

[26] Id.