

# Wisconsin's Supreme Court: Contractual Waivers of Civil Jury Trial Are Enforceable



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Last year the Wisconsin Court of Appeals threw businesses a curveball when it held that a contractual waiver of the right to a jury trial was unenforceable.

The holding of the case, *Parsons v. Associated Banc-Corp.*, 2016 WI App 44, 370 Wis. 2d 112, 881 N.W.2d 793, seemed at odds with long-settled case law and with principles concerning freedom of contract.

But the Supreme Court has now straightened the court of appeals' pitch. In a 4-2 decision issued last week, it reversed the lower court. *See Parsons v. Associated Banc Corp.*, 2017 WI 37. Justice Annette Ziegler wrote for the majority; Justice Ann Walsh Bradley wrote a dissent, in which Justice Shirley Abrahamson joined; Justice Daniel Kelly did not participate.

The contractual waiver appeared in loan documents executed by a lender and a borrower, most importantly the borrower's promissory note. The documents said plainly that both parties "waive any right to have a jury participate in resolving any dispute." The borrower filed a preemptive suit against Associated and demanded a jury trial. The circuit court granted Associated's motion to strike the jury demand, but the court of appeals, having granted leave to appeal the interlocutory order,

reversed that decision.

The Supreme Court noted that the ability to waive the right to a civil jury trial “is already settled law.” The very provision in Wisconsin’s constitution that creates the right to a civil jury trial, Art. I, § 5, allows a party to waive a jury “in all cases in the manner prescribed by law”—and that phrase, according to the court’s decision, includes waivers accomplished under ordinary application of the common law of contract.

The Supreme Court also rejected the waiver standard applied by the court of appeals, which would have required Associated to prove that the borrower had understood “the scope of and the specific nature of the rights given up.” ¶ 37. Clear and unambiguous terms in a contract are all that is required for the waiver to be valid. ¶ 36.

We have little doubt that most Wisconsin practitioners will not be all that surprised, to this point, by the Supreme Court’s opinion, for the court of appeals’ decision last year was certainly something of an outlier.

But the final issue for the Supreme Court—the timeliness of Associated’s motion—was, in our view, a much closer call. The bank filed its motion 16 months after the borrower filed an amended complaint (which would have been the second time that Associated would have seen the jury demand), and after the case had been on the calendar for a jury trial for 36 months. The dissent thought that estoppel might be appropriate to bar invocation of the contractual waiver so late in the litigation, but the court concerned itself with the absence of any “statutory directive” regarding the timeliness of a motion like this. It relied, rather, on the circuit court’s discretion to hear Associated’s motion, in spite of the delay, and took comfort from a Third Circuit case in which DaimlerChrysler had waited three years to raise a similar issue. Regardless, bank lawyers will be well-advised to check the loan documents and not to wait so long to challenge a jury demand the next time they see one.

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