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A Tale of Two Waivers: Waiver of the Jury Waiver Defense Under the Federal Rules of Civil Procedure

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I. INTRODUCTION

We live in a brave new world. Over the past forty years, pre-dispute jury trial waivers in commercial and employment contracts have become commonplace.[1] The insertion of these clauses into leasing and lending agreements by financial institutions has been going on for many years.[2] The insertion of such clauses in employment agreements is a more recent trend.[3] Regardless of the context, the reasons for jury waivers abound: juries are less predictable than judges;[4] juries favor the "little guy" over the "big guy;"[5] juries are more likely than judges to award high damages awards;[6] trying a case to a jury is time-consuming and inconvenient;[7] and jury waivers are preferable to mandatory arbitration clauses because arbitration proceedings are becoming increasingly expensive.[8]

In federal court civil cases, the Seventh Amendment to the United States Constitution protects the right to trial by jury in civil actions that existed at common law.[9] If the Seventh Amendment right does not apply to a particular civil action or its applicability is unclear, a federal statute may nonetheless provide a jury trial right.[10] In spite of the constitutional dimension of the jury trial right in civil actions, this right, like other constitutional rights, may be waived by prior

1. *See* Debra T. Landis, Annotation, *Contractual Jury Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688 (1989 & 2007–2008 Supp.); Jay M. Zitter, Annotation, *Contractual Jury Waivers in State Civil Cases*, 42 A.L.R. 5th 53 (1996 & 2007 Supp.).

2. Zitter, *supra* note 1, at 53.

3. Michael H. LeRoy, *Jury Revival or Jury Reviled? When Employers Are Compelled to Waive Jury Trials*, 7 U. PA. J. LAB. & EMP. L. 767, 788 (2005) (finding that the number of court opinions on employee challenges to mandatory jury waivers is small, but noting that the number of court opinions underestimates the prevalence of jury waivers in employment contracts in that lawyers "have only recently advised employers to use these [jury] waivers instead of arbitration").

4. Chester S. Chuang, *Assigning the Burden of Proof in Contractual Jury Waiver Challenges: How Valuable is Your Right to a Jury Trial*, 10 EMP. RTS. & EMP. POL'Y J. 205, 209 (2006) ("From a risk management perspective . . . many employers find a jury's legendary unpredictability to be unacceptable.").

5. Zitter, *supra* note 1, at 53; JERRY CUSTIS, LITIGATION MANAGEMENT HANDBOOK 8:32 (2004).

6. MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, WORK LAW: CASES AND MATERIALS 1009 (2005).

7. Zitter, *supra* note 1, at 53.

8. CRAIN ET AL., *supra* note 6, at 1008–1009.

9. U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.").

10. *See* 42 U.S.C. § 1981a(c) (2006) (providing right to jury trial by statute in Title VII cases where a party seeks compensatory or punitive damages).

written agreement of the parties.[11] Commentators have written many articles regarding whether pre-dispute jury waivers should be enforceable, the appropriate federal standard for determining the validity of a contractual jury waiver, which party has the burden of proving an enforceable waiver, and other related issues.[12] Litigators on both sides of the bar have spent countless hours arguing over whether pre-dispute jury waivers are enforceable as a matter of law, and, if so, whether the particular waiver at issue in their case is enforceable under the law despite unequal bargaining power between the parties or lack of conspicuousness of the waiver provision itself.[13] Judges have authored numerous opinions on these subjects.[14] Very little has been written, however, on the procedure for raising the jury trial waiver defense in federal court.[15] Most federal courts faced with the issue of the deadline for raising the jury waiver defense have been content to cite the general rule that the deadline to move to strike a jury demand is the eve of trial.[16]

The procedure for asserting the jury waiver defense in federal district court should not be overlooked. Given the increasing number of jury waiver provisions that apply to commercial and employment ar-

11. Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir. 1986); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755–56 (6th Cir. 1985); Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977); RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002). At least two state courts have held that pre-dispute jury waivers violate state law. *See* Grafton Partners LP v. Superior Court, 116 P.3d 479, 488 (Cal. 2005); Bank S., N.A. v. Howard, 444 S.E.2d 799 (Ga. 1994).

12. *See supra* notes 3 and 4; Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, 80 CHI.-KENT L. REV. 933 (2005); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2004); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085 (2002); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001); Deborah J. Matties, Note, *A Case for Judicial Self-Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court*, 65 GEO. WASH. L. REV. 431 (1997); Samuel Estreicher & Rene M. Johnson, *Contractual Jury Waivers in Federal Employment Litigation*, N.Y. L. J., May 2, 2003, at 3; Stephen F. Fink, *Insist on Bench Trials*, NAT'L L. J., Jan. 13, 2003, at A17.

13. *See supra* note 11.

14. *See supra* note 11.

15. *See* Mowbray v. Zumot, 536 F. Supp. 2d 617, 621 (D. Md. 2008) (noting that the deadline for raising the jury waiver defense under the Federal Rules of Civil Procedure arises infrequently).

16. *See* Tracinda Corp. v. DaimlerChrysler AG, 502 F.3d 212, 226–27 (3d Cir. 2007); *Mowbray*, 536 F. Supp. 2d at 621; Bear Stearns Funding, Inc. v. Interface Group-Nev., Inc., 2007 U.S. Dist. LEXIS 82557, *9–*10 (S.D.N.Y. Nov. 7, 2007); Great Earth Int'l Franchising Corp. v. Milks Dev., 311 F. Supp. 2d 419, 437–38 (S.D.N.Y. 2004).

rangements, one would expect an increasing number of cases in which a jury trial waiver defense may be asserted. Fair procedural requirements that are consistent with the Federal Rules of Civil Procedure need to be developed in this area in a manner that is different from the most recent judicial decisions. It may surprise some that, according to case law, this defense may be raised on the eve of trial or *even during a jury trial* and still be timely and ultimately successful.[17] Indeed, as the courts are interpreting the Federal Rules of Civil Procedure, waiver of the jury trial waiver defense through inaction during the litigation process seems to be nearly impossible.[18]

The thesis of this Article is that the Federal Rules of Civil Procedure, most specifically Rule 8(c), should be interpreted to require the jury waiver defense to be pled early on in the pretrial stage of litigation. The failure to plead the defense risks waiver. Part II of this Article expands upon the legal issues previously raised regarding the enforceability of a pre-dispute contractual jury waiver. Part III summarizes the basic rules regarding demanding a jury trial and defending against that demand under the Federal Rules of Civil Procedure. Part IV presents and explains the novel argument regarding the early deadline for raising the jury waiver defense under the Federal Rules, and establishes legal principles for determining whether the assertion of an untimely jury waiver defense waives the defense. Part V makes some final remarks.

II. CONTRACTUAL JURY WAIVERS

A. The Jury Waiver Explosion

Jury waivers in commercial agreements have been ubiquitous for many years.[19] Jury waivers in employment agreements are a twenty-first century trend.[20] Prior to the passage of the 1991 Civil Rights Act, judges, not juries, acted as fact-finders in many employment discrimination cases because the courts had generally interpreted Title VII to not guarantee a jury-trial right.[21] The 1991 Civil Rights Act

17. *See supra* note 16.
18. *See supra* note 16.
19. Zitter, *supra* note 1, at 53.
20. LeRoy, *supra* note 3, at 788. While this Article uses employment cases as an exemplar, the ideas expressed herein relating to contractual jury waivers apply across a broad swath of federal claims brought in federal court.
21. Fink, *supra* note 12, at A17. Jury trials were available prior to 1991 for claims brought under other federal employment discrimination statutes such as the Age Discrimination in Employment Act, 29 U.S.C. § 621 (2007), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (2006). *See* BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 494–95, 696–97 (2nd ed., BNA Books 1982). Antidiscrimination claims were also tried to juries under some state antidiscrimination statutes. *See, e.g.*, Asare v. Hartford Fire Ins. Co., 1 Cal. App. 4th 856, 868–69 (App. Ct. 1991) (right to a jury trial exists under California

changed the law and guaranteed the right to jury in Title VII cases involving compensatory or punitive damages.[22] Not surprisingly, after federal law changed to provide the right to a jury trial in Title VII cases, the victory rate at trial for employees in employment discrimination cases increased.[23] Employment discrimination plaintiffs tended to do better in front of juries than they had done in front of federal judges in terms of liability and higher damages awards.[24] Moreover, the settlement value calculation of an employment discrimination case bound for a jury trial became quite different than the prior calculation of a case bound for a bench trial. Employers tended to pay higher settlements to plaintiffs who had overcome a summary-judgment motion and were destined to try their case to a jury because of the threat—whether real or perceived—of the runaway jury.[25]

This changing dynamic in the early 1990s spurred employers to develop alternatives to trying employment discrimination cases to juries. Many employers turned to mandatory arbitration in the 1990s as a way to avoid the vagaries of the judicial system.[26] Under mandatory arbitration programs, private arbitrators, some of whom possess an expertise in employment law, become the judges of the law and facts.[27] From the employer's perspective, arbitration avoided the perceived problems of the judicial system.[28]

Over the past several years, however, some of the employers who initially adopted mandatory arbitration programs as a dispute resolution technique, to reduce litigation expenses and manage risk, have

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employment discrimination statute—the Fair Employment and Housing Act, CAL. GOV'T CODE, § 12900), *overruled on other grounds by* Claxton v. Waters, 96 P.3d 495 (Cal. 2004).

22. Fink, *supra* note 12, at A17; 42 U.S.C. § 1981a(c) (2006). Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e, is the federal statute that prohibits discrimination in employment because of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (2006).
23. Fink, *supra* note 12, at A17.
24. *Id.*
25. *Id.*
26. *Cf.* LeRoy *supra* note 3, at 773 (explaining that *Gilmer* decision accelerated the growth of the use of arbitrators in employment disputes in the 1990s). In the 1991 *Gilmer* decision, the United States Supreme Court held that a mandatory pre-dispute arbitration agreement signed by an employee as a condition of employment was enforceable and precluded the employee from litigating his employment discrimination claim in federal district court. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
27. *Cf.* LAURA J. COOPER, DENNIS R. NOLAN & RICHARD A. BALES, ADR IN THE WORKPLACE 547 (West Group 2000) (explaining that arbitrators are private, impartial actors who resolve disputes outside the normal judicial process; almost all employment law arbitrators are attorneys and many of these arbitrators also arbitrate labor law disputes).
28. *Cf.* Thomas J. Piskorski & D.B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment Disputes*, 19 EMP. REL. L.J. 205, 209 (1993) (describing the advantages of arbitration from an employer's perspective).

found that such programs are not all they are cracked up to be. Arbitration is becoming increasingly expensive and almost all of the rising costs are borne by the employer, as opposed to the employee.[29] Lowering the cost and risk to employees of bringing claims leads to more claims.[30] Arbitration procedures are becoming more "judicialized" in terms of procedural rights like discovery and application of evidentiary protections.[31] The "judicialization" of arbitration proceedings leads to greater litigation expense, which defeats one of the benefits of arbitration.[32] Furthermore, some employers are finding that the runaway arbitrator is out there as well.[33] Only with arbitration, as opposed to public justice, there is typically no appellate remedy;[34] the employer is simply stuck with the large award.[35] Finally, arbitration has proven to be controversial in that many employees believe that such a system is inherently tilted in the employer's favor because of the "repeat player" phenomenon, and therefore can really never be made fair.[36]

All of this hand-wringing and disappointment over arbitration has led some employers to turn to jury waivers as the new alternative dispute resolution system. As one commentator advocated from the employer's perspective, the courts are fine; the problem is with juries.[37]

29. *See* CRAIN ET AL., *supra* note 6 at, 1009 ("A typical employment arbitration now costs between $30,000 and $100,000, most of which is borne by the employer."); Michael H. LeRoy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143 (2002); Shankle v. B-G Maint., 163 F.3d 1230 (10th Cir. 1999) (holding that a fee-splitting provision in a mandatory arbitration agreement is unenforceable).

30. *See* CRAIN ET AL., *supra* note 6, at 1008–1009 (explaining that arbitration systems are heavily utilized because they are low cost or costless to employees); Fink, *supra* note 12, at A17 ("Anecdotal evidence suggests that lowering the cost and risk of making claims has the the predictable effect of generating more claims.").

31. Fink, *supra* note 12, at A17.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* Sarah Rudolph Cole, *Managerial Litigants: The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1233 n.152 (2000); Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857, 863 (1999); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

37. *See* Fink, *supra* note 12, at A17 ("There is an alternative to arbitration [jury-trial waivers]. Courts are not the employer's problem: juries are.").

B. Enforceability of Jury Waivers

The jury-trial right in federal civil court cases is guaranteed by the Seventh Amendment to the United States Constitution.[38] The United States Supreme Court has interpreted the Seventh Amendment to guarantee a jury trial in suits in which legal rights, as opposed to equitable rights, are asserted.[39] The Seventh Amendment applies to common-law causes of action and certain statutory causes of action.[40] Statutes may provide a right to jury trial either implicitly or explicitly.[41] If congressional intent to imply the right to a jury trial does not exist, the Seventh Amendment question must be addressed.[42] A historical test applies. The cause of action is compared to eighteenth-century actions brought in the English courts. The court will determine whether the modern-day action is more analogous to the legal or equitable forms of action which existed in 1791 England.[43] The nature of the relief sought is also examined to determine whether it is best viewed as legal or equitable.[44] The remedies part of the test is usually viewed as the most important part.[45]

The constitutional right to a civil jury trial under the Seventh Amendment may nonetheless be waived by parties through a written agreement signed prior to the dispute.[46] More than general contract law principles are utilized to determine whether such a waiver is enforceable, however. Because of the constitutional right at stake, the waiver must meet a higher "knowing consent" standard.[47] The federal standard for determining the validity of a waiver is whether the parties executed the waiver knowingly, voluntarily, and intelligently.[48] Whether the jury-trial right has been waived under this

38. *See supra* note 9.
39. Chauffeurs, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830).
40. City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 708–709 (1999).
41. Lorillard v. Pons, 434 U.S. 575, 577 (1978); O'CONNOR'S FEDERAL RULES * CIVIL TRIALS, ch. 5, pt. C, § 4.2, at 253 (2008) [hereinafter O'CONNOR'S].
42. *City of Monterey*, 526 U.S. 687, 707–08; O'CONNOR'S, *supra* note 41, at 253.
43. *Chauffeurs Local No. 391*, 494 U.S. at 565; Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989); Tull v. United States, 481 U.S. 412, 417–418 (1987); *see, e.g.*, Jarod S. Gonzalez, *SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 51–68 (2006).
44. *See supra* note 43.
45. *See supra* note 43.
46. *See supra* note 11.
47. Chuang, *supra* note 4, at 213–15; Sternlight, *supra* note 12, at 677–80; Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 258, 258 (2d Cir. 1977).
48. Tracinda Corp. v. DaimlerChrysler AG, 502 F.3d 212, 222 (3d Cir. 2007); Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832–33 (4th Cir. 1986); *Nat'l Equip. Rental Ltd.*, 565 F.2d at 258; RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002); First Union Nat'l Bank v. United States, 164 F. Supp. 2d 660, 663 (E.D. Pa. 2001); Coop. Fin. Ass'n, Inc. v. Garst, 871 F. Supp. 1168, 1171 (N.D.

standard is a question of federal law for the court to decide.[49] The majority of federal courts hold that the party seeking enforcement of the waiver has the burden to prove that the other party's consent was made knowingly, voluntarily, and intelligently.[50] The factors generally used by the federal courts to decide whether the waiver meets this federal standard include: the conspicuousness of the waiver provision; the relative bargaining power between the parties; the business or professional experience, i.e., sophistication, of the party opposing the waiver; and whether the opposing party had the opportunity to negotiate contract terms.[51]

Courts have applied these legal principles regarding the enforceability of jury waivers, whether the jury waiver is signed in the commercial context or the employment law context.[52] Although courts are perhaps more searching in their analysis of jury waivers in employment agreements because of a greater likelihood of disparities in the bargaining process,[53] jury waivers in employment agreements have been enforced.[54] Indeed, irrespective of the context, it is clear that properly drafted jury-trial waivers may be enforceable under federal

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Iowa 1995); Phoenix Leasing, Inc. v. Sure Broad., Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994), *aff'd*, 89 F.3d 846 (9th Cir. 1996); *In re* Reggie Packing Co., Inc., 671 F. Supp. 571, 573 (N.D. Ill. 1987); Dreiling v. Peugeot Motors of Am., Inc., 539 F. Supp. 402, 403 (D. Colo. 1982).

49. *See* Simler v. Conner, 372 U.S. 221, 222 (1963); GTEM, LLC v. TKN Sales, Inc., 257 F.3d 235, 238 (2d Cir. 2001); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755 (6th Cir. 1985); Morris v. McFarland Clinic, P.C., 2004 U.S. Dist. LEXIS 26639, *3 (S.D. Iowa Jan. 29, 2004); RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 812–13 (N.D. Tex. 2002) (stating that federal law determines the enforceability of a pre-litigation contractual jury waiver).

50. The Second, Fourth, and Tenth Circuits place the burden of providing the enforceability of the waiver on the party seeking to enforce the waiver. *See* Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 838 (10th Cir. 1988); *Leasing Service Corp.*, 804 F.2d at 832–33; *Nat'l Equip. Rental Ltd.*, 565 F.2d at 258. The Sixth Circuit places the burden on the party objecting to the jury waiver provision. *See K.M.C. Co.*, 757 F.2d at 758.

51. Brown v. Cushman & Wakefield, Inc., 235 F. Supp. 2d 291, 294 n.5 (S.D.N.Y. 2002); *RDO Fin. Servs. Co.*, 191 F. Supp. 2d at 813–14; *First Union Nat'l Bank*, 164 F. Supp. 2d at 663; *Coop. Fin. Ass'n, Inc.*, 871 F. Supp. at 1171–72; 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 38.52[3][c] (3d ed. 1997) [hereinafter 8 MOORE'S FEDERAL PRACTICE].

52. *See Winiarski*, 2008 U.S. Dist. LEXIS 35799 (district court applied the legal principles regarding "knowing consent" in contractual jury waiver in employment agreement); *Brown*, 235 F. Supp. 2d at 293–95 (same).

53. *See, e.g.*, LeRoy, *supra* note 3, at 796 (explaining that courts pay more attention to the arm's length nature of the bargain in determining whether to enforce jury waiver provisions in employment agreements than they do in deciding whether to enforce mandatory arbitration provisions).

54. *See* Winiarski v. Brown & Brown, Inc., 2008 U.S. Dist. LEXIS 35799 (M.D. Fla. May 1, 2008); Joseph Oat Holdings, Inc. v. RCM Digesters, Inc., 2007 U.S. Dist. LEXIS 62879 (D. N.J. Aug. 24, 2007); Morris v. McFarland Clinic, P.C., 2004 U.S. Dist. LEXIS 26639 (S.D. Iowa Jan. 29, 2004); Schappert v. Bedford, Freeman &

law.[55] Nevertheless, federal law provides ample opportunity for a party in a particular case to argue that the applicable waiver is unenforceable on one or more grounds.[56] Parties frequently oppose a contractual jury waiver defense in litigation if the defense is raised.[57] They are sometimes successful. There are various cases in which a court determined that the party seeking enforcement of the waiver did not prove a knowing and voluntary waiver of the right to a jury trial and thus the court refused to enforce the waiver.[58]

III. DEMANDING A JURY TRIAL AND STRIKING A JURY DEMAND UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

A. The Jury Trial Demand and Motion for Jury Trial

The jury-trial right is not self-executing.[59] Federal Rules of Civil Procedure 38 and 39 establish the procedure for asserting the right to a jury trial.[60] Rule 38 preserves the jury-trial right as guaranteed by

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Worth Publ'g Group, LLC, 2004 U.S. Dist. LEXIS 14153 (S.D.N.Y. July 23, 2004); *Brown*, 235 F. Supp. 2d 291.

55. *See* Landis, *supra* note 1 (collecting cases).

56. An inconspicuous clause that contains the jury-trial waiver, an unsophisticated party without bargaining power, or the document signed under duress are a just a sample of the possible arguments that could be used to defeat the enforcement of a waiver provision. *See supra* note 51 (citing cases that set forth the factors courts look at in determining whether jury waiver was made knowingly and voluntarily).

57. *See supra* note 51.

58. *See* Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (inconspicuous waiver provision and inequality in bargaining power suggested that waiver was not knowing); RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813–14 (N.D. Tex. 2002) (waiver buried deep in a lengthy paragraph and lacking in mutuality—lender had power to demand jury—led court to find that jury waiver was not enforceable); First Union Nat'l Bank v. United States, 164 F. Supp. 2d 660, 665 (E.D. Pa. 2001) (gross disparity in bargaining power and lack of opportunity to negotiate terms rendered waiver invalid); Dreiling v. Peugeot Motors, Inc., 539 F. Supp. 402, 403 (D. Colo. 1982) (insertion of a waiver provision at the end of a standardized form contract rendered jury waiver unenforceable); 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, at § 38.52[3][c].

59. 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, at § 38.50[1][a] ("The right to a jury trial is not self enforcing. To be obtained, a jury trial must be demanded pursuant to the provisions of Rule 38. Inaction results in waiver of the right."); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2318, at 211 (3d ed. 2008) [hereinafter 9 WRIGHT & MILLER] ("The right to jury trial preserved by the Seventh Amendment to the Constitution and embodied in Federal Rule 38(a) is not self-enforcing.").

60. FED. R. CIV. P. 38 (establishing the procedure for demanding a jury trial and specifying that waiver of the jury trial occurs if that procedure is not followed); FED. R. CIV. P. 39 (permitting the court to order a jury trial on motion of the party who waived the right to jury trial by failing to follow the FRCP 38 procedure).

the Seventh Amendment or a federal statute,[61] but provides that the right is waived if it is not asserted by a party during the pleading stage of litigation.[62]

A party may demand a jury trial on any issue where a right to trial by jury exists.[63] The jury demand must be made by serving the opposing party with the written demand no later than ten days after the last pleading directed to the issue is served and filing the demand with the Clerk of Court shortly thereafter.[64] The "last pleading" will generally be the answer or the reply to a counterclaim,[65] but an amended complaint or amended answer may extend the jury demand

61. FED. R. CIV. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.").

62. FED. R. CIV. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed.").

63. FED. R. CIV. P. 38(b) ("On any issue triable of right by a jury, a party may demand a jury trial . . . .").

64. FED. R. CIV. P. 38(b) ("On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand—which may be included in a pleading—no later than 10 days after the last pleading directed to the issue is served; and (2) filing the demand in accordance with Rule 5(d)."); FED. R. CIV. P. 5(d)(1) ("Any paper after the complaint that is required to be served—together with a certificate of service—must be filed within a reasonable time after service.").

A different set of rules applies to a case removed from state court to federal court. *See* FED. R. CIV. P. 81(c)(3). A party who has already demanded a jury in state court does not have to repeat the demand after the case is removed to federal court. FED. R. CIV. P. 81(c)(3)(A). If all of the necessary pleadings have been served in the state court case before removal but no jury demand was made in the state-court pleadings, a jury demand must be served in the federal court case within ten days after the filing of the notice of removal or service of the notice of removal. FED. R. CIV. P. 81(c)(3)(B). If no jury demand was made in state court and all of the required state court pleadings have not been made at the time of removal, the general rule in Rule 38(b) is followed concerning the deadline for demanding a jury trial. Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd., 239 F.3d 1000, 1002 n.2 (9th Cir. 2001); 9 WRIGHT & MILLER, *supra* note 59, § 2319, at 225–226 (explaining that the "the usual provisions of the Federal Rules, particularly Rule 38(b) . . . govern the time in which to demand a jury" if not all of the necessary pleadings have been served in the state court proceeding prior to removal). In states where the applicable state law does not require an express jury demand, a "party need not make one after removal unless the court orders the parties to do so within a specified time." FED. R. CIV. P. 81(c)(3)(A).

65. *See In re* Tex. Gen. Petroleum Corp., 52 F.3d 1330, 1339 (5th Cir. 1995) ("The last pleading in Rule 38 usually means an answer or a reply to a counterclaim."); McCarthy v. Bronson, 906 F.2d 835, 840 (2d Cir. 1990), *aff'd*, 500 U.S. 136 (1991) ("'[T]he last pleading directed to an issue is not the pleading that raises the issue, it is the pleading that contests the issue. Normally, that pleading is an answer, or, with a respect to a counterclaim, a reply."); 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, at § 38.50[3][b] ("The 'last pleading' within the meaning of the rules generally will be an answer or reply, and is determined on a case-by-case basis.").

time-period if that amended pleading raises new jury trial issues.[66] In the majority of cases, a jury demand is timely if served within ten days after the last defendant's answer to the complaint.[67] The jury demand may be included in a pleading, such as endorsing "Jury Trial Demanded" on the plaintiff's original complaint, or made as a stand-alone document.[68] Waiver of the right to a jury trial occurs if the jury demand is not made within the ten-day period under the rule.[69] The ten-day provision provides a sufficient amount of time for counsel to determine whether a jury-trial right exists in the case and, if it does, whether it is strategically beneficial to assert the right by making a jury demand.[70]

66. *See* Shelton v. Consumer Prods. Safety Comm'n, 277 F.3d 998, 1011 (8th Cir. 2002); Huff v. Dobbins, Fraker, Tennant, Joy & Perlstein, 243 F.3d 1086, 1090 (7th Cir. 2001); 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, § 38.50[3][b] (amended pleadings "do not extend the jury demand time, except as to issues that are raised for the first time by the [amended] pleadings."); O'CONNOR'S, *supra* note 41, ch. 5, pt. C, § 3.4, at 252 ("An amended pleading that does not introduce new issues of fact is insufficient to renew a party's waived right to jury trial.").

67. *See* O'CONNOR'S, *supra* note 41, ch. 5, pt. C, § 3.1, at 252 (noting that "[i]n most cases a party's jury demand is timely if served within ten days after the defendant's answer to the complaint"). In cases involving multiple defendants, the jury-demand deadline runs from the date the *last* defendant serves its answer. *See* 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, at § 38.50[3][b] (collecting cases).

68. FED. R. CIV. P. 38(b)(1); 9 WRIGHT & MILLER, *supra* note 59, § 2318, at 213–15 ("Although no particular form of writing is required, and the [jury] demand may be 'included in a pleading,' it is desirable that the demand be either in a separate document or set off from the main body of the pleading in order to make it readily recognizable."); O'CONNOR'S, *supra* note 41, ch. 5, pt. C, § 2.1, at 250 ("The [jury] demand may be included in the plaintiff's complaint, the defendant's answer, or a separate document. Merely checking the jury-demand box on the civil cover sheet is not a proper demand for a jury.").

69. The federal courts have universally interpreted Rule 38(d) according to its plain language and ruled that the failure to satisfy the requirements of Rule 38(b) waives the right to a jury trial. *See Pac. Fisheries Corp.*, 239 F.3d at 1002; BCCI Holdings (Lux.), S.A. v. Khalil, 214 F.3d 168, 172–73 (D.C. Cir. 2000); Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1063 (5th Cir. 1990); *see also* 9 WRIGHT & MILLER, *supra* note 59, § 2321, at 267 ("It is well settled by a considerable array of cases that waiver by a failure to make a timely demand is complete even though it was inadvertent and unintended and regardless of the explanation or excuse.").

70. *See* 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, § 38.50[3][b] ("The 10-day provision enables counsel to reflect on the various factors which should be considered in deciding whether to demand a jury."). Whether a party is better suited for a bench or jury trial in a particular case depends on many factors, which include, but are not limited to, venue, the relative skills and reputation of the attorneys, the complexity of the case, cost, which party has the burden of proof, the concreteness of damages, and the amount of questionably admissible evidence. *See* WILLIAM DORSANEO, III, 7 TEXAS LITIGATION GUIDE, § 113.50[2] (Aug. 2006); WILLIAM DORSANEO, III, DAVID CRUMP, ELAINE A. CARLSON & ELIZABETH THORNBURG, TEXAS CIVIL PROCEDURE: TRIAL AND APPELLATE PRACTICE § 1.02[C], at 46–47 (4th ed. 2001).

Although failure to serve and file a timely jury demand waives the right to a jury trial, the trial court has the discretion, upon a motion, to order a jury trial under Rule 39(b).[71] Therefore, a party who desires to assert the right to a jury trial may file a motion for jury trial after the deadline for serving and filing the jury demand has passed, in hopes of convincing the court to order the jury trial.[72] The decision whether to grant the motion for jury trial is discretionary with the trial court, and the appellate courts rarely overturn the trial court's decision.[73] The federal courts often apply some variation of the following multi-factor balancing test when deciding whether to grant the motion for jury trial. The factors include: whether the issues are suitable for a jury; whether granting the motion would disrupt the schedule of the court or of the adverse party; whether any prejudice would result to the adverse party; how long the party delayed in bringing the motion; and the reasons for failure to file a timely demand.[74]

The case law from the various federal circuits demonstrates some differences in the circuits' approaches to this issue.[75] In weighing the factors, some circuits apply a strong presumption that the motion for jury trial should be granted.[76] Other circuits tend to be sticklers for compliance with the Federal Rules and are not apt to grant a motion for jury trial unless exceptional circumstances excuse the delay.[77] For example, the Fifth and Eleventh Circuits direct trial courts to grant motions for jury trials unless "strong and compelling reasons to the contrary" exist.[78] In contrast, the Third Circuit courts consistently

71. FED. R. CIV. P. 39(b) ("Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.").

72. *See* 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, at § 39.31[2] ("The language of Rule 39(b) suggests that the filing of a formal, written motion for a jury trial is the best procedure to follow to obtain relief from a waiver of jury trial rights resulting from the failure to make a timely jury demand."); Hare v. H&R Indus., Inc., 2001 U.S. Dist. LEXIS 8661, *2 (E.D. Pa. June 26, 2001) ("A party may not insert an untimely jury demand into a case by stealth; rather, the proper procedure is a motion under Rule 39(b).").

73. *See* 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, at § 39.31[3] ("As a practical matter, regardless of what standard for the exercise of discretion is expressed, appellate courts tend to affirm the decision of trial courts on motions for a jury trial.").

74. *See* U.S. Sec. and Exch. Comm'n v. The Infinity Group Co., 212 F.3d 180, 195–96 (3d Cir. 2000); *Daniel Int'l Corp.*, 916 F.2d at 1064; Parrott v. Wilson, 707 F.2d 1262, 1267 (11th Cir. 1983); Noddings Inv. Group, Inc. v. Kelley, 881 F. Supp. 335, 337 (N.D. Ill. 1995).

75. *See* O'CONNOR'S, *supra* note 41, ch. 5, pt. C, § 6.4, at 255.

76. *See* 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, § 39.31[4].

77. *Id.*

78. *See Daniel Int'l Corp.*, 916 F.2d at 1064 (fundamental right to jury trial under the Seventh Amendment means the trial court should grant a motion for jury trial under Rule 39(b) in the absence of strongly and compelling reasons to the contrary); *Parrott*, 707 F.2d at 1267 (same rule as Fifth Circuit).

deny motions for jury trial when the reason for the failure to serve and file a timely jury demand is due to attorney inadvertence or neglect.[79] The Ninth Circuit approach is generally in line with the Third Circuit.[80] The Seventh Circuit stakes out a middle ground.[81]

Courts vary with respect to how much weight they attribute to each value. For some courts, making sure that a case in which a constitutional or statutory right to a jury trial applies is tried to a jury is paramount; the procedural requirements are more readily overlooked.[82] For other courts, the disregard of procedural requirements is a big deal.[83] Moreover, when a bench trial case is changed to a jury trial case late in the pretrial process, these courts take the prejudice that may be caused to both the opposing party and the court very seriously.[84]

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79. *See U. S. Sec. and Exch. Comm.*, 121 F.3d at 195–96 (district court's decision to deny untimely demand for jury trial upheld when the only reason given for the untimely demand was attorney inadvertence and oversight); Reis v. Barley, Snyder, Senft & Cohen L.L.C., 2008 U.S. Dist. LEXIS 26046, *7–*20 (E.D. Pa. Mar. 27, 2008); Iseley v. Talaber, 2007 U.S. Dist. LEXIS 76891, *11–*14 (M.D. Pa. Sept. 28, 2007); FSA Group, Inc. v. Amerada Hess Corp., 2006 U.S. Dist. LEXIS 23376, *1–*23 (E.D. Pa. Apr. 26, 2006); Shen Mfg. Co. v. Family Dollar Stores, Inc., 2006 U.S. Dist. LEXIS 79820, *1–*11 (Oct. 31, 2006); *In re* Inacom Corp., 2005 U.S. Dist. LEXIS 19117, *1–*15 (D. Del. Sept. 6, 2005); Vulcan Print Media, Inc. v. Las Vegas Sports News, L.L.C., 2001 U.S. Dist. LEXIS 24206, *1–*6 (E.D. Pa. Nov. 19, 2001).

80. *See* Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd., 239 F.3d 1000, 1002 (9th Cir. 2001) ("An untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown.").

81. *See* Members v. Paige, 140 F.3d 699, 704 (7th Cir. 1998) ("Applications under Rule 39(b) should be entertained with an open mind.").

82. *See Daniel Int'l Corp.*, 916 F.2d 1061, 1064 (emphasizing that the fundamental nature of the jury-trial right should be considered in deciding whether to grant a motion for jury trial under Rule 39(b) and citing to statement in WRIGHT & MILLER that denying a jury trial as a penalty for a technical violation of Rule 38 is against the spirit of the rules).

83. This view is perhaps most eloquently stated in *Bank Building & Equipment Corp. of America v. Mack Local 677 Federal Credit Union*, 87 F.R.D. 553, 555 (E.D. Pa. 1980). In the *Bank Building* case, Judge Troutman denied a late jury demand for the following reasons:

> To sanction [plaintiffs'] omission would invite disregard of procedural requirements in all of the Rules, cause delay in disposition of disputes by creating confusion on trial dockets and prejudice the opposing party by injecting an unnecessary element of uncertainty into trial strategy and preparation. Worse, the Rules' articulated purpose of securing the "just, speedy and inexpensive determination of every action" would be reduced to an empyrean principle with no practical meaning.

Id.; see also Iseley, 2007 U.S. Dist. LEXIS 76891 at *14 ("A relief from waiver of jury trial under the particular circumstances of this case would defeat the purpose of Rule 38, and may encourage other litigants to disregard the procedural requirements which seek to promote the orderly and timely progress of an action.").

84. *See* United States v. Unum, Inc., 658 F.2d 300, 303 (5th Cir. 1981) (noting that granting the motion for jury trial would cause a substantial hardship because the

B. The Motion to Strike a Jury Demand

Rule 38(b) makes clear that in the run-of-the mill cases the deadline for asserting a jury demand is ten days after the last defendant files its answer to the complaint.[85] Rule 39(b) provides an opportunity for a jury trial to be granted by the court notwithstanding a late jury demand.[86] But the Federal Rules of Civil Procedure are ambiguous regarding the deadline for contesting a jury demand. Rule 39(a)(2) states that when a jury trial is demanded on the issues in which there is a jury-trial right, the case must be tried to a jury unless "the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial."[87] There is no specific statement in this rule regarding the deadline for contesting the jury demand either by an opposing party or the court.[88]

Rule 39(a)(2) certainly establishes that a party may contest a jury demand by filing a motion.[89] Traditionally, a party who desires to contest a jury demand files a motion to strike the jury demand.[90] There are three basic grounds upon which a jury demand may be challenged. First, a party may move to strike a jury demand because there is no federal right to a jury trial under the Seventh Amendment or a federal statute.[91] Second, a party may move to strike a jury demand if the other party has forfeited the jury-trial right due to litigation con-

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opposing party in preparing for a bench trial had relied on depositions and documentary evidence instead of live witnesses); Hare v. H&R Indus., 2001 U.S. Dist. LEXIS 8661, at *3 n.1 (E.D. Pa. June 26, 2001) (noting the difficulty a party moving for a jury trial under Rule 39(b) would have in winning the motion because the opposing party would likely be prejudiced by the extra costs associated with a jury trial and the schedule of the case would be disrupted); BCCI Holdings (Lux.), S.A. v. Khalil, 214 F.3d 168, 172–73 (D.C. Cir. 1998) (party opposing late jury demand argued to court that it based deposition and trial witness strategy on reliance that case would be tried to the bench; district court denied jury trial in part because of the prejudice that the opposing party would suffer if a jury trial was granted late in the case); Williams v. J.F.K. Int'l Carting Co., 164 F.R.D. 340, 342 (S.D.N.Y. 1996) (finding that relief from the waiver of a jury trial under Rule 38 would cause prejudice because the parties "proceeded in discovery for ten months with the understanding that the case would be tried before the Court.").

85. *See supra* note 67.

86. *See supra* note 71.

87. FED. R. CIV. P. 39(a)(2) ("When jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless: . . . (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.").

88. *Id.*

89. *Id.* ("The trial on all issues so demanded must be by jury unless: . . . (2) the court, *on motion* or on its own, finds that on some or all of those issues there is no federal right to a jury trial.") (emphasis added).

90. 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, at § 39.13[2][b]; O'CONNOR'S, *supra* note 41, ch. 5, pt. C, § 5, at 254; Akin v. PAFEC, Ltd., 991 F.2d 1550, 1555 (11th Cir. 1993).

91. O'CONNOR'S, *supra* note 41, ch. 5, pt. C, § 5.4, at 254–55.

duct. For example, a party may move to strike a jury demand when the opposing party's jury demand is untimely or was never served on the parties.[92] A party may also move to strike a jury demand when a written stipulation for a bench trial signed by the parties to the litigation preceded the jury demand.[93] Finally, a party may move to strike a jury demand if the parties have agreed to a pre-dispute contractual jury-trial waiver.[94]

Although Rule 39(a)(2) does not establish a deadline for the filing of a motion to strike the jury demand, the prevailing view is that, whatever the ground to strike the jury demand, parties may wait until the eve of trial to move to strike a jury demand.[95] Indeed, courts subscribing to this view have granted motions to strike a jury demand filed a week before trial and on the very eve of trial.[96] Courts often reason that, because Rule 39(a)(2) gives a trial court the power to act on its own initiative to strike a jury demand, a court has the discretion to permit a motion to strike a jury demand at any time during pretrial proceedings, even on the eve of trial.[97] The federal courts have ruled that the "eve of trial" deadline applies to a motion to strike a jury demand based on a pre-dispute contractual jury waiver.[98]

Some courts take it a step further and rule that it is not too late for the court or an opposing party to contest a jury demand during the actual jury trial itself. In this line of cases, appellate courts have permitted trial courts to switch from a jury trial to a bench trial *during the actual jury trial* when a party or judge points out, after the jury

92. *Id.*

93. *Id.*; FED. R. CIV. P. 39(a)(1) ("The trial on all issues so demanded must be by jury unless: (1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record.").

94. O'CONNOR'S, *supra* note 41, ch. 5, pt. C, § 5.4, at 255.

95. *See* 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, at § 39.13[2][c] ("Parties have a great latitude on the timing of motions to strike a jury demand. Because a court has the power act to sua sponte at any time, it follows that a court has the discretion to permit a motion to strike a jury demand at any time, even on the eve of trial."); Tracinda Corp. v. DaimlerChrysler AG, 502 F.3d 212, 226–27 (3d Cir. 2007) (adopting MOORE's rational and permitting motion to strike jury demand); Mowbray v. Zumont, 536 F. Supp. 2d 617, 621 (D. Md. 2008) (same); Bear Stearns Funding, Inc. v. Interface Group-Nev., Inc., 2007 U.S. Dist. LEXIS 82557, *9–*10 (S.D.N.Y. Nov. 7, 2007) (same); E.E.O.C. v. Thomas J. Lipton, Inc., 571 F. Supp. 535, 535–36 (D. N.J. 1982) (same).

96. United States v. Schoenborn, 860 F.2d 1448, 1455 (8th Cir. 1988) (trial court granted motion to strike jury demand filed one week prior to trial); Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 1158 (5th Cir. 1982) (court takes case away from jury based on motion to strike jury demand filed on eve of trial); Jones-Hailey v. Corp. of Tenn. Valley Auth., 660 F. Supp. 551, 553 (E.D. Tenn. 1987) (motion to strike jury demand filed one month before trial is timely because Rule 39(a) does not specify a time limit for filing a motion to strike jury demand).

97. *See supra* note 95.

98. *See Tracinda Corp.*, 502 F.3d at 226–27; *Mowbray*, 536 F. Supp. 2d at 621; *Bear Stearns*, 2007 U.S. Dist. LEXIS 82557 at *9–*10.

trial has commenced, that the claims are equitable claims and hence not jury claims.[99] As a procedural matter in these cases, the trial judge makes the jury advisory pursuant to Rule 39(c), which provides for advisory juries where a party does not have the right to a jury trial.[100] Other appellate courts have rejected this action. In *Hildebrand v. Board of Trustees of Michigan State University*, for example, the Sixth Circuit reasoned that principles of fundamental fairness and judicial economy militate against permitting a trial court to abort a jury trial due to a lack of a jury-trial right during the jury trial and convert the proceedings into a bench trial.[101]

Whether most federal courts would permit a party or the trial court to contest a jury demand during the jury trial itself is uncertain, yet it appears that the federal courts that have considered the issue have ruled that a motion to strike a jury demand may be filed at any time prior to the start of trial.[102] As explained below, the adopted rule that a contractual jury waiver challenge may be raised at any time prior to trial is not grounded in the text of Rule 39(a). The federal courts have not adequately explained the bases for this adopted rule. It is conceivable that this rule is a carryover from either pre-1938 practice in federal court or from common practice in state courts. However, the federal courts have not articulated pre-1938 practice as a justification for the rule.[103]

IV. WAIVER OF THE JURY WAIVER DEFENSE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

A. Flaws in the Current Law

Federal Rule of Civil Procedure 39(a)(2) simply states that "[t]he trial on all [jury] issues so demanded must be by jury unless the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial."[104] As previously explained, many federal courts have reasoned, in line with *Moore's Federal Practice*, that "because a court has the power to act sua sponte *at any time*, it follows that a court has the discretion to permit a motion strike a jury

99. *See* Ed Peters Jewelry Co. v. C & J Jewelry Co., 215 F.3d 182, 186–88 (1st Cir. 2000); Merex A.G. v. Fairchild Weston Sys., Inc., 29 F.3d 821, 826–27 (2d Cir. 1994).

100. *See supra* note 99; FED. R. CIV. P. 39(c) ("In an action not triable of right by a jury, the court, on motion or on its own: (1) may try any issue with an advisory jury; or (2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.").

101. 607 F.2d 705, 710 (6th Cir. 1979) (converting from a jury trial to a bench trial may prejudice one side over the other).

102. *See supra* notes 96–98.

103. *See supra* note 95.

104. FED. R. CIV. P. 39(a)(2).

demand at any time, even on the eve of trial."[105] This reasoning is flawed. Rule 39(a)(2) clearly states that a party may move to contest a jury demand on the ground that there is no federal right to a jury trial or that a court on its own initiative may strike a jury demand because there is no federal right to a jury trial.[106] The statement from the rule that a court may act sua sponte—on its own initiative—to strike a jury demand does not necessarily imply that the court may act sua sponte to do this *at any time* during the case. The rule does not state that a court may act sua sponte *at any time*.[107] One would expect this sort of additional language if the drafters intended to permit a court to raise a jury-demand challenge at any time during the litigation. For example, it is black-letter law that a challenge to a federal court's subject-matter jurisdiction may be raised by the court at any time during litigation—even after trial and the entry of judgment—but this principle is reflected in Rule 12(h)(3), which clearly states that a court may raise the lack of subject-matter jurisdiction at any time.[108] The most one can say about Rule 39(a)(2) is that it permits a party and the court to move to strike a jury demand, but does not make clear the deadline for a party to file a motion to strike or for the court to strike the jury demand on its own initiative. The rule is unclear about whether a party or the court must adhere to any deadline at all.

This begs the question: Why did the drafters of Rule 39 choose not to establish a firm deadline to file a motion to strike a jury demand? The current versions of Rules 38 and 39 are largely unchanged from the original 1937 versions of these rules.[109] There is no discussion of the original drafters' reasoning behind the decision not to provide a motion to strike a jury demand deadline in the 1937 Advisory Com-

105. 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, at § 39.13[2][c]; *see supra* notes 95–96.

106. FED. R. CIV. P. 39(a)(2).

107. *Id.*

108. Prior to the 2007 stylistic changes to the Federal Rules of Civil Procedure, Rule 12(h)(3) stated that "[*w*]*henever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FED. R. CIV. P. 12(h)(3) (pre-December 1, 2007 version) (emphasis added). Rule 12(h)(3) currently states: "[i]f the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action." FED. R. CIV. P. 12(h)(3) (post-December 1, 2007 version) (emphasis added). *See also* Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006) (citing to Rule 12(h)(3) for the proposition that the lack of subject-matter jurisdiction in federal court "may be raised by a party, or by a court on its own initiative, at any stage of the litigation, even after the trial and entry of judgment"); Kontrick v. Ryan, 540 U.S. 443, 455 (2004) (same); Frett-Smith v. Vanterpool, 511 F.3d 396, 398 n.3 (3d Cir. 2007) (same).

109. Rule 38 was amended in 1966, 1987, 1993, and 2007. Rule 39 was amended in 2007. None of the amendments address moving to strike a jury demand by a party or striking a jury demand on the court's own initiative. *See* 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, at §§ 38App.100, 39App.01–.02.

mittee Notes to Rules 38 and 39.[110] Accordingly, interested observers are left to speculate as to the thoughts underlying the Advisory Committee's decision.

There are several possible policy reasons that could explain the failure to establish a deadline. First, the Advisory Committee members may have believed that setting a firm deadline would not be a good idea because determining whether a jury-trial right does exist under the Seventh Amendment is a complicated issue and one that may be difficult to determine by simply looking at the pleadings.[111] Under this view, due to the complicated Seventh Amendment analysis, a party might need considerable time to evaluate whether the jury-trial right exists, and thus, a firm deadline, especially a deadline fairly early in the pretrial process, would hamstring a party's ability to contest what detailed research may reveal is an improper jury demand. Second, the Committee members may have deemed a deadline imprudent because the jury-trial right may change during the course of the litigation as parties and claims are added and subtracted. The changing nature of the jury-trial right—a jury demand that is proper when originally made because the demand is based on a legal issue in the case could later become lost as a matter of right due to the subsequent dismissal of that legal issue if the remaining issues in the case are equitable—counseled against the establishment of a firm deadline for moving to strike a jury demand.[112] Finally, the Committee members may have considered that motions to strike jury demands would be filed to contest untimely jury demands and that setting a deadline to contest an untimely jury demand would be difficult given the differences in particular cases in terms of the amount of lateness of a particular jury demand.

Looking at this issue in hindsight, the possible reasons for failing to establish a firm deadline for a party to move to strike a jury demand are not entirely convincing. First, if there is a concern that it takes a long time to discern whether or not a federal right to a jury trial exists, why does the party making the jury demand have to make this determination early on in the pleading stage by serving and filing

110. *See* Advisory Committee on Rules for Civil Procedure Note of 1937 to Rules 38 and 39, 75th Congress, 3d Session, House Document No. 588 (Feb. 1938); *see also* 8 MOORE'S FEDERAL PRACTICE, *supra* note 51, §§ 38App.01[2], 39App.01[2].

111. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1102–1120 (Erwin Chermerinsky et al. eds., Aspen Publishers, Inc. 3d ed. 2002); Merex A.G. v. Fairchild Weston Sys., Inc., 29 F.3d 821, 827 (2d Cir. 1994) ("Given the minimal strictures of federal pleading, it will sometimes not be clear until well into the trial whether an issue is equitable or legal.").

112. *See* Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 158 (5th Cir. 1982) (trial court appropriately took case away from jury and ruled on the equitable claim when the court had previously dismissed the legal claim upon which the jury demand was based prior to the start of trial).

a jury demand?[113] If the amount of time it may take to evaluate the substantive right to a jury trial is truly a concern, the deadline for filing a jury demand would not be during the pleading stage. Moreover, this argument, even if convincing, favors establishing a motion-to-strike-jury-demand deadline that is later on in the pretrial litigation stage, but does not favor establishing no deadline at all. Second, a caveat to any deadline could be devised to take into account jury demands that are proper when originally made but later become improper due to dismissed claims. Finally, a timing problem regarding contesting untimely jury demands is a red herring. If a party fails to make a jury demand in a timely manner, it must file a motion for jury trial. The opposing party has the opportunity to contest the jury demand in a response to the motion for jury trial or could file its own motion to strike at the same time. Thus, this timing issue could also be addressed by an exception.

From a policy perspective, the development of the law in this area is troubling. Although, at the very least, there is ambiguity regarding the timing of a motion to strike a jury demand, the legal authorities have coalesced around the idea that a motion to strike a jury demand is timely if filed at any time before trial.[114] A motion to strike a jury demand filed a week or even a day before trial is timely.[115] A motion to strike a jury demand during the trial may also be timely if the case has not yet been submitted to the jury.[116] In short, there is not much of a time limit on filing the motion to strike a jury demand.

B. Limiting Rule 39 to its Text

The current Federal Rules of Civil Procedure should be interpreted to require a contractual jury waiver challenge to a jury demand to be raised early on in the pretrial process. Rule 39(a) should be limited to its text.

The original 1937 version of Rule 39(a)(2) stated that issues on which a jury demand has been asserted shall be tried to a jury unless "the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues *does not exist under the Constitution or statutes of the United States*."[117] After the stylistic changes to the Federal Rules of Civil Procedure, effective December 1, 2007, the current version of Rule 39(a)(2) states that a trial on all issues in

113. *See supra* Part III.A.
114. *See supra* notes 96–98.
115. *See supra* notes 96–98.
116. *See supra* notes 99–101.
117. *See* R. CIV. P. FOR THE DIST. CTS. OF THE U.S. (adopted by the Supreme Court pursuant to the 1934 Rules Enabling Act) (on file with author); Letter of Submittal from the Chief Justice of the United States to the Attorney General of the United States (December 20, 1937) (emphasis added) (on file with author).

which a jury demand has been asserted shall be tried to a jury unless "the court, on motion or on its own, finds that on some or all of those issues *there is no federal right to a jury trial.*"[118]

Assume for the sake of argument that the prevailing view, which holds that a motion to strike a jury demand filed at any time—even on the eve of trial—is timely, is the correct interpretation of Rule 39(a)(2), and is sound policy.[119] By its very terms, this time limit only applies to motions to strike jury demands that challenge the substantive right to a jury trial.[120] The original Rule 39(a)(2) speaks of a challenge to a jury demand based on a jury right not existing under the Seventh Amendment to the Constitution or federal statutes. As the stylistically-changed but substantively-unaltered 2007 version phrases the point, the basis for the motion to strike the jury demand under the rule is whether a federal right to a jury trial exists.[121] Neither the original version nor the stylistic modification refer to waiver defenses—motions to strike jury demands based on waiver of the jury right due to litigation conduct or waiver based on a pre-dispute written agreement. The waiver questions are separate and apart from whether a jury trial right exists under the Seventh Amendment or a federal statute. Therefore, in establishing the procedural mechanisms and timings for contesting jury demands on these grounds, Rule 39 does not serve as a constraint.

The idea that Rule 39(a) does not specifically apply to contractual jury waivers is a novel concept. No federal court has yet made this distinction. One litigant has argued that distinction to no avail.

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118. FED. R. CIV. P. 39(a)(2) (emphasis added).

119. One could argue that there are sound reasons for a rule that allows challenges to jury demands, based on the absence of a right to a jury trial under the Seventh Amendment or a federal statute, to be raised very late in the pretrial process. The challenge to the substantive right to the jury trial under federal law is decidedly different from a challenge to a waiver of that jury-trial right under federal law. This difference may implicate concerns that could properly lead to separate timing rules for these different challenges. For example, one might assert that the former challenges bear more of a resemblance to subject matter jurisdiction, and thus, these claims should be allowed to be raised later in the process. This Article does not stake out a position on this separate question. It focuses only on the timing question as it relates to a pre-dispute contractual jury waiver challenge.

120. *See supra* notes 117–118 and accompanying text.

121. The 2007 changes were not meant to alter the substance of Rule 39(a). *See* FED. R. CIV. P. 39 (2007) (notes of the Advisory Committee) ("The language of Rule 39 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."); *see also* FED. R. CIV. P. 1 ¶13 (2007) (notes of the Advisory Committee) ("*Other Changes.* The style changes to the rules are intended to make no changes in substantive meaning."). Rule 39 was not one of the rules that contained a minor technical amendment that could arguably change meaning. *Id.*

Without any real attempt to address the argument, the federal district court dismissed it out of hand.[122] Although the argument is a novel one, it is a straightforward interpretation of the plain language of the rule. The acceptance of this distinction would allow the adoption of a different approach under the Federal Rules—an approach that best serves the important public policy considerations of promoting fairness and judicial economy. The last part of this Article focuses solely on establishing different procedural rules for raising a pre-dispute contractual jury waiver defense.[123]

C. A Different Procedural Approach to the Jury Waiver Defense

Once the shackles of Rule 39 are released from the contractual jury waiver defense, other rules of civil procedure may be applied to develop the proper procedural mechanism for raising and litigating a contractual jury waiver defense to a jury demand. The overriding goals in developing this new procedural mechanism for raising and litigating a contractual jury waiver defense are to promote fairness and convenience, apply probability, and prevent surprise. Fortunately, these goals are accomplished by characterizing a challenge to a

122. Mowbray v. Zumot, 536 F. Supp. 2d 617, 621–22 (D. Md. 2008).

123. As a practical matter, the time limit on motions to strike based on waiver of the jury right due to litigation conduct should not pose that many problems. Courts will need to remain flexible regarding the time limit. In general, waiver of the jury right due to litigation conduct encompasses two types of challenges. First, the motion to strike the jury demand is filed on the ground that the other party did not file a timely jury demand. Second, the motion to strike the jury demand is filed on the ground that the parties stipulated to a bench trial during the litigation and prior to the filing of the jury demand. With regard to the first challenge, the timeframe to make this sort of challenge is fairly intuitive. The party opposing a jury demand on the ground that the jury demand is untimely should raise the challenge shortly after the other party files the untimely demand or the motion for jury trial. In actuality, the burden is on the party filing the untimely jury demand to prove that its waiver should be excused. If Rule 38 is carefully followed, this party must use the motion for jury trial as the procedural means of proving excuse from its waiver. The party contesting the untimely waiver may make its challenge in a response to that motion or may file its own motion to strike but it does not bear any burden. The time for conducting the challenge should be fairly apparent. There would be no need to raise this type of challenge in a pleading. With regard to the second challenge, the motion to strike the jury demand would be filed shortly after the jury demand.

The nature of these challenges is that they are not raised unless a party slept on its rights or stipulated to a bench trial earlier in the litigation process. The challenges are raised at the time the jury demand right is asserted. Courts should be willing to let parties raise these types of challenges, if such challenges are required, within a considerable amount of time after the right to a jury trial is asserted based on the individual factual circumstances and equities of the particular case, which may include permitting such challenges on the eve of trial or during trial.

jury demand on the ground that a pre-dispute contractual agreement waived the right to a jury trial as a "matter of avoidance or affirmative defense" under Federal Rule of Civil Procedure 8(c).

The effect of this characterization is that the contractual jury waiver defense must be pled and proven by the party who raises it. Thus, a contractual jury waiver challenge must be asserted in the initial responsive pleading or an amended pleading. A motion to strike the jury demand based on the pled contractual jury waiver defense may follow at any time prior to the non-dispositive motion deadline established by the court. The failure to plead the affirmative defense of a contractual jury waiver at the pleading stage of the litigation leads to the risk that the defense will be waived, just like the failure to plead other affirmative defenses and matters in avoidance. Yet, consistent with the principles permitting the raising of affirmative defenses in amended pleadings and motions under the Federal Rules, it is possible that an untimely pled contractual waiver defense will still be allowed.

The benefit of this approach is two-fold. First, this approach, as opposed to the current approach under Rule 39, forces the party who raises a contractual jury waiver defense in response to a jury demand to do so at the pleading stage of the litigation. The pleading requirement promotes fairness to the parties, promotes judicial economy, and prevents surprise. Second, this approach also permits untimely contractual jury waiver defenses to be permitted by courts in certain circumstances, just like courts may permit untimely jury demands in certain circumstances. Thus, there is symmetry in the law between untimely jury demands and untimely contractual jury waiver defenses. The end result of this approach is that it will be very unlikely that contractual jury waiver challenges made on the eve of trial will be permitted by the courts. This approach contrasts with the current approach, which assumes such challenges late in the pretrial process are timely.

1. *The Jury Waiver Defense as an Affirmative Defense Under Rule 8(c)*

Rule 8(c) enumerates nineteen affirmative defenses or avoidances that must be pled in a responsive pleading or waiver of those defenses is risked.[124] It also creates a catch-all category for other affirmative

124. FED. R. CIV. P. 8(c) (2006). Prior to the 2007 stylistic changes Rule 8(c) read: "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, *waiver*, and any other matter constituting an avoidance or affirmative defense." *Id.* (emphasis added).

defenses or matters of avoidance that are not listed in the rule, but still must be pled in a responsive pleading.[125] The contractual jury waiver is an affirmative defense or avoidance under Rule 8(c) for two reasons.

First, *waiver* is specifically listed as one of the nineteen affirmative defenses in the Rule.[126] The commonly accepted definition of waiver is "the voluntary relinquishment or abandonment—express or implied—of a legal right or advantage."[127] A pre-dispute contractual jury waiver fits this bill. A party knows it has a right to a jury trial under the Seventh Amendment or a federal statute and intentionally gives that right up in exchange for consideration.

Second, the contractual jury waiver defense is a matter of avoidance under the catch-all category for policy reasons. One may plausibly, though not persuasively, attack the textual argument that a contractual jury waiver defense to a jury demand is not a *waiver* under Rule 8(c) because an avoidance or affirmative defense is limited to a defensive allegation that admits the allegations of the complaint, but suggests some other reason why there is no right of recovery on the *substantive* civil claim.[128] In other words, the affirmative defense

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FED. R. CIV. P. 8(c)(1) (2007). The post-2007 Rule 8(c)(1), which incorporated the stylistic change, read: "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and *waiver*." *Id.* (emphasis added).

125. The text of the rule establishes that the list of nineteen affirmative defenses is not exhaustive. FED. R. CIV. P. 8(c) (2006) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . *and any other matter constituting an avoidance or affirmative defense.*") (emphasis added). FED. R. CIV. P. 8(c)(1) (2007) ("In responding to a pleading, a party *must affirmatively state any avoidance or affirmative defense, including*: . . .") (emphasis added). Commentators have noted that the list of affirmative defenses and avoidances in Rule 8(c) is not exhaustive and that other affirmative defenses and avoidances must be pleaded as well. They have also noted that the scope of this part of Rule 8(c) is not entirely clear. *See* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 8.08[5] (3d. ed. 1997) [hereinafter 2 MOORE'S FEDERAL PRACTICE]; 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1271, at 581–85 (3d ed. 2004) [hereinafter 5 WRIGHT & MILLER].

126. FED. R. CIV. P. 8(c)(1); *see supra* note 124; *see also* Barwell & Hays, Inc. v. Sloan, 564 F.2d 254, 255 (8th Cir. 1977) (waiver is an affirmative defense that must be affirmatively pleaded under Rule 8(c)); Bard v. Mark Steven CVS, Inc., 378 F. Supp. 2d 33, 40 (D.R.I. 2005) (waiver is an affirmative defense under Rule 8(c)).

127. BLACK'S LAW DICTIONARY 1611 (8th ed. 2004); *see also* Dominex, Inc. v. Key, 456 So. 2d 1047, 1058 (Ala. 1984); Brown v. City of Pittsburgh, 186 A.2d 399, 401 (Pa. 1962); RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (1979).

128. 5 WRIGHT & MILLER, *supra* note 125, § 1271, at 585 (an affirmative defense or matter of avoidance under Rule 8(c) encompasses a defensive allegation that admits the allegations of the complaint but suggests some other reason why there is no right of recovery); 2 ROY W. MCDONALD, TEXAS CIVIL PRACTICE IN DISTRICT

of *waiver* under Rule 8(c) concerns the types of actions in which an entire claim, or at least the issues that relate to the substantive claim, is waived. Under this view, a contractual jury waiver challenge is not an allegation that defeats the right of recovery on the substantive civil claim; it simply defeats a procedural right—the right to a jury trial on a claim. The jury waiver defense has nothing to do with the claim itself and therefore is not covered by Rule 8(c). Indeed, the classic affirmative defenses—like statute of limitations, res judicata, and statute of frauds—each cut off the right of recovery on the substantive claim.[129] The better view, however, is that the concept of what constitutes an affirmative defense or matter of avoidance under Rule 8(c) is not limited to defenses that address the underlying substantive claim.[130]

Professors Wright and Miller state that affirmative defenses or matters in avoidance may also encompass defensive allegations that address offensive allegations made by the plaintiff that are outside of the plaintiff's prima facie case.[131] A jury demand made by a plaintiff is an offensive allegation that is outside of the plaintiff's prima facie case—the substantive right to recover on his or her claim—and thus a challenge by the defendant to that jury demand via a contractual jury waiver goes to an allegation that is outside of the plaintiff's prima facie case. Accordingly, under this view, the contractual jury waiver defense is a matter of avoidance under Rule 8(c).

Equally as important, commentators and courts have written about how determining whether something constitutes a matter of avoidance or affirmative defense is at its core a policy question.[132]

AND COUNTY COURTS §7.34.1, at 220 (Frank Elliott ed., Callaghan & Co. 1982) ("Affirmative defenses, when taken in isolation from other parts of the answer, usually are considered as accepting the existence at one time of a prima facie case and as asserting propositions which, if established, will defeat the claim.").

129. *See* Day v. Moscow, 955 F.2d 807, 811 (2d Cir. 1992) (false arrest claim barred by res judicata); Grant v. Preferred Research, Inc., 885 F.2d 795, 799 (11th Cir. 1989) (fraud claim barred by the statute of limitations); Treasure Valley Gastroenterology Specialists, P.A. v. Woods, 20 P.3d 21, 25 (Idaho Ct. App. 2001) (oral employment agreement rendered unenforceable by the Statute of Frauds).

130. *See* Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 96 (4th Cir. 1996) (stating that an arbitration agreement defense—which does not cut off a substantive claim—should be pleaded as an affirmative defense under Rule 8(c)).

131. *See* 5 WRIGHT & MILLER, *supra* note 125, § 1271, at 585 ("Generally speaking, [Rule 8(c)'s] reference to 'an avoidance or affirmative defense' encompasses . . . defensive allegations . . . that concern allegations outside the of the plaintiff's prima facie case that the defendant therefore cannot raise by a simple denial in the answer.").

132. *See* Ingraham v. United States, 808 F.2d 1075, 1078–1079 (5th Cir. 1987) (policy questions—like whether the matter should be indulged or disfavored—are pertinent "[to] whether a given defense is 'affirmative' within the ambit of Rule 8(c)"); LG Phillips LCD Co. v. Tatung Co., 243 F.R.D. 133, 136 (D. Del. 2007) (to deter-

Professors Wright and Miller have noted some "working principles" for determining whether a party is required to plead a particular defense under Rule 8(c). These principles include: controlling precedent; the logical inference test; and considerations of policy, fairness, probability, and surprise.[133]

Concededly, federal courts to this point have not viewed the contractual jury waiver defense as a matter of avoidance or affirmative defense under 8(c).[134] However, the other listed factors weigh in favor of characterizing the defense in that way. Under the logical inference test, "matters that are not part of the plaintiff's substantive case are to be pleaded affirmatively."[135] As mentioned previously, a jury demand is not part of a party's substantive case. Therefore, a contractual jury waiver challenge attacks a matter that is not part of the party's substantive case, and such a challenge is not logically inferable from the mere assertion of a jury demand in a pleading.[136]

Judge Charles E. Clark, a Yale Law School Dean, Chief Judge of United States Second Circuit Court of Appeals, and an author of the Federal Rules of Civil Procedure, explained that "policy" in this context means that the relative favor of a defense, convenience concerns, and the issue of surprise are all relevant inquiries.[137] For a wide vari-

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mine whether a defense must be pleaded affirmatively under the Rule 8(c) "the more helpful inquiry examines the policy and fairness considerations implicated by the defense"); Greathouse v. Charter Nat'l Bank-SW., 851 S.W.2d 173 (Tex. 1992); JUDGE CHARLES E. CLARK, CODE PLEADING, § 96, at 609–10 (2d ed. 1947) (disfavored defenses must be affirmatively alleged by the defendant); MCDONALD, *supra* note 128, at 221 ("Considerations of fairness and convenience, of the ease or difficulty of making proof, of the comparative likelihood that a particular defensive situation may exist in a reasonable proportion of the cases presented in court, and even of handicapping disfavored contentions, have contributed to the shaping of the concept of an 'affirmative' defense"); 5 WRIGHT & MILLER, *supra* note 125, § 1271, at 602 ("[i]n determining what defenses other than those listed in Rule 8(c) must be pleaded affirmatively, resort often must be had to considerations of policy, fairness, and in some cases probability.").

133. 5 WRIGHT & MILLER, *supra* note 125, § 1271, at 585–607.

134. *See supra* notes 94–103 and accompanying text.

135. 5 WRIGHT & MILLER, *supra* note 125, § 1271, at 601.

136. *See, e.g., id.* § 1271, at 600 (The logical inference test looks at "whether a particular issue arises by logical inference from the well-pleaded allegations in the plaintiff's complaint."); JOHN J. COUND, JACK H. FRIEDENTHAL, ARTHUR R. MILLER, & JOHN E. SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS 547 (7th ed. 1997) ("In general, defendants must raise affirmatively defenses that do not flow logically from the plaintiff's complaint.").

137. JUDGE CHARLES E. CLARK, CODE PLEADING, § 96, at 609–10 (2d ed. 1947).

> [J]ust as certain disfavored allegations made by the plaintiff . . . must be set forth with the greatest particularity, so like the disfavored defenses must be particularly alleged by the defendant. These may include such matters as fraud, statute of frauds . . . , statute of limitations, truth in slander and libel . . . and so on. In other cases, the mere convenience may seem prominent, as in the case of payment, where the defendant can more easily show affirmative payment at a certain time than the

ety of reasons, the law disfavors contractual jury waivers, even though they are enforced.[138] Moreover, it is most convenient for the party that contests the jury demand to raise the jury waiver defense. Consequently, characterizing the contractual jury waiver defense as an affirmative defense for this reason has some merit based on Judge Clark's guidance.

Professors Wright and Miller contend that the notion of "fairness" refers to whether or not most of the relevant information on a particular issue "is within the control of one party or that one party has a unique nexus with the issue in question and therefore that party should bear the burden of affirmatively raising the matter."[139] Once again, this understanding favors the advocated approach. The party that desires to enforce a contractual jury waiver is in the best position to affirmatively raise the issue. Particularly in jury waivers in employment cases, the employer who seeks to enforce a jury waiver may be the only one who still has the copy of the waiver and remembers that the employee signed it. The employee may not have known what he or she was signing at the time, may not have kept the waiver agreement, and may not even remember signing the agreement.[140] Moreover, at least in most circuits, the party that seeks to enforce a jury waiver has the burden to prove that the waiver was made knowingly, voluntarily, and intelligently.[141]

As for "probability," the more the issue is an "unusual occurrence"[142] that departs from the legal or behavioral norm, the more likely the law should put the burden of pleading the issue on the party

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> plaintiff can the negative of nonpayment over a period of time. Again it may be an issue which may generally be used for dilatory tactics, such as the plaintiff's right to sue . . . a vital question, but one usually raised by the defendant on technical grounds. These have been thought of as issues "likely to take the opposite party by surprise," which perhaps conveys the general idea of fairness or the lack thereof, though there is little real surprise where the case is well prepared in advance.

Id. Under Judge Clark's analysis, one might think of a party's right to a jury trial as a "vital question" and the jury waiver defense as a technical defense used to defeat that important right. If viewed this way, the jury waiver defense is again appropriately viewed as an affirmative defense that must be pleaded.

138. Because the right to jury trial is a constitutional right, a court should indulge "every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937). In the contractual jury waiver context, the higher "knowing consent" standard makes it more difficult to enforce contractual jury waivers than normal contracts. *See supra* notes 46–51 and accompanying text.

139. 5 WRIGHT & MILLER, *supra* note 125, § 1271, at 603.

140. *See, e.g.*, Winiarski v. Brown & Brown, Inc., 2008 U.S. Dist. LEXIS 35799, *8 (M.D. Fla. May 1, 2008) (employee challenged the enforcement of a jury trial waiver on the ground that she did not know her employment agreement contained a jury waiver).

141. *See supra* note 50 and accompanying text.

142. F. JAMES, G. HAZARD, & J. LEUBSDORF, CIVIL PROCEDURE § 3.11, at 203 (5th ed. 2001) ("The party who claims the unusual occurrence can be required to plead it

who will benefit by establishing a deviance from the norm.[143] The legal norm is that if there is a substantive right to a jury trial under federal law and that right is properly asserted through a jury demand, a jury trial should take place.[144] A contractual jury waiver is properly viewed as an unusual occurrence that departs from this established legal norm. Therefore, this factor also favors characterizing the jury waiver defense as a defense that must be pled under Rule 8(c).

Finally, the original Advisory Committee Note to Rule 8(c) states that the drafters intentionally deleted the notion of surprise from the Rule.[145] In spite of the Advisory Committee Note, Professors Wright and Miller take the position that "notice-giving" should be a factor in deciding whether a certain matter should be pleaded affirmatively.[146] The federal courts have taken this position as well.[147] In *Garrison v. Baltimore & Ohio Railroad Company*, for example, a Pennsylvania district court noted that had a defense been properly pled as an affirmative defense as it should have been, the plaintiff could have pursued appropriate discovery procedures regarding whether the defense was properly raised.[148] The court ruled that the raising of the affirmative defense on the eve of trial by the defendant surprised and prejudiced the plaintiff.[149] Similarly, parties act differently in terms of discovery and other pretrial preparation if the case is a jury trial instead of a bench trial.[150] The "surprise" that occurs when the con-

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affirmatively so that the usual assumptions may be indulged as a matter of course when there is no such unusual circumstance.").

143. 5 WRIGHT & MILLER, *supra* note 125, § 1271, at 604 ("In part, the theory underlying the relevance of [the probability] factor is that the burden of pleading should be put on the party who will be benefitted by establishing a departure from the supposed legal or behavioral norm.").

144. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.").

145. FED. R. CIV. P. 8(c) (1937) (Advisory Committee Note) ("This follows substantially English Rules under the Judicature Act (The Annual Practice Act, 1937) O.19, r. 15 and N.Y.C.P.A. (1937) § 242, with 'surprise' omitted in this rule.").

146. 5 WRIGHT & MILLER, *supra* note 125, § 1271, at 605. Judge Clark takes the same view. JUDGE CHARLES C. CLARK, CODE PLEADING, § 96, at 609–10 (2d ed. 1947) (affirmative defenses and matters of avoidance have been thought of as issues that take the opposing party by surprise).

147. *See* Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971) (stating that the purpose of Rule 8(c) is to provide the opposing party with notice of the affirmative defense and the opportunity to rebut it); Brunswick Leasing Corp. v. Wis. Cent., Ltd., 136 F.3d 521 (7th Cir. 1998) (stating that the purpose of Rule 8(c) is to avoid surprise and undue prejudice); Red Deer v. Cherokee County, Iowa, 183 F.R.D. 642, 652 (N.D. Iowa 1999) (notice of the defense to the plaintiff in order to avoid surprise and undue prejudice is an important consideration).

148. 20 F.R.D. 190, 195–96 (W.D. Pa. 1957).

149. *Id.*

150. *See supra* note 84 and accompanying text.

tractual jury waiver defense is raised late in the game is another reason to characterize the jury waiver defense as an affirmative defense that must be pled.[151]

Taking a bird's eye view, adopting the affirmative defense approach fits squarely within the broader historical trend toward greater disclosure, planning, and discovery in federal civil litigation. Since the adoption of the Federal Rules in the 1930s, there has been a radical change in pre-trial judicial and party involvement in cases. The affirmative defense approach furthers the goals of the modern

151. In a similar context, the federal courts have recognized that prejudice can occur when a party delays filing a motion to compel arbitration once litigation has begun. *See In re* Citigroup, Inc., 376 F.3d 23, 26 (1st Cir. 2004); Thyssen, Inc. v. Calypso Shipping Corp., S.A., 310 F.3d 102, 105 (2d Cir. 2002); Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 925 (3d Cir. 1992); Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc., 380 F.3d 200, 206 (4th Cir. 2004); Republic Ins. Co. v. PAICO Receivables, LLC, 383 F.3d 341, 346 (5th Cir. 2004); O.J. Distrib., Inc. v. Hornell Brewing Co., 340 F.3d 345, 356 (6th Cir. 2003). A party who delays in filing a motion to compel arbitration and instead decides to substantially invoke the litigation process as a means of testing out the litigation process before making the decision on whether to try to compel arbitration risks waiver of that arbitration right. *See In re* Tyco Int'l Ltd. Sec. Litig., 422 F.3d 41, 46 n.5 (1st Cir. 2005); Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 134 (2d Cir. 1997).

Interestingly, like *waiver, arbitration and award* is listed as an affirmative defense under Rule 8(c). The federal courts have disagreed on whether an *arbitration agreement* fits within the concept of an affirmative defense under 8(c). *Compare Thyssen, Inc.*, 310 F.3d at 105–106 (affirmative defense of arbitration and award under 8(c) refers to a situation in which an arbitrator has already ruled and made an award in a case) *with* Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 96 (4th Cir. 1996) (indicating that a party that wishes to pursue arbitration based on an arbitration agreement should raise the arbitration agreement as an affirmative defense under 8(c)). The view that an arbitration agreement, which does not cut off a substantive claim, should be pleaded as an affirmative defense under 8(c) strengthens the argument that a jury waiver defense, which does not cut off a substantive claim, should also qualify as an affirmative defense under 8(c). *See supra* Part IV.C.1.

Whether an arbitration agreement should fit within Rule 8(c) is certainly ripe for debate, but due to the development of the case law regarding waiver of the arbitration right through litigation conduct—waiver of that right can occur when a motion to compel arbitration is not raised early in the litigation process—the arbitration issue under Rule 8(c) is not as pressing as the jury waiver issue under Rule 8(c) in that policy concerns are already reflected in the case law. Even if 8(c) applied to the raising of the arbitration right, the perspectives, in terms of judging whether to permit late-raised defenses are different. Because of the strong public policy favoring arbitration, there is a strong presumption against finding that a party waived its right to arbitration. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983). In contrast, there is not a strong public policy favoring jury waivers. Accordingly, there is not a presumption against finding that a party waived its jury waiver defense. Because the jury trial right is fundamental, the strong presumption is to protect that right if at all possible. Thus, the jury waiver defense should be more easily waived than the arbitration right.

federal civil procedure system. The current approach undermines these goals. Under the current approach—where a jury-trial waiver challenge does not need to be raised until trial—a party may keep an opposing party in the dark about the possibility of the jury waiver defense during the discovery period. The current approach violates the spirit of the federal discovery rules in that sorting out the merits of the contractual jury waiver challenge depends on both parties having access to information about the contract formation during the discovery period.

In addition to furthering modern discovery principles, the affirmative defense approach supports the goals of Rule 16 and judicial calendar planning. Since 1938, the Federal Rules have undergone a significant transformation in pretrial management with an aim toward early resolution of issues. For example, Rule 16(a) discusses the various purposes underlying a court's ordering of a pretrial conference, which include expediting disposition of the action, discouraging wasteful pretrial activities, improving the quality of the trial through more thorough preparation, and facilitating settlement. These articulated reasons for pretrial judicial management coincide with the reasons for adopting an affirmative defense approach to contractual jury waiver challenges. Furthermore, this approach would reduce the costs for both the court and litigants with respect to the preparation of jury instructions and other jury-oriented trial tasks. It could also affect how a judge would rule on motions in limine.[152]

2. *The Affirmative Defense Effect*

Treating the contractual jury waiver defense as an affirmative defense or avoidance under Rule 8(c) leads to the following litigation procedure. The defense must be affirmatively pled in the first responsive pleading after the jury demand is asserted. In many cases, this procedure will work like other affirmative defenses. For example, if the plaintiff asserts a jury demand in his original complaint, the defendant must raise the contractual jury waiver defense in his original answer.[153] If the defendant asserts a jury demand in his original answer, the plaintiff must raise the contractual jury waiver defense in an answer to the jury demand.[154] The deadlines regarding the raising

152. Sandra Sperino's insightful comments provided the basis for this "historical trend" point.

153. FED. R. CIV. P. 8(c); *In re* Cumberland Farms, Inc., 284 F.3d 216, 225 (1st Cir. 2002) ("Rule 8(c) of the Federal Rules of Civil Procedure . . . states that affirmative defenses . . . must be raised in the defendant's answer to the plaintiff's complaint.").

154. *See, e.g.*, FED. R. CIV. P. 12(a)(1)(B) ("A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim.").

of this affirmative defense follow the normal twenty-day deadlines for answers to complaints and answers to counterclaims.[155]

The normal rules regarding the deadline for pleading the affirmative defense of contractual jury waiver must be tweaked to accommodate the special circumstances regarding the jury demand deadline. Under Rule 38, the jury demand is timely if served on the opposing party no later than ten days after the last defendant's answer to the complaint.[156] Consequently, if a party waited until the tenth day after the last defendant's answer to serve the jury demand, the jury demand would still be timely.[157] This scenario raises the question of when the deadline to plead the defense is. The best rule is that the opposing party must raise the affirmative defense of the contractual jury waiver within twenty days after the service of the jury demand. A twenty-day time period is preferable in this situation so that consistency is maintained with the general twenty-day time period for answering an original pleading. Under this view, the jury demand is considered part of the original pleading.[158]

In a different circumstance, if a party asserts an untimely jury demand, which should be made through a motion for jury trial,[159] the opposing party must affirmatively plead the jury waiver defense within twenty days after service of the demand or within the deadline established for responding to the motion.[160] This rule also maintains consistency regarding response deadlines with the standard situation in which a jury demand is timely filed.

155. *See* FED. R. CIV. P. 12(a)(1)(A)(i) ("A defendant must serve an answer within 20 days after being served with the summons and complaint."); FED. R. CIV. P. 12(a)(1)(B) ("A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim."). Under the suggested approach, a sixty-day time period would replace the normal twenty-day deadline when the defendant waived service of process, the United States is the defendant, or a United States officer or employee is the defendant. *See* FED. R. CIV. P. 12(a)(1)(A)(ii); FED. R. CIV. P. 12(a)(2); FED. R. CIV. P. 12(a)(3).

156. FED. R. CIV. P. 38(b)(1).

157. *Id.*

158. An alternative approach in this situation would be to consider the jury demand as an amended pleading, which triggers the rule that a "required response to an amended pleading must be made . . . within 10 days after service of the amended pleading." *See* FED. R. CIV. P. 15(a)(3); Nelson v. Adams, USA, Inc., 529 U.S. 460, 466 (2000). This approach should not be followed for two reasons. First, although the jury demand is being asserted after the party's original pleading, the jury demand is timely in this scenario and does not require court permission to serve and file. Accordingly, it is not the type of amended pleading, which requires leave of court, that is contemplated by Rule 15(a)(2). Second, importing a twenty-day time period in this scenario maintains a consistent response deadline, which is salutary for litigants and lawyers.

159. *See supra notes* 71–74 and accompanying text.

160. It will typically be prudent to fully brief the contractual jury waiver defense in response to the motion for jury trial as well pleading it as an affirmative defense.

In a nutshell, the failure to affirmatively plead the contractual jury waiver defense within twenty days after service of the jury demand would generally result in the waiver of that defense. If the defense is timely raised, the opposing party is put on notice that the waiver of the jury right is at issue in the case and both parties may then act according to their interests. The opposing party is put on notice that the jury-trial right is not a given and will be able to engage in pretrial preparation with this knowledge. In order to win on its defense, the party that pleads the defense must, at some subsequent time, move to strike the jury demand and brief the court on the jury waiver issue. Generally speaking, a motion to strike the jury demand on the contractual jury waiver ground would be timely if filed within the deadline for filing non-dispositive motions established by the court's scheduling order, assuming that the party affirmatively pleaded the jury waiver defense in a timely manner.[161]

The typical exceptions to the rule that an affirmative defense is waived if not pled should also apply to jury waiver defenses that are not timely and affirmatively pled. In determining whether to permit the untimely affirmative defense of contractual jury waiver, the federal courts should initially look to the authorities that have already developed in each circuit in regards to the allowance of untimely affirmative defenses. Each circuit is slightly different in terms of the test for determining whether to allow late affirmative defenses. Some courts are more generous in allowing late affirmative defenses than others.[162] In general, however, the courts consider the amount of the delay, the reason for the delay, and the surprise and prejudice the opposing party has suffered due to the failure to timely plead.[163] That being said, because the jury-trial right is such an important right, courts should err on the side of denying late amendments for contractual jury waivers. Many courts tend to err on the side of allowing untimely jury demands because the jury-right is so critical to our civil

161. This procedural process is similar to situations in which a party, after pleading some other type of affirmative defense, attempts to prove that affirmative defense as a matter of law prior to trial. The usual rule is that a motion based on a pleaded affirmative defense, such as a summary-judgment motion on license, should be made by the deadline for filing dispositive and non-dispositive motions. *Cf.* Jack Preston Wood: Design, Inc. v. BL Bldg. Co., 2004 U.S. Dist. LEXIS 30511, *60 (S.D. Tex. June 22, 2004) (court barred party from asserting affirmative defenses of waiver, license, and fraud when these affirmative defenses were raised for the first time three weeks after the dispositive and non-dispositive motions deadline set by the scheduling order).

162. Some courts preclude a party from raising an unpleaded affirmative defense in a post-answer motion. Other courts are more generous and allow a party to raise an upleaded affirmative defense for the first time in a motion to dismiss or motion for summary judgment. 2 MOORE'S FEDERAL PRACTICE, *supra* note 125, § 8.08[2]–[3] (collecting and explaining cases).

163. *Id.*

justice system.[164] The same principle indicates that courts should disallow untimely contractual jury waivers.

While it is difficult to make generalizations about when courts should accept an untimely amendment that adds a contractual jury waiver defense, the following categorical approach, which addresses the question based on timing, is a rule of thumb that courts may utilize. The approach is based on two fundamental assumptions. First, the longer a party waits to plead the contractual jury waiver defense, the greater the surprise and prejudice to the party asserting the jury demand. A party that demands a jury trial may be prejudiced by the other party's late contractual jury waiver defense if the former party relies on its previously unchallenged jury demand when developing a trial strategy. The party may, for example, tailor its descovery and pretrial preparation for a jury trial by emphasizing live witnesses' testimony over documentary evidence and deposition testimony. Second, the longer a party waits to plead the contractual jury waiver defense, the greater the reason to penalize the party for missing the deadline and thereby mandate compliance with the Federal Rules.

In almost all civil cases, federal district courts establish a scheduling order, which includes a deadline for amending pleadings.[165] Prior to this amended pleadings deadline, Rule 15(a) establishes a policy that encourages courts to liberally grant leave to amend.[166] After the amended pleadings deadline, Rule 16(b) establishes that "good cause" must be demonstrated in order to allow an amendment.[167] For the

164. *See supra* note 78 and accompanying text.

165. FED. R. CIV. P. 16(b)(1) ("Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order . . . ."); FED. R. CIV. P. 16(b)(3) ("The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions."); Campania Mgmt. Co. v. Rooks, Pitts & Poust, 290 F.3d 843, 848–49 n. 1 (7th Cir. 2002) (circuit court of appeals admonished district court for failure to include a deadline for amended pleadings in its scheduling order and insisted that the district court delineate such a deadline in future cases).

166. FED. R. CIV. P. 15(a) (When amendment as a matter of course is not permitted "a party may amend its pleading only with the opposing party's written consent or the court's leave. *The court should freely give leave when justice so requires.*") (emphasis added); Foman v. Davis, 371 U.S. 178, 182 (1962) (court should follow Rule 15(a)'s admonition to grant leave freely); 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15.14[1] (3d. ed. 1997) [hereinafter 3 MOORE'S FEDERAL PRACTICE] (collecting cases advocating liberal policy in favor of amending pleadings).

167. FED. R. CIV. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."); S&W Enter., L.L.C. v. Southtrust Bank of Ala., NA, 315 F.3d 533, 535–536 (5th Cir. 2003) ("We take this opportunity to make clear that Rule 16(b) governs amendment of pleadings after a scheduling order deadline has expired."); Parker v. Columbia Pictures Indus., 204 F.3d 326, 342 (2d Cir. 2000); *In re* Milk Prods. Antitrust Litig., 195 F.3d 430, 437 (8th Cir. 1999); Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1419 (11th Cir. 1998) (per curiam); Johnson v.

self-evident reason of requiring compliance with federal court orders, the courts are less likely to grant an amendment after the amended pleadings deadline than prior to the deadline.[168] Whether a court should permit the untimely affirmative defense of jury waiver to be raised in an amended pleading depends on circumstances and timing. Pursuant to the liberal amendment policy of 15(a), permitting an amendment to add a contractual jury waiver defense prior to the amended pleadings deadline should be routine. Courts should exhibit less mercy when a party raises the contractual jury waiver defense after the amended pleadings deadline but prior to the deadline for filing non-dispositive motions. In this situation, although many circuits allow unpled affirmative defenses to be raised in non-dispositive and dispositive motions, it should not be a given that the jury waiver defense will be permitted. It should be just as likely that the defense is denied as it is permitted. Finally, courts should *not* permit an unpled contractual jury waiver defense to be raised after the non-dispositive or dispositive motion deadlines established by the scheduling order. Courts should adopt a per se rule that the contractual jury waiver defense is not allowed if raised after this motion deadline. This will preclude the contractual jury waiver defense from being successfully raised on the eve of, and during trial.

Jury Waiver Affirmative Defense Table[169]

Jury Demand	Jury Waiver Aff. Defense	Trial Court Decision
Timely	Raised Prior to Amended Pleadings Deadline	Routinely Permit
Timely	Raised After Amended Pleadings Deadline and Prior to Non-Dispositive Motions Deadline	Maybe Permit—decision depends on the factual circumstances
Timely	Raised After Non-Dispositive or Dispositive Motions Deadline	Disallow

In short, the advocated approach requires the party who desires to raise the contractual jury waiver defense to plead that defense during the pleading stage and move to strike the jury demand prior to the

Mammoth Recreations, Inc., 975 F.2d 604, 610 (9th Cir. 1992); Riofrio Anda v. Ralston Purina Co., 959 F.2d 1149, 1154–1155 (1st Cir. 1992).

168. *S&W Enter., L.L.C.*, 315 F.3d at 535–36 (noting the importance of preserving the integrity and purpose of the pretrial scheduling order as a reason for why Rule 16(b) governs the amendment of pleadings after the amended pleadings deadline in the scheduling order expires).

169. This chart summarizes the categorical approach outlined in the preceding paragraph.

deadline for filing non-dispositive motions. The approach serves an important notice function. It also permits regular and timely discovery concerning the merits of the defense prior to the deadline for motions and then a final resolution of the merits of the defense through a motion filed well before trial.

Admittedly, it takes some work to shoehorn the suggested limitation within Rule 8. For all of the reasons elucidated in the Article, this seems to be the best way to address this issue. Others may remain unconvinced. Skeptics may be convinced that the current approach is problematic, but nonetheless conclude that Rule 8 is not the proper solution because the contractual jury waiver defense is not exactly like the other affirmative defenses listed in Rule 8(c). There might be other approaches for those individuals to consider. For example, one might construct an argument under Rule 8(b) that goes something like this: a jury trial demand is a factual allegation that the asserted claim is not subject to a contractual jury waiver and therefore the defendant has to respond to the factual allegation by admitting, denying, or indicating a lack of information.[170] Given that jury demands are often listed in a substantive portion of the complaint, this type of specific denial requirement may appeal to some. Another course of action might be to require the use of a Rule 12(f) motion to strike procedure to raise the jury waiver.[171] Rule 12(f) motions must typically be made before the first responsive pleading.[172] The notion could be that the filing of a jury demand after a pre-dispute jury waiver is "immaterial" or "impertinent" and thus should be stricken by a 12(f) motion.[173] Finally, for those who believe that an alternative approach under the current Federal Rules is not possible at all, constructing a new federal civil procedure rule to address the policy concerns set forth in this Article could be a good solution.

These alternative approaches are not the focus of this Article. They are mentioned, however, so that those who are not convinced that Rule 8 provides the proper solution to this problem, but who do believe the current approach is nevertheless misguided, will not throw the baby out with the bathwater. At a minimum, this Article aims to

170. FED. R. CIV. P. 8(b)(1)(B) ("In responding to a pleading, a party must: . . . admit or deny the allegations asserted against it by an opposing party."); FED. R. CIV. P. 8(b)(3) ("A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.").

171. FED. R. CIV. P. 12(f) ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act . . . on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.").

172. *See* FED. R. CIV. P. 12(f).

173. *See id.*; E.E.O.C. v. Lipton, 571 F. Supp. 535 n.1 (D. N.J. 1982) (arguing that motion to strike a jury demand was untimely because it did not follow Rule 12(f)).

encourage discussion of this issue amongst scholars, judges, and practitioners, which hopefully will lead to further research and exploration of the issue by interested parties in the legal community. An approach that requires a party to raise the jury waiver defense early in the litigation is imperative.

3. An Altered Outcome

The best example of a recent case that would turn out differently under the approach outlined in this Article is *Tracinda Corporation v. DaimlerChrylser AG*—a Third Circuit decision.[174] In *Tracinda*, the plaintiffs, a group of Chrysler shareholders, sued certain DaimlerChrysler executives and the DaimlerChrysler Corporation for alleged fraud, misrepresentation, and other federal securities law violations stemming from the 1998 merger of Daimler-Benz AG and Chrysler Corporation.[175]

In *Tracinda*, the plaintiffs made their jury demand against the individual executives in a timely fashion early on in the litigation.[176] Nonetheless, the defendants did not move to strike the jury demand until approximately *three* years after Tracinda filed the demand.[177] The defendants filed the motion to strike the jury demand after the close of discovery, approximately eight months after they filed their summary-judgment motion, and only about six weeks prior to the trial.[178] The district court granted the motion to strike the jury demand, despite the delay, finding that a broadly worded jury trial waiver applied to the plaintiffs' claims against both the individual and corporate defendants.[179] The parties tried the case to the bench.[180] The district court decided in favor of the defendants and entered a corresponding judgment.[181]

The plaintiffs appealed on several grounds, including the court's decision to grant the motion to strike the jury demand.[182] They challenged the district court's finding on two points. First, the plaintiffs, while conceding that a jury waiver provision applied to the corporate defendants, argued that the jury waiver provision did not cover the individual defendants.[183] The Third Circuit rejected this argument. It held that a valid contractual jury waiver provision, which applies to a signatory corporation, also applies to a non-signatory officer acting

174. 502 F.3d 212 (3d Cir. 2007).
175. *Id.* at 220.
176. *Id.* at 226.
177. *Id.*
178. *Id.*
179. *Id.* at 221.
180. *Id.* at 220–21.
181. *Id.*
182. *Id.* at 221.
183. *Id.* at 221–25.

as an agent of the signatory corporation.[184] Second, the plaintiffs argued that the district court should bar the motion to strike the jury demand as untimely because of laches.[185] They asserted that the defendants committed inexcusable delay in waiting over three years until very near the trial date to file the motion and that this delay caused them undue prejudice.[186] The plaintiffs claimed that they would have conducted discovery differently had they known that there was a challenge to their jury demand. Because there was no challenge to their jury demand, they prepared for trial with the idea that they would be trying the case to the jury instead of the court.[187] The Third Circuit rejected these arguments as well. It followed the traditional view, applying Rule 39 and interpreting Rule 39 to state that a party may file a motion to strike a jury demand at any time during the case.[188] Therefore, the *Tracinda* court reasoned that because the defendants filed the motion to strike in a timely fashion under the rule—even though the motion was filed three years after the jury demand and very close to the trial date—there was not inexcusably delay.[189] And because there was no inexcusable delay, the court stated that it did not have to consider whether the defendants' delay caused prejudice to the plaintiffs.[190]

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184. *Id.* at 225.

185. *Id.* at 226. Laches is an equitable defense, which is based on the concept that equity aids the vigilant and not those who slumber on their rights. It is the "unreasonable delay in pursuing a right or claim . . . in a way that prejudices the party against whom relief is sought." BLACK'S LAW DICTIONARY 891 (8th ed. 2004). The elements of a laches defense typically include: (1) inexcusable delay; and (2) prejudice to the opposing party due to the delay. Santana Prods., Inc. v. Bobrick Washroom Equip., Inc., 401 F.3d 123, 138 (3d Cir. 2005); Rogers v. Ricane Enter., Inc., 772 S.W.2d 76, 80 (Tex. 1989).

186. *Tracinda*, 502 F.3d at 226.

187. *Id.*

188. *Id.* at 226–27.

189. *Id.* at 227.

190. *Id.* at 227. ("Because a party may file a motion to strike a jury demand at any time under Rule 39(a), we conclude that DaimlerChrysler did not commit inexcusable delay by filing its motion to strike after the close of discovery. Having reached this conclusion, we need not consider whether DaimlerChrysler's delay caused prejudice to Tracinda.").

Despite the *Trancinda* court's statement that there was no need to consider whether the delay caused prejudice to the plaintiffs, the court did do a cursory prejudice analysis in a footnote and concluded that the plaintiffs were not prejudiced because they already knew that the contractual jury waiver clause applied to the corporate defendants. *Id.* at 227 n.16. This is a questionable analysis given that it depends on the further conclusion that there could be no jury trial on the claims against the individual defendants. There was a jury trial right on the claims against the individual defendants and assuming that right was taken away by a jury waiver, the plaintiffs could justifiably have believed that those claims would have to be tried to a jury, even though a jury waiver provision covered the claims against the corporate defendants. Thus, the way in which the plaintiffs prepared for trial on those individual claims could certainly have been

Under the affirmative defense approach, the *Tracinda* case would be decided differently. The defendants would be expected to plead the jury waiver defense as an affirmative defense within twenty days of the service of the jury demand. They would then be expected to file the motion to strike the jury demand within the non-dispositive motion deadline. At the very least, they would be expected to raise the issue in a court document in some fashion prior to the amended pleadings deadline in the case. The defendants' decision to wait until just a few weeks before the trial date to raise the defense would render their jury waiver defense waived. Like other affirmative defenses, a court could consider whether to allow the jury waiver defense as a late affirmative defense even though the defense had already been waived. However, in this instance, the Third Circuit should have disallowed the defense because of the extreme nature of the delay and the likelihood of prejudice to the plaintiffs. Moreover, it should have disallowed the defense to penalize the defendants for failing to abide by procedural rules and to reinforce the fundamental nature of the jury-trial right. That right is closely guarded and will not be taken away when the opposing party fails to follow procedural requirements.

V. CONCLUSION

The traditional application and interpretation of Rule 39 of the Federal Rules of Civil Procedure to jury waivers is unwarranted. Rule 8(c) of the Federal Rules of Civil Procedure should regulate the procedural requirements for asserting and proving the contractual jury waiver defense in federal court. This approach, while novel and as of yet not applied by courts, should be adopted because it more fully comports with the text of the rules and the policy goals in this area of the law.

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altered had the defendants given timely notice of their challenge to the jury demand. Indeed, given the failure on the part of the defendants to file a motion to strike the jury demand prior to the discovery deadline, there was certainly reason to believe that the jury demand would be honored and the plaintiffs cannot be faulted for taking steps in accordance with that reasonable belief.