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## The Indulgence of Reasonable Presumptions: Federal Court Contractual Civil Jury Trial Waivers

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# NOTE

## The Indulgence of Reasonable Presumptions: Federal Court Contractual Civil Jury Trial Waivers

Joel Andersen\*

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### INTRODUCTION

Large institutions such as banks, franchisers, international companies, and lessors distrust juries' ability to properly resolve disputes and award reasonable damages. As a result, these and other actors have attempted to limit juries' potential influence on the contracts to which they are parties. They have done so through contractual jury trial waiver clauses<sup>1</sup> in these agreements.<sup>2</sup>

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1. These contractual waivers occasionally exist concurrently with mandatory binding arbitration agreements, but often they exist independently. This Note will not tackle the issue of arbitration agreements and jury trial waivers. For scholarship on that complicated topic, see Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; 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, 691 (2001) [hereinafter Sternlight, *Mandatory Binding Arbitration*] (discussing the Seventh Amendment jury trial waiver standard as applicable to both jury trial waivers and arbitration agreements); and Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

2. See, e.g., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (equipment-lease agreement); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir.

The Seventh Amendment to the Constitution guarantees the jury trial right.<sup>3</sup> Whether the right is determined to exist in an individual instance is a matter of federal common law,<sup>4</sup> which merely preserves the jury trial right as it existed when the Amendment was adopted in 1791.<sup>5</sup> Although the Seventh Amendment guarantees the right to a

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1985) (lending agreement); *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (equipment-lease agreement); *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) (debt guarantee); *Efficient Solutions, Inc. v. Meiners' Country Mart, Inc.*, 56 F. Supp. 2d 982, 938 (W.D. Tenn. 1999) (master-service agreement); *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F. Supp. 15, 18 (D. P.R. 1996) (lien agreement); *Phoenix Leasing Inc. v. Sure Broad. Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994) (lending agreement), *aff'd*, 89 F.3d 846 (9th Cir. 1996) (unpublished opinion); *Bonfield v. Aamco Transmissions, Inc.*, 717 F. Supp. 589, 594-96 (N.D. Ill. 1989) (franchise agreement); *Hydramar, Inc. v. Gen. Dynamics Corp.*, No. CIV.A.85-1788, 1989 WL 159267, at \*2 (E.D. Pa. Dec. 29, 1989) (construction contract); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982) (dealer agreement).

3. U.S. CONST. amend. VII. The Seventh Amendment states:

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.

*Id.* For a brief history of the ratification of the Amendment, see Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

4. *Simler v. Conner*, 372 U.S. 221, 221 (1963) (per curium); see also *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (holding that the Seventh Amendment does not apply to the states).

5. Courts apply a historical analysis to determine whether the jury trial right would have existed in eighteenth-century England. *Tull v. United States*, 481 U.S. 412, 417-21 (1987). Hence, a jury trial right exists only when the dispute, viewed in this historical context, would have been heard by a jury at common law. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2301, at 14-15 (2d ed. 1994). No right exists when the dispute would have been tried in the courts of equity. *Id.* Since the merger of law and equity in 1938, courts must determine which claims are legal and which are equitable by looking to 1791 English custom and the remedy sought. See *FED. R. CIV. P. 2*; *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377 (1913); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830); see also *Groome v. Steward*, 142 F.2d 756, 756 (D.C. Cir. 1944) (stating that this is the only area in which the distinction between law and equity has any further procedural significance); Note, *The Effect of the Merger of Law and Equity on the Right of the Jury Trial in Federal Courts*, 36 GEO. L.J. 666, 666 (1948).

This approach has been the accepted interpretation of the Seventh Amendment beginning with Justice Story's 1812 opinion on circuit in *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812), when he stated:

Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.

The historical approach is the primary test for determining whether the jury trial right exists, but is not rigidly followed. Lower courts have developed many procedures for checking jury abuses, yet the Court has found them all to be consistent with the Seventh Amendment. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (nonmutual collateral estoppel); *Galloway v. United States*, 319 U.S. 372, 388-93 (1943) (directed verdict); *Dimick v. Schiedt*, 293 U.S. 474 (1935) (remititur); *Gasoline Prod. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497-98 (1931) (retrial limited to the question of damages); *Fid. & Deposit Co. of Md. v. United States*, 187 U.S. 315, 319-21 (1902) (summary judgment).

jury trial, it does not mandate one. As with other constitutional rights, this right may be waived.<sup>6</sup>

For those issues that may go to a jury, Federal Rule of Civil Procedure (“FRCP”) 38 creates a procedure for demanding or waiving the jury trial right.<sup>7</sup> FRCP 38 establishes a bright-line rule that places the demand burden on the party seeking a jury trial.<sup>8</sup> That is, a litigant must specifically demand a jury trial, and if she does not, she waives this right. In addition to this passive waiver procedure, a litigant may also actively waive her jury trial right by contract in anticipation of potential litigation.<sup>9</sup>

In disputes over whether a jury trial has been passively waived under FRCP 38, the Rule clearly provides where the burden of proof in demanding a jury trial lies: the burden is placed on the party seeking the jury trial right to demonstrate she has not waived this right.<sup>10</sup> The placement of this burden is not so clear for contractual

6. See *Kearney v. Case*, 79 U.S. (12 Wall.) 275, 281 (1870); *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819).

7. FED. R. CIV. P. 38. The complete text of FRCP 38, Jury Trial of Right, reads as follows:

- (a) Rights Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
- (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.
- (c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.
- (d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.
- (e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

8. *Id.*

9. See, e.g., *McCarthy v. Wynne*, 126 F.2d 620, 623 (10th Cir. 1942).

10. A party who makes a prompt demand pursuant to FRCP 38(b) is entitled to a jury trial as a matter of right. See, e.g., *Previn v. Barell*, 14 F.R.D. 466, 467 (E.D.N.Y. 1953). Courts determine whether the Rule’s “technical requirements” — proper service and filing — have been fulfilled “with an eye toward fairness.” *Wauhop v. Allied Humble Bank*, 926 F.2d 454, 455 (5th Cir. 1991). If a party fails to demand a jury trial pursuant to Rule 38(b), Rule 39(b) allows the court discretion to grant a jury trial notwithstanding the party’s failure

jury trial waivers. The issue of where to place the burden is ultimately a conflict between two asserted rights: the Seventh Amendment and the freedom of contract. On one hand, the Seventh Amendment guarantees the right to a jury trial.<sup>11</sup> Courts that place the burden on the party seeking enforcement of the contractual waiver value the fundamental jury trial right over the liberty of contract.<sup>12</sup> They ground their holdings on the jury trial right's hallowed place among the Bill of Rights and the Supreme Court's declaration of the right as fundamental,<sup>13</sup> relying heavily on the Court's statement in *Aetna Insurance Co. v. Kennedy*<sup>14</sup> that "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."<sup>15</sup> On the other hand, individuals have the right to freely and mutually enter into contracts.<sup>16</sup> Courts that have placed the burden on the party seeking to avoid enforcement appear to value liberty of contract over the right to a jury trial.<sup>17</sup> Instead of indulging a presumption against waiver, these courts hold there should be a presumption in favor of the validity of such a waiver contract.<sup>18</sup>

Although nearly every federal circuit has addressed the issue of burden placement in contractual jury trial waiver disputes, their opin-

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to make timely demand. FED. R. CIV. P. 39(b). The burden of convincing the court to exercise such discretion is placed on the demanding party. *See* Local 783, *Allied Indus. Workers of Am., AFL-CIO v. Gen. Elec. Co.*, 471 F.2d 751, 754 (6th Cir. 1973); *Bloch v. Fishman*, 610 F. Supp. 282, 284 (E.D. Wis. 1985).

11. *See supra* note 3.

12. *See, e.g.,* *Hydramar, Inc. v. Gen. Dynamics Corp.*, No. CIV.A.85-1788, 1989 WL 159267, at \*2 (E.D. Pa. Dec. 29, 1989) ("[A]lthough there is a compelling interest in the preservation of the freedom to contract, there is an even greater interest in guarding the fundamental right to a jury.").

13. For the leading cases in these circuits, *see infra* note 19. *See also* *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Johnson v. Zerbst*, 304 U.S. 458, 464 ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."); *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 307 (1937) ("We do not presume acquiescence in the loss of fundamental rights."); *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.").

14. *Aetna*, 301 U.S. 389 (1937).

15. *Id.* at 393; *see also* *Roell v. Withrow*, 123 S. Ct. 1696, 1706 (2003) (Thomas, J., dissenting) (quoting *Aetna*).

16. *See, e.g.,* 42 U.S.C. § 1981 (1977) (protecting the right of all citizens to make and enforce contracts); *City of Memphis v. Greene*, 451 U.S. 100, 125 n.38 (1981) (interpreting 42 U.S.C. § 1981); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the liberty guaranteed by the Fourteenth Amendment includes "the right of the individual to contract").

17. *See, e.g.,* *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985) (implying as such by placing the burden on the objecting party "in the context of an express contractual waiver.").

18. *See id.* (relying on MOORE'S FEDERAL PRACTICE, which instructs the court to "start with a presumption in favor of validity in the interest of liberty of contract." 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 38.46, at 428-39 (2d ed. 1984)).

ions have included minimal thoughtful analysis.<sup>19</sup> Federal courts generally recognize contractual jury waivers as valid if they were voluntary and knowing;<sup>20</sup> however, courts disagree as to who bears the burden of proving or disproving the waiver's validity. Currently, seven federal circuits place the burden of proving that a contractual jury trial waiver was voluntary and knowing on the party seeking to enforce the waiver.<sup>21</sup> The Sixth Circuit, on the other hand, places the burden on the party seeking a jury trial in contravention of the waiver.<sup>22</sup>

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19. The leading cases in each circuit are as follows:

A First Circuit district court, addressing the validity of a jury trial waiver provision in a lien agreement, stated only that "even though the First Circuit has not expressed an opinion as to this matter, we are persuaded that the burden of proving the waiver of such a fundamental right properly rests upon the party seeking to enforce such a waiver." *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F. Supp. 15, 18 (D. P.R. 1996).

In a Second Circuit case involving an equipment lease containing a jury trial waiver provision, the court noted that the jury trial right is fundamental and that a presumption exists against its waiver. *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977). Although it did not state as such, by implication the court placed the burden of proving that the waiver was signed intentionally and knowingly on the lessor, the party seeking waiver enforcement. *See id.*

In a Third Circuit commercial contract dispute where one party waived its jury trial right, a district court, in an unpublished opinion, placed the burden of proving the validity of the waiver on the party seeking enforcement, relying on the "great[] interest in guarding the fundamental right to a jury." *Hydramar, Inc. v. Gen. Dynamics Corp.*, No. CIV.A.85-1788, 1989 WL 159267, at \*2 (E.D. Pa. Dec. 29, 1989).

In a Fourth Circuit case involving an equipment lease where the lessees waived their jury trial right, the court stated only that "where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed." *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986).

A Fifth Circuit district court, addressing the validity of a jury waiver clause in a guaranty, concluded, without stating a reason, that the party seeking enforcement bears the burden. *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002).

The Sixth Circuit addressed the issue in the context of a lending agreement containing a jury waiver clause and stated only that "in the context of an express contractual waiver the objecting party should have the burden of demonstrating that its consent to the provisions was not knowing and voluntary." *K.M.C.*, 757 F.2d at 758.

In a Ninth Circuit case involving a loan agreement containing a jury trial waiver, a district court, with no analysis other than chronicling what the majority of courts have held, placed the burden on the lender, the party seeking waiver enforcement. *Phoenix Leasing Inc. v. Sure Broad. Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994), *aff'd*, 89 F.3d 846 (9th Cir. 1996) (unpublished opinion).

Finally, a Tenth Circuit district court addressing the validity of a jury waiver in a dealer agreement noted the "strong presumption" in favor of jury trials, thus placing the burden on the party seeking enforcement. *See Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982).

20. *Hendrix*, 565 F.2d at 258. Some courts use different but similar elements. *See, e.g.*, *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994) (knowing and voluntary); *Nat'l Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 667 (Bankr. S.D.N.Y. 1991) (voluntary and intentional); *Smyly v. Hyundai Motor Am.*, 762 F. Supp. 428, 429 (D. Mass. 1991) (knowing and intentional).

21. The First, Second, Third, Fourth, Fifth, Ninth, and Tenth Circuits place the burden in this manner. For the leading cases in each circuit, see *supra* note 20.

22. *See K.M.C.*, 757 F.2d at 758; *Efficient Solutions, Inc. v. Meiners' Country Mart, Inc.*, 56 F. Supp. 2d 982, 983 (W.D. Tenn. 1999).

Among courts that adopt the majority position — those that place the burden on the party seeking to enforce the jury trial waiver — most simply conclude that the court is persuaded, without analysis, that the burden should be placed on the party seeking to uphold the waiver.<sup>23</sup> Several courts note the jury trial right as fundamental, or note the presumption in favor of jury trials as espoused in *Aetna*.<sup>24</sup> Some merely point to what the majority of courts have held and hold likewise.<sup>25</sup> Most, however, offer no justification whatsoever for where they place the burden, or what that burden actually entails.<sup>26</sup> More importantly for this Note, no court in the majority has actually analyzed what *Aetna*'s "every reasonable presumption" means in concrete terms, or how the specific facts in *Aetna* inform the analysis. Also, no court has been explicit about whether a presumption shifts any or all three of the burdens of proof: pleading, production, and persuasion.<sup>27</sup> The Sixth Circuit, which places the burden of proof on the party seeking to void the waiver, engages in more analysis of the issue than courts in the majority of circuits, but its analysis suffers from similar shortcomings.<sup>28</sup> Its cases note a presumption in favor of liberty of contract, but they fail to explain what that presumption entails or how it comports with the presumption against waivers.<sup>29</sup>

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23. See, e.g., *Crane*, 804 F.2d at 833; *Hendrix*, 565 F.2d at 258; *Powell*, 191 F. Supp. 2d at 813; *Luis Acosta*, 920 F. Supp. at 18; *Phoenix Leasing*, 843 F. Supp. at 1384; *Hydramar*, 1989 WL 159267, at \*2; *Dreiling*, 539 F. Supp. at 403.

24. See, e.g., *Hendrix*, 565 F.2d at 258; *Luis Acosta*, 920 F. Supp. at 18; *Hydramar*, 1989 WL 159267, at \*2; *Dreiling*, 539 F. Supp. at 403.

25. See, e.g., *Crane*, 804 F.2d at 833; *Phoenix Leasing*, 843 F. Supp. at 1384.

26. See, e.g., *Crane*, 804 F.2d at 833; *Hendrix*, 565 F.2d at 258; *Powell*, 191 F. Supp. 2d at 813; *Luis Acosta*, 920 F. Supp. at 18; *Phoenix Leasing*, 843 F. Supp. at 1384, *aff'd*, 89 F.3d 846 (9th Cir. 1996) (unpublished opinion).

27. See *infra* text regarding presumptions and shifting of the burdens of proof accompanying notes 39-44.

28. In a Sixth Circuit suit between a borrower and a lender for breach of a financial agreement, *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985), where the contractual agreement contained a jury trial waiver, the court relied on MOORE'S FEDERAL PRACTICE for its holding, which states in part:

In determining whether to give effect to the contractual waiver against an objecting party, the court should start with a presumption in favor of validity in the interest of liberty of contract. This would require the objecting party to point to some one or more matters that render the provision improper.

5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 38.46, at 428-39 (2d ed. 1984). The court agreed and held that in the context of contractual jury trial waivers, the objecting party should bear the burden. *K.M.C.*, 757 F.2d at 758. In a district court master-service agreement and supplemental-contract dispute, the waiving party argued that the waiver was not knowing and voluntary because the provision was not "sufficiently conspicuous." *Efficient Solutions, Inc. v. Meiners' Country Mart, Inc.*, 56 F. Supp. 2d 982, 983 (W.D. Tenn. 1999). Citing *K.M.C.*, the court concluded that "when a contract contains an express jury waiver provision, the party objecting to that provision has the burden of demonstrating that its consent to the waiver was not knowing and voluntary." *Id.*

29. See, e.g., *K.M.C.*, 757 F.2d at 758.

Observing this split, one is still left with the impression that courts on either side have yet to truly tackle the burdens of proof and presumption issues.<sup>30</sup> This is understandable.<sup>31</sup> Courts have used the term presumption in a dizzying array of ways,<sup>32</sup> and unlike the courts interpreting the *Aetna* language seem to suggest,<sup>33</sup> there is clearly no one definition of the term. It is also clear that not all of the uses of the term necessarily entail a shift in one of the burdens of proof.<sup>34</sup> Thus, given the lack of analysis by courts on either side of the split, and given the incredible confusion generally on the use of the term presumption, this Note employs the most systematic of available approaches.<sup>35</sup> It draws on the framework of evidentiary presumptions and the six presumption types catalogued by scholars<sup>36</sup> to decipher *Aetna*'s "every reasonable presumption" language.<sup>37</sup> Only by doing

30. In the area of presumptions, an observer understandably would be pessimistic. As one legal scholar once observed, "[T]he doctrine of presumptions is clouded with difficulties and leads to much vain speculation and logical unrealism." JOHN H. WIGMORE, *A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE* 454 (1935). Another noted that every writer who has tried to make sense of presumptions "has left . . . with a feeling of despair." Edmund M. Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937).

31. One scholar recently wrote that "[t]he legal term 'presumption' confuses almost everyone who has ever thought about it. That confusion is fully justified. Not only are the concepts represented by the term complex, but courts and legislatures have used the term in many different and often inconsistent ways." Kenneth S. Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C. L. REV. 697 (1984).

32. See generally Broun, *supra* note 32.

33. See, e.g., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986); *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); *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F. Supp. 15, 18 (D. P.R. 1996); *Phoenix Leasing Inc. v. Sure Broad. Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994), *aff'd*, 89 F.3d 846 (9th Cir. 1996) (unpublished opinion).

34. See, e.g., G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, 25 CREIGHTON L. REV. 383 (1992). In this article, the author catalogues every use of the term presumption by Nebraska courts. Amazingly, he includes the following varied uses, not all of which entail a burden shift: presumptions that shift the burden of persuasion; Nebraska common-law presumptions that shift the burden of production; legally permissible inferences from relevant evidence; and rules of law (including so-called "irrebuttable" presumptions, rules establishing who has the initial burden of proof regarding each essential element of each issue in a case, rules governing statutory interpretation, rules governing the interpretation of legal documents, and constitutional presumptions).

35. For the only other work in addition to this Note analyzing the circuit split, see Deborah J. Matties, *A Case for Judicial Self-Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court*, 65 GEO. WASH. L. REV. 431 (1997). The author takes the majority view and argues that courts should make waiving one's right to a jury trial as difficult as possible, thus placing the burden on the party seeking enforcement. For lists of cases and summaries without analysis of the split, see 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, 1119 (2002); Sternlight, *Mandatory Binding Arbitration*, *supra* note 1; Debra T. Landis, Annotation, *Contractual Jury Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688 § 4, at 695-97 (1989).

36. See *infra* notes 47-52.

37. See *Aetna Ins. Co. v. Kennedy*, 301 U.S. 292, 393 (1937).



this can one analyze the use of the presumption term in *Aetna* to determine, in a more logical way than the courts have done, if a burden should be shifted, and if so, which one.<sup>38</sup>

This Note argues that in the case of federal contractual jury trial waiver disputes, courts should adhere only to a permissive presumption in favor of jury trials. Part I contends that *Aetna* is best understood as establishing a permissive presumption rather than a mandatory burden-of-production-shifting presumption. Part II argues that multiple policy reasons weigh in favor of adhering to a permissive presumption rather than a mandatory burden-of-production-shifting presumption.

### I. *AETNA INSURANCE CO. V. KENNEDY* ESTABLISHES A NON-BURDEN-SHIFTING PERMISSIVE PRESUMPTION

The law imposes three burdens that a party must satisfy to prove its case.<sup>39</sup> The first is the burden of pleading, or convincing the court that one has sufficiently stated a claim for relief under the law based on the alleged factual assertions.<sup>40</sup> The second is the burden of production, where one party must demonstrate sufficient evidence to allow a factfinder to find in that party's favor.<sup>41</sup> The third is the burden of persuasion, where one party must convince the factfinder of some proposition in order to render a verdict for that party.<sup>42</sup> The party initiating the suit or seeking a change in the status quo usually bears these three burdens;<sup>43</sup> however, legislatures and courts occasionally shift one or more of the burdens, usually for public policy reasons.<sup>44</sup>

Presumptions are one way for legislatures and courts to shift burdens. In evidentiary terms, they essentially allow the factfinder to presume that a fact is true if some predicate fact is shown.<sup>45</sup> That is, if

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38. Scholarly articles and other secondary sources have also failed to analyze the *Aetna* statement in terms of presumption categories or the three separate burdens. See Matties, *supra* note 35; 47 AM. JUR. 2D *Jury* §§ 72, 76 (2003); 50A C.J.S. *Juries* § 184 (2002) (citing without analysis only New York state case law to conclude that the party seeking waiver should bear the burden).

39. For general introductions to the three burdens making up the burden of proof, see RICHARD O. LEMPET ET AL., A MODERN APPROACH TO EVIDENCE 1235-47 (3d ed. 2000); and STEPHEN C. YEAZELL, CIVIL PROCEDURE 719-22 (5th ed. 2000).

40. BLACK'S LAW DICTIONARY 190 (7th ed. 1999).

41. *Id.*

42. *Id.* In civil cases, the plaintiff's burden is usually by a preponderance of the evidence; in criminal cases, the prosecution's burden is beyond a reasonable doubt. *Id.*

43. LEMPET ET AL., *supra* note 39, at 1236.

44. *Id.* at 1237.

45. BLACK'S LAW DICTIONARY 1203 (7th ed. 1999) ("presumption[:] A legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.").

the predicate fact **A** is proved, then the fact **B** is presumed to follow. The type of presumption being used determines how strong the connection must be from **A** to **B**.

Evidence scholars catalogue six presumption types, not all of which shift a burden:<sup>46</sup> permissive inferences;<sup>47</sup> permissive presumptions;<sup>48</sup> mandatory burden-of-pleading-shifting presumptions;<sup>49</sup> mandatory burden-of-production-shifting presumptions;<sup>50</sup> mandatory burden-of-persuasion-shifting presumptions;<sup>51</sup> and conclusive presumptions.<sup>52</sup> Although Federal Rule of Evidence (“FRE”) 301 provides a default rule for presumptions in federal court,<sup>53</sup> it is used only when the law creating the presumption does not specify its effect.<sup>54</sup>

The majority of circuits that have placed the burden of proof in contractual jury trial waiver disputes on the party seeking to uphold the waiver have done so by relying on the Supreme Court’s statement in *Aetna Insurance Co. v. Kennedy* that “courts indulge every reasonable presumption against waiver.”<sup>55</sup> No court, however, has actually investigated the facts and holding of *Aetna*, nor has any court parsed the words in this quote to determine the precise nature of this

46. This Note borrows heavily from and thus follows the categorization developed in LEMPET ET AL., *supra* note 39 (six presumption categories). For other categorizations, see Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196-209 (1953) (eight presumption categories); and Edmund M. Morgan, *Further Observations on Presumptions*, 16 S. CAL. L. REV. 245, 247-49 (1943) (seven presumption categories).

47. If the party proves **A**, then the factfinder may find **B** when **A** is considered along with all evidence.

48. If the party proves **A**, then the factfinder may find **B** even if **A** is the only evidence.

49. If the party proves **A**, then the factfinder must find **B**, unless the opposing party claims **B** is not true.

50. If the party proves **A**, then the factfinder must find **B**, unless the opposing party introduces evidence sufficient to prove **B** is not true. Sufficient evidence may be defined as any evidence, reasonable evidence, or substantial evidence.

51. If the party proves **A**, then the factfinder must find **B**, unless the opposing party persuades the factfinder that **B** is not true. Persuasion may be defined anywhere from a preponderance to beyond a reasonable doubt.

52. If the party proves **A**, then the factfinder must find **B**. Conclusive presumptions are probably better understood as rules of law, since they cannot be rebutted. See RICHARD EGGLESTON, *EVIDENCE, PROOF AND PROBABILITY* 92 (1978); WIGMORE, *supra* note 31.

53. FED. R. EVID. 301. FRE 301 reads as follows:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof . . . which remains throughout the trial upon the party on whom it was originally cast.

54. FRE 301 may be relevant since the contractual jury trial waiver disputes at issue take place in federal court.

55. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 292, 393 (1937); see also *supra* note 20.

presumption.<sup>56</sup> This Part examines *Aetna* and argues that even if it appears to establish a mandatory burden-of-production-shifting presumption when limited to its own facts (a situation that did not involve a contract dispute), when applied to a contractual jury trial waiver dispute, it establishes only a permissive presumption. This Part further contends that the Sixth Circuit is correct in holding that the burden of proof should not be shifted from the party seeking to avoid the waiver.

The question presented in *Aetna* to the Supreme Court was “[w]hether, by their request for directed verdicts, the parties waived their right to trial by jury.”<sup>57</sup> At trial, plaintiff Bogash (who had acquired Kennedy’s interest) and defendant Aetna Insurance Co., having introduced their evidence and agreed upon the amount of loss sustained, both submitted requests for peremptory-jury instructions and for a directed verdict in their respective favor.<sup>58</sup> The district court refused both sides’ requests and submitted the case to the jury.<sup>59</sup> The jury found for Aetna, and Bogash appealed.<sup>60</sup> The circuit court of appeals held that the district court erred in refusing to charge the jury on Bogash’s requested instructions, reversed, and ordered a new trial.<sup>61</sup> On Bogash’s application for rehearing, however, the appeals court held that “by their requests for peremptory instructions, plaintiff and defendants assumed the facts to be undisputed and submitted to the trial judge the determination of the inferences to be drawn from the evidence and so took the cases from the jury.”<sup>62</sup> The court denied the request for rehearing and remanded the case to the district court with directions to give judgment to Bogash in the amount of the agreed upon loss.<sup>63</sup>

The majority of circuits have relied almost exclusively upon *Aetna*’s language that “as the right of jury trial is fundamental, courts

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56. See, e.g., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828 (4th Cir. 1986); *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985); *Nat’l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. 1977); *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811 (N.D. Tex. 2002); *Efficient Solutions, Inc. v. Meiners’ Country Mart, Inc.*, 56 F. Supp. 2d 982 (W.D. Tenn. 1999); *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F. Supp. 15 (D. P.R. 1996); *Phoenix Leasing Inc. v. Sure Broad. Inc.*, 843 F. Supp. 1379 (D. Nev. 1994), *aff’d*, 89 F.3d 846 (9th Cir. 1996) (unpublished opinion); *Bonfield v. Aamco Transmissions, Inc.*, 717 F. Supp. 589 (N.D. Ill. 1989); *Hydramar, Inc. v. Gen. Dynamics Corp.*, No. CIV.A.85-1788, 1989 WL 159267 (E.D. Pa. Dec. 29, 1989); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402 (D. Colo. 1982).

57. *Aetna*, 301 U.S. at 392-93.

58. *Id.* at 392.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

indulge every reasonable presumption against waiver” in determining where to place the burden of proof in contractual jury trial waiver disputes.<sup>64</sup> That language originates from the following holding:

The established rule is that where plaintiff and defendant respectively request peremptory instructions, and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences properly to be drawn from them. And upon review a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it. But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver. And unquestionably the parties respectively may request a peremptory instruction and, upon refusal of the court to direct a verdict, have submitted to the jury all issues as to which opposing inferences may be drawn from the evidence. Here neither the plaintiff nor the defendants applied for directed verdicts without more. With their requests for peremptory instructions they submitted other requests that reasonably may be held to amount to applications that, if a peremptory instruction were not given, the cases be submitted to the jury.<sup>65</sup>

Analyzed in terms of evidentiary presumptions, *Aetna*'s language does appear to create some type of burden-shifting presumption for jury trial waiver disputes.<sup>66</sup> Here, both parties to the suit claimed the same thing (that they requested more than just directed verdicts), while the trial court “claimed” that they waived their jury trial right; the appellate court is deciding the dispute.<sup>67</sup> Thus, in effect, the “party” benefiting from any presumption is actually both parties to the litigation, the “opposing party” is the trial judge, and the “factfinder” is the appellate court. In terms of the previous catalogue of presumptions, the predicate fact **A** is a request for more than a directed verdict, and the presumed fact **B** is not waiving the jury trial.<sup>68</sup>

With this in mind, one can survey the six presumption types and find the appropriate match. The permissive inference and permissive presumption fail to fit the situation. Both ignore the trial judge's conclusions,<sup>69</sup> contrary to *Aetna*'s holding.<sup>70</sup> These presumptions permit the factfinder to find the presumed fact **B** without any

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64. *Id.* at 393.

65. *Id.* at 393-94 (footnotes omitted).

66. Note that *Aetna* does provide some explanation for the presumption. Since FRE 301 is a default rule that only applies when the law creating the presumption does not specify its effect, one cannot rely upon it in this case. See FED. R. EVID. 301; see also *supra* text accompanying notes 53-54.

67. *Aetna*, 301 U.S. at 391-94.

68. See *supra* text accompanying notes 45-47.

69. See *supra* notes 48-49.

70. *Aetna*, 301 U.S. at 394.

reference whatsoever to the opposing party (here, the trial judge).<sup>71</sup> But *Aetna* clearly references the trial judge, stating that his decision “must stand if the record discloses substantial evidence.”<sup>72</sup>

The mandatory burden-of-pleading-shifting presumption also fails. It grants the trial judge too much power, since he need only claim that there was a waiver.<sup>73</sup> Under this presumption, the factfinder must find the presumed fact **B**, unless the opposing party merely claims **B** is not true.<sup>74</sup> This again runs contrary to *Aetna*’s statement that the trial judge’s decision stands only if supported by “substantial evidence.”<sup>75</sup>

The mandatory burden-of-persuasion-shifting presumption does not appear applicable either. *Aetna* discusses sufficiency of supporting evidence in the record,<sup>76</sup> not adequacy of persuasion on the part of the trial judge.<sup>77</sup>

Finally, the conclusive presumption is too strong. It requires the factfinder to find the presumed fact **B** if the predicate fact **A** is proven.<sup>78</sup> In *Aetna*’s case, the appellate court would be required to find **B** (no waiver) if the parties prove **A** (a request for more than a directed verdict).<sup>79</sup> *Aetna*’s holding does not so bind the appellate court. In determining if there is no waiver, *Aetna* directs the appellate court to analyze the evidence on the record before the trial judge and the reasonableness of the parties’ proof of their requests for more than a directed verdict.<sup>80</sup> This appellate court discretion conflicts with the understanding of a conclusive presumption as a nonrebuttable rule of law.<sup>81</sup>

The most appropriate match among the six presumption types therefore appears to be the mandatory burden-of-production-shifting presumption. That is, if the party (both litigation parties together) proves **A** (they each requested more than a directed verdict), then the

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71. Under the permissive inference, the factfinder may find the presumed fact **B** when the predicate fact **A** is considered along with all the evidence. Under the permissive presumption, the factfinder may find **B** even if **A** is the only evidence. Both presumptions ignore the opposing party’s claims.

72. *Aetna*, 301 U.S. at 393-94.

73. *See supra* note 49.

74. *See supra* note 49.

75. *Aetna*, 301 U.S. at 393-94.

76. *See id.* (stating that the trial judge’s decision must stand “if the record discloses substantial evidence to support it,” without reference to the persuasiveness of that evidence).

77. *See supra* note 51.

78. *See supra* note 52.

79. *See supra* note 52.

80. The parties’ other requests “reasonably may be held to amount” to requests for more than a directed verdict. *Aetna*, 301 U.S. at 393-94.

81. *See supra* note 52.

factfinder (the appellate court) must find **B** (there was no waiver), unless the opposing party (the trial judge) introduces evidence sufficient to prove **B** is not true.<sup>82</sup> Here, the Supreme Court makes clear that the required sufficient evidence must be substantial; that is, there must be “substantial evidence” in the record supporting the trial court’s finding.<sup>83</sup>

In contrast, the concerns and facts prompting the Court arguably to create a mandatory burden-of-production-shifting presumption in the *Aetna* context are materially different from those surrounding contractual jury trial waivers. In *Aetna*, there was no opposing party relying upon the first party’s contractual promise; there was only the trial judge.<sup>84</sup> Thus, the party-litigants’ joint claim that they had not waived the right to a jury trial did not harm the expectations of the opposing party (there, the trial judge) in any way similar to a contractually bound party. The trial judge may have been harmed in that he sought to avoid jury trials in order to efficiently administer his court, but unlike a contract, there had been no consideration, no bargained-for exchange, and certainly no long-term reliance by the opposing party.

When contractual jury trial waiver disputes are involved, therefore, one must reexamine the six presumption categories and find the most appropriate presumption that 1) upholds the fundamental right of jury trials, 2) protects the interests of parties to the contract, and 3) follows *Aetna*’s instruction of indulging a “reasonable presumption.”<sup>85</sup>

With this in mind, the permissive presumption is the most appropriate.<sup>86</sup> In the contractual waiver situation, if the party claims **A** (her

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82. See *supra* note 50. Recall under the mandatory burden-of-production-shifting presumption, sufficient evidence may be defined as any evidence, reasonable evidence, or substantial evidence. See also *Aetna*, 301 U.S. at 391-94.

83. *Aetna*, 301 U.S. at 393.

84. *Id.* The appellate court was essentially deciding a “dispute” with the party-litigants on one side and the trial court judge on the other.

85. *Aetna*, 301 U.S. at 393 (emphasis added).

86. See *supra* note 48. For the following, assume that **A** is the predicate fact (the waiver was not voluntary and knowing), and that **B** is the presumed fact (there was no waiver). See *supra* text accompanying notes 45-54. The other five presumptions catalogued in this Note do not fit the contractual jury trial waiver scenario nearly as well as the permissive presumption. A permissive inference (if the party proves **A**, then the factfinder may find **B** when **A** is considered along with all evidence) allows the factfinder to conclude too easily that there was no jury trial waiver, given that any and all evidence may be used to reach that conclusion. See *supra* note 47. The mandatory burden-of-pleading-shifting presumption (if the party proves **A**, then the factfinder must find **B**, unless the opposing party claims **B** is not true), mandatory burden-of-production-shifting presumption (if the party proves **A**, then the factfinder must find **B**, unless the opposing party introduces evidence sufficient to prove **B** is not true), mandatory burden-of-persuasion-shifting presumption (if the party proves **A**, then the factfinder must find **B**, unless the opposing party persuades the factfinder that **B** is not true), and conclusive presumption (if the party proves **A**, then the factfinder must find **B**) are all too strong in the other direction. They all leave too little discretion for the factfinder to find against the party seeking to avoid the waiver if that party proves that the waiver was

waiver was not voluntary and knowing),<sup>87</sup> then the factfinder *may* find **B** (there was no waiver) even if that party's claim of **A** is the only evidence. First, the permissive presumption upholds the fundamental jury trial right. It allows the factfinder the freedom to find that there was no waiver even if the signing party can only claim her waiver was not voluntary and knowing, and is unable to offer other supporting evidence.<sup>88</sup> Second, the permissive presumption also protects the contractual interests of parties. By not shifting a burden to the party seeking to uphold the waiver while allowing the factfinder to find against the party seeking to avoid the waiver with weak evidence,<sup>89</sup> the presumption protects both parties' expectations.<sup>90</sup> Finally, the permissive presumption is reasonable. It does not alter the normal mechanisms found in an ordinary contract dispute,<sup>91</sup> yet it allows the factfinder the power to protect the notion of the jury trial.

*Aetna's* reasonableness language also suggests that the evidence the waiver-signing party must furnish to prove her jury trial waiver was voluntary and knowing should be of a reasonable amount.<sup>92</sup> To prove that neither party had limited its application to a motion for directed verdict, the Supreme Court stated that the parties "submitted other requests that *reasonably* may be held to amount to applications" for more than directed verdicts.<sup>93</sup> Applied to contractual jury trial waivers, the party claiming an invalid waiver must also submit evidence that reasonably may be held to show a lack of voluntariness, knowledge, or intelligence with respect to the waiver signing. This relatively easy standard is tempered by the factfinder's discretion that she may, but need not, find that the plaintiff had not waived her right

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not voluntary and knowing. These remaining four presumptions therefore do not protect the expectations of the parties to the contract enough to satisfy the interests in freedom of contract recognized in this Note. *See supra* notes 49-52.

87. *See supra* note 21 and accompanying text.

88. Of course, a factfinder would likely (and probably correctly) find that there was a valid waiver if the signing party is unable to offer any supporting evidence to her claim that her waiver was not voluntary and knowing.

89. For the amount of evidence required, *see infra* text accompanying notes 80-82.

90. It is predicate evidence and contract common law that a party to a contract who seeks to void it expects to bear the burden of proving the contract is somehow invalid. *See* 29 AM. JUR. 2D *Evidence* § 158 (1994) (the burden of proof "generally fall[s] upon the party seeking a change in the status quo, or upon the party that asserts the claim").

91. The party claiming that an enforceable contract exists bears the burden of proving formation (offer, acceptance, and consideration), *see, e.g.,* *Kilpatrick v. Paige*, 193 F. Supp. 2d 145, 152 (D.D.C. 2002), while the party challenging the contract under an affirmative defense bears the burden of proving that defense, *see, e.g.,* *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (unconscionability); *Harrison v. Grobe*, 790 F. Supp. 443, 447 (S.D.N.Y. 1992) (incapacity).

92. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393-94 (1937).

93. *Id.* (emphasis added).

to a jury trial.<sup>94</sup> The court would (1) protect the fundamental right of jury trial by allowing reasonable evidence to void a waiver; (2) safeguard the liberty of contract and the opposing party's reliance on a bargained-for exchange by maintaining discretion to find in the waiver-seeking party's favor; and (3) indulge the most reasonable presumption in furtherance of *Aetna's* instructions.

Applying *Aetna* in this manner shows that the Sixth Circuit properly declined to shift any burden of proof to the party seeking to uphold the waiver.<sup>95</sup> On its face, *Aetna* appears to create a mandatory burden-of-production-shifting presumption, shifting the burden from the party seeking to avoid the waiver to the party seeking to uphold it.<sup>96</sup> A closer examination of the facts and procedure, however, leads to a different conclusion. *Aetna* does not present a situation in which contractual duties are in effect. Thus, when *Aetna's* language requiring the indulgence of "every reasonable presumption" in favor of the jury trial right is applied to the contractual setting, it is clear that another type of presumption must be applied.<sup>97</sup> Although the Sixth Circuit did not specifically analyze the presumption present in *Aetna*, but rather

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94. See *supra* note 48.

95. See *supra* note 20.

96. *Aetna* does so by concluding that the Seventh Amendment's jury trial right is fundamental. 301 U.S. at 393-94. At least one circuit, however, has found an exception to the jury trial right for complex cases. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980). In *Ross v. Bernhard*, 396 U.S. 531, 538 (1970), the Supreme Court recognized that the "Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." The Court explained this statement in a footnote: "As our cases indicate, the 'legal' nature of an issue is determined by considering . . . the practical abilities and limitations of juries." *Id.* The Third Circuit relied upon this language to create an exception to the jury trial right for complex cases, stating that "[a] suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner." *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d at 1079 (citing *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 526 (1956)); see also Douglas King, Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 612 (1984). But see *Phillips v. Kaplus*, 764 F.2d 807, 814 (11th Cir. 1985); *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1130 (Fed. Cir. 1985) (Markay, C.J., joining with additional views); *In re United States Fin. Secs. Litig.*, 609 F.2d 411, 432 (9th Cir. 1979); *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351, 355 (E.D. Mich. 1980). Thus, the Seventh Amendment jury trial right may not be as fundamental as some courts have stated. The *Ross* complexity exception demonstrates that in the split over where the burden should be placed in contractual jury trial waiver disputes, the majority of courts, by shifting the burden to the party seeking to uphold the waiver, may be overconfident in their assessment of the fundamental nature of jury trials in federal civil cases.

97. See *Aetna*, 301 U.S. at 393-94; see also *supra* note 86 for an explanation of why the five presumptions other than the permissive presumption do not fit the situation as presented in *Aetna*.



applied a presumption in favor of liberty of contract,<sup>98</sup> the court at least reached the correct holding.<sup>99</sup>

## II. POLICY REASONS UNDERLIE A PERMISSIVE-PRESUMPTION INTERPRETATION OF *AETNA*

In addition to the analysis of *Aetna* set forth above, two policy considerations also support interpreting the presumption in *Aetna* as a permissive presumption rather than a mandatory burden-of-production-shifting presumption. First, FRCP 38's demand and waiver procedure is consistent with the permissive presumption. Second, courtroom and judicial system efficiency concerns support this reading of *Aetna*.

### A. *FRCP 38's Bright-Line Demand and Waiver Rule*

For issues that may involve the jury trial right as protected by the Seventh Amendment,<sup>100</sup> FRCP 38 creates a demand and waiver procedure.<sup>101</sup> As the Advisory Committee Notes from 1937 state, FRCP 38 "provides for the preservation of the constitutional right of trial by jury."<sup>102</sup> It makes "definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions."<sup>103</sup>

FRCP 38 establishes a bright-line standard that places the demand burden on the party seeking a jury trial. Under this Rule, an individual is not entitled to a jury trial without a timely demand.<sup>104</sup> In this sense, the Rule fixes a clear presumption against a jury trial and sets a bright-line standard for when the jury trial right attaches.<sup>105</sup>

There is no reason why demanding a jury trial that has been actively waived should be procedurally different from the normal demand (and passive waiver) procedure in FRCP 38.<sup>106</sup> When a party

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98. This presumption, found in MOORE'S FEDERAL PRACTICE, is as confusing as the one found in *Aetna* because it is not described in categorical terms. See *supra* note 29 and accompanying text.

99. See *supra* note 29.

100. See the description of the historical approach, *supra* text accompanying note 5.

101. See *supra* note 7.

102. FED. R. CIV. P. 38 advisory committee's notes.

103. *Id.*

104. See *supra* note 7.

105. Note here how, in giving application to the jury trial right's fundamental nature, the facial reading of *Aetna* (establishing a mandatory burden-of-production-shifting presumption) is totally inconsistent with the demand and waiver policy established by FRCP 38. See *supra* text accompanying notes 65-83.

106. At least one author would argue otherwise:

waives its right to a jury trial and then attempts to avoid that waiver (assumedly by arguing the waiver was somehow invalid), the party is essentially making a demand for a jury trial. There is no intelligible difference between demanding something that has yet to be granted and demanding something that has been relinquished.<sup>107</sup> Under ordinary FRCP 38 normal demand procedure,<sup>108</sup> the individual seeking the jury trial has the burden of making a demand.<sup>109</sup> Likewise, for an avoidance-of-waiver demand procedure, the burden of making the demand should remain on the party seeking the jury trial. This uniformity retains FRCP 38's recognition of the jury trial right's importance in the Constitution, honors each party's liberty to waive its jury trial right by contract, protects parties who have relied on contractual waivers, and remains consistent with the bright-line demand and waiver procedure established by the Rule.

The policy behind this uniform structure also meshes well with the type of presumption argued for in this Note. Whereas the mandatory burden-of-production-shifting presumption,<sup>110</sup> suggested by a superficial reading of *Aetna*,<sup>111</sup> would require that the burden of production shift to the party opposing the jury trial demand, the permissive presumption,<sup>112</sup> suggested by a more informed reading of *Aetna*,<sup>113</sup> would maintain the burden on the party demanding the jury trial. The

Courts should not treat waivers made before litigation in the same way as waivers made when litigation has already begun. The issues and stakes are known in current litigation; in contrast, when a contract is signed far in advance of litigation, much uncertainty exists regarding problems that could occur "with respect to" the contract.

See Matties, *supra* note 35, at 463 (citing *Phoenix Leasing Inc. v. Sure Broad. Inc.*, 843 F. Supp. 1379, 1388 (D. Nev. 1994), *aff'd*, 89 F.3d 846 (9th Cir. 1996) (unpublished opinion)). One can, however, make the opposite argument. When a contract is signed far in advance of litigation, the reliance interest of the opposing party is significantly greater than when the jury trial right is waived in the context of ongoing litigation. Protecting this interest would require courts to be more strict with early waivers than with late ones. In addition, whatever differences exist in what is known about the issues and stakes of the litigation are accounted for in requiring a waiver before litigation to be voluntary and knowing. See *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 756 n.4 (6th Cir. 1985).

107. This becomes even clearer when one compares how waiver occurs in the two situations. Under passive waiver, the jury-trial seeker waives his right by simple passage of time. Under active waiver, the jury-trial seeker has gone out of his way to waive his right. It is unclear, therefore, why waiver should be *more* difficult when active relinquishment occurs rather than mere passive resignation.

108. Where a party demands her jury trial right either in her complaint or answer. See *supra* note 10.

109. See *supra* note 7.

110. To remind the reader: If the party proves **A**, then the factfinder must find **B**, unless the opposing party introduces evidence sufficient to prove **B** is not true. Sufficient evidence may be defined as any evidence, reasonable evidence, or substantial evidence.

111. See *supra* Part I.

112. To remind the reader: If the party proves **A**, then the factfinder may find **B** even if **A** is the only evidence.

113. See *supra* Part I.

permissive presumption is more consistent with the policy of bright-line demand and waiver present in FRCP 38.<sup>114</sup> At the same time, the permissive presumption protects the fundamental nature of the jury trial right by allowing the factfinder to grant the party's demand based on little evidence that the waiver was not signed properly.<sup>115</sup>

### B. *Administrative Efficiency*

Allowing pre-litigation jury trial waivers and, in determining the legitimacy of those waivers, maintaining the burden on the party seeking to avoid a waiver permit judges to maximize courtroom efficiency — one of the goals generally envisioned by the Federal Rules of Civil Procedure.<sup>116</sup> As judges seek to use most effectively their limited time and resources, they use rules and procedures such as FRCP 38<sup>117</sup> and various presumptions<sup>118</sup> to administer their courts efficiently. Placing the burden on the party seeking a jury trial and defining waiver broadly to include “the failure of a party to serve and file a demand as required by this rule” allows the judge to quickly and easily decide whether a jury trial is or is not required.<sup>119</sup>

Some critics argue that an inquiry into whether a contractual waiver has been properly signed would limit whatever efficiency gains would come from allowing pre-litigation jury trial waivers and placing the burden of proof on the party seeking to avoid such a waiver.<sup>120</sup> That is, in order to determine whether the jury trial right has been waived, the court must determine under a fact-intensive investigation whether the waiver was voluntary and knowing.<sup>121</sup> This investigation, it is argued, would make whatever gains in efficiency from not having a jury insignificant.

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114. See *supra* text accompanying notes 86-90. The permissive presumption looks only to the proof of demand or waiver supplied by the party seeking the jury trial, creating more of a bright-line rule than were the court required to shift a burden to the opposing party.

115. See *supra* text accompanying notes 92-94.

116. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 912 (1990) (Blackmun, J., dissenting) (“The District Court and today's majority fail to recognize the guiding principle of the Federal Rules of Civil Procedure, the principle that procedural rules should be construed pragmatically, so as to ensure the just and efficient resolution of legal disputes.”).

117. See, e.g., *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 756 n.4 (6th Cir. 1985) (“Similarly, the rule respecting timely demand for trial by jury is a reasonable requirement calculated to insure the orderly presentation of the business of the court.”).

118. See *supra* text accompanying notes 47-52.

119. See *supra* note 7.

120. See *Matties*, *supra* note 35, at 463 (“Because the standard by which contractual jury waivers are enforced always requires an intensive facts and circumstances inquiry, a presumption in favor of waiver does not affect the efficiency of trial courts.” (footnotes omitted)).

121. *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977).

This argument fails for two reasons. First, it misunderstands the concept of efficient court administration. FRCP 38's simple demand and waiver provisions allow for efficient administration in two distinct ways. The demand procedure's simplicity and the bright-line determination of demand versus waiver allow for quick and simple judgments about whether a jury is required. More importantly, by easily allowing jury trial waivers, FRCP 38 decreases jury trial frequency. Cases tried by judges rather than juries consume less court time and fewer court resources.<sup>122</sup> Applied to the contractual jury trial waiver setting, allowing for such simple waivers and maintaining the burden of demand on the party seeking the waiver makes jury trials less frequent, which again, allows for more efficiently administered courts.<sup>123</sup> Second, the argument that an inquiry into the voluntary and knowing nature of the waiver would make efficiency gains insignificant fails because it does not take into account this Note's reading of *Aetna* as requiring only a permissive presumption in favor of jury trials.<sup>124</sup> The permissive presumption allows the judge to find that the waiver was not signed properly if the party seeking to avoid the waiver claims as much.<sup>125</sup> As argued in this Note, *Aetna*'s reasonableness language suggests that the evidence the signing party must furnish to prove her waiver was not voluntary and knowing is a reasonable amount.<sup>126</sup> Thus, the inquiry into whether the waiver was voluntary and knowing will be rather restricted. Limiting the inquiry in this manner combined with maintaining the burden on the party seeking a jury trial would allow for efficiency in the same manner as ordinary FRCP 38 waivers, and would therefore not be insignificant. These effi-

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122. That is, court proceedings are more streamlined when the court need not contend with a jury. To name a few examples, jury selection need not be conducted, jury instructions need not be given, and evidentiary hearings need not be held outside of the jury's ears. *See, e.g.,* *Matter of Grabill Corp.*, 967 F.2d 1152, 1158 (7th Cir. 1992) (“[J]ury trials are, by nature, more time consuming than [sic] bench trials . . .” (quoting *In re G. Weeks Sec., Inc.*, 89 B.R. 697, 710 (Bankr. W.D. Tenn. 1988))); *BCCI Holdings (Luxembourg), Societe Anonyme v. Khalil*, 182 F.R.D. 335, 339 (D.D.C. 1998) (mem.) (“In other complex cases, real efficiencies can be had in trying the case to the Court rather than a jury because of the greater flexibility available in a bench trial.”); *Rosen v. Dick*, 83 F.R.D. 540, 544 (S.D.N.Y. 1979) (“A bench trial always moves more expeditiously than a jury trial.”).

123. This can most easily be seen by comparing the ease of waiver under the two burden regimes discussed in this Note — shifting the burden to the party seeking to uphold the waiver, and maintaining the burden on the party seeking to void the waiver. Under the former, to waive its jury trial right, a party must sign the waiver and the party's opponent must then produce evidence that the waiver was voluntary and knowing. Under the latter, to waive its jury trial right, a party must simply sign the waiver. The extra burden placed on the opposing party in the burden-of-production-shifting regime clearly demonstrates that in the aggregate, waivers would be more frequent, hence jury trials less frequent, when the burden is not shifted and a permissive presumption is applied.

124. *See supra* text accompanying notes 86-90.

125. *See supra* note 48.

126. *See supra* text accompanying notes 92-94.

ciency goals weigh heavily in favor of this Note's limited reading of *Aetna's* presumption favoring jury trials.<sup>127</sup>

### CONCLUSION

This Note analyzes two conflicting policy considerations in the context of federal court contractual jury trial waiver disputes: the fundamental nature of the jury trial versus the liberty of contract. When a party seeks to avoid a previously signed contractual jury trial waiver, an issue arises in these disputes as to who bears the burden of proving that waiver was not voluntary and knowing.<sup>128</sup> The two conflicting policies just mentioned have led to opposing holdings regarding where that burden should be placed. Courts valuing the fundamental jury trial right over liberty of contract place the burden on the party seeking enforcement of the waiver,<sup>129</sup> pointing to the Supreme Court's statement in *Aetna Insurance Co. v. Kennedy* that "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."<sup>130</sup> Courts valuing the liberty of contract over the jury trial right place the burden on the party seeking to avoid enforcement,<sup>131</sup> pointing to this value's endorsement by *Moore's Federal Practice*.<sup>132</sup>

This Note argues that in balancing the fundamental right of jury trial with the liberty of contract, the burden of proof in contractual jury trial waiver disputes should not be shifted away from the party seeking to avoid the waiver to the party seeking to enforce the waiver. Several legal and policy arguments lead to this conclusion. First, an informed reading of *Aetna* demonstrates that the case did not require a mandatory burden-of-production-shifting presumption, but rather a permissive presumption.<sup>133</sup> Such a reading would allow a factfinder the freedom to find there was no waiver even if the signing party can only claim her waiver was not voluntary and knowing, but it is unable to offer any other supporting evidence, and would also protect the contractual expectations of both parties. Second, policy reasons, including judicial efficiency and procedural consistency with Federal

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127. This is not meant to pit efficiency against the fundamental importance of juries. Rather, this Note's reading of the *Aetna* presumption as a permissive presumption rather than a mandatory burden-of-production-shifting presumption is simply more consistent with the efficiency goal.

128. See *supra* notes 20-21 and accompanying text.

129. See *supra* text accompanying notes 20-22.

130. 301 U.S. at 393.

131. See *supra* text accompanying notes 18-19.

132. MOORE ET AL., *supra* note 29.

133. See *supra* Part I.

Rule of Civil Procedure 38's bright-line demand and waiver procedure, support the conclusion that the burden should not be shifted.<sup>134</sup>

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134. *See supra* Part II.