

Assigning the Burden of Proof in Contractual Jury Waiver Challenges: How Valuable is Your Right to a Jury Trial?

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INTRODUCTION

Consider the following two hypotheticals:

Elizabeth, an 18 year old high school graduate, applies for a cashier position at a prominent national retailer. Following a successful interview, she is offered the position and presented with an employment contract to sign on a take-it-or-leave-it basis. The employment agreement includes a waiver of Elizabeth's right to a jury trial. Elizabeth signs the agreement. Elizabeth works for the retailer full-time for five years and in that time is promoted to shift supervisor. She notices, however, that all male employees with similar performance reviews and seniority have been promoted to store managers. Elizabeth strongly believes that she has been denied opportunities for promotion on the basis of her gender and decides to sue her employer. Elizabeth takes her case to various plaintiff's attorneys but none will take it for fear that her jury trial waiver will result in a *de minimis* recovery. Undaunted, Elizabeth files a lawsuit against her employer *in pro per*. Throughout the litigation, she makes critical mistakes due to her legal inexperience. Finally, her employer offers her \$5000.00 to settle the matter. Elizabeth accepts the settlement.

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Sarah, an 18 year old high school graduate, applies for a cashier position at a prominent national grocer. Following a successful interview, she is offered the position and presented with an employment contract to sign on a take-it-or-leave-it basis. The employment agreement does not include a waiver of Sarah's right to a jury trial. Sarah signs the agreement. Sarah works for the grocer full-time for five years and in that time is promoted to shift supervisor. She notices, however, that all male employees with similar performance reviews and seniority have been promoted to store managers. Like Elizabeth, Sarah strongly believes that she has been denied opportunities for promotion on the basis of her gender and decides to sue her employer. Sarah takes her case to various plaintiff's attorneys. After reviewing the facts of Sarah's case and weighing the likely outcome of a jury trial, a prominent plaintiff's attorney takes her case on contingency. The attorney helps Sarah amass substantial evidence of gender discrimination by her employer. Sarah's attorney contacts her employer and threatens to sue. During the subsequent negotiations, Sarah's attorney makes it clear that they are prepared to take the case to the jury. Before the suit is even filed, Sarah's employer offers to settle the case for \$1,000,000.00, which Sarah accepts.

As exemplified by the foregoing hypotheticals, a jury trial waiver can significantly affect the perceived value of a plaintiff's case. Indeed, in 2004, the U.S. Department of Justice found that the amount awarded to plaintiff winners varied significantly depending on whether the case was decided by a jury or a

judge.¹ The difference between the award amounts was particularly striking in employment discrimination cases, where plaintiff winners were awarded a median of \$218,000 from juries as compared to only \$40,000 from judges.² Not surprisingly, many employers have sought to avoid the greater risk inherent in jury trials by requiring their employees to use alternate dispute resolution methods such as arbitration.³ But the use of pre-dispute mandatory arbitration agreements in the employment context carries its own distinct disadvantages.⁴ Accordingly, some commentators are advocating for increased use of pre-dispute contractual jury waivers as a way to manage employment litigation risk.⁵

But while jury waivers can be an attractive alternative to arbitration on the one hand and jury trials on the other, judicial treatment of such waivers has been quite varied.⁶ Two state supreme courts, California and Georgia, have ruled that

¹ Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties*, 2001, BUREAU OF JUSTICE STATISTICS BULLETIN app. F, at 5-6 (Apr. 2004), available at <http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc01.htm>.

² *Id.* at 6. The survey found that the median amount awarded to plaintiff winners in federal district courts was also higher in jury trial cases than in bench trial cases. *Id.* at 7. Although the survey did not specify the median award amount in federal employment discrimination cases, it found that the median award in federal jury trial cases involving “contract,” a category which included employment discrimination cases, was \$330,000 as compared to only \$226,000 in bench trial cases. *Id.* at 7, 10-11.

³ See, e.g., Michael H. LeRoy, *Jury Revival or Jury Reviled? When Employers are Compelled to Waiver Jury Trials*, 7 U. Pa. J. Lab. & Emp. 767, 768-770 (2005); Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, 80 Chi.-Kent L. Rev. 933, 934 (2005).

⁴ See *infra*, Part I.B.

⁵ See, e.g., LaRocca, *supra* note 3, at 954-959 (arguing that jury trial waivers allow employers and employees to avoid the disadvantages of arbitration); Chad Shultz, *The Jury’s Still Out—Way Out: Subtracting the Jury From the Equation Decreases Uncertainty in Employment Cases*, HR Magazine (Jan. 2005) (suggesting that employers use jury waivers in lieu of arbitration); Harold M. Brody and Anthony J. Oncidi, *Careful What You Wish For: Is Arbitration the Employer’s Panacea? Perhaps There is a Better Alternative*, 9 No. 6 HR Advisor: Legal & Practical Guidance 7 (noting that jury trial waivers, as opposed to arbitration, are a “better way to shield employers from the risk and expense associated with jury trials”); Samuel Estreicher and Rene M. Johnson, *Contractual Jury Trial Waivers in Federal Employment Litigation*, N.Y.L.J. (May 2, 2003) at 3 (noting that “practitioners are increasingly considering contractual jury trial waivers”).

⁶ See *infra*, Part II.B & C.

pre-dispute contractual jury waivers are not enforceable.⁷ Those jurisdictions that permit such waivers use a wide array of “safeguards not typical of commercial law”⁸ to protect the constitutional right to jury trial. The multiple safeguards used by courts, and the different ways of applying them led the California Supreme Court to note “the difficulties experienced in other jurisdictions [with respect to pre-dispute jury waivers], where disagreements persist concerning such matters as allocation of the burden of proof when a party resists enforcement of a contractual waiver of jury trial.”⁹ These disagreements must be settled before employers and employees can use such waivers appropriately and effectively.

This Article resolves the burden of proof question by arguing that several factors support assigning the burden of proof to the party seeking enforcement of the waiver, which in employer-employee disputes will usually be the employer. Allocating the proof burden in this way will standardize judicial treatment of pre-dispute jury waivers, allowing employers and employees to use them optimally to manage the risks of dispute resolution.

Part I of this Article assesses the use of pre-dispute jury waivers in the employment context and explains their appeal to employers and employees alike. Part II analyzes the various ways that federal courts have treated pre-dispute jury

⁷ See *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944, 961, 116 P.3d 479, 488 (2005) (holding that state statute does not authorize pre-dispute waiver of the right to jury trial); *Bank South N.A. v. Howard*, 264 Ga. 339, 340, 444 S.E.2d 799, 800 (1994) (holding that neither the Georgia constitution nor state statute provide for pre-litigation contractual waivers of jury trial).

⁸ *Grafton Partners L.P.*, 36 Cal. 4th at 965 & 966 n.12. For a more extensive discussion of the safeguards used by courts, see *infra*, note 54 & accompanying text.

⁹ *Grafton Partners L.P.*, 36 Cal. 4th at 966; see also Shultz, *supra* note 5 (“It is safe to assume that lawyers who represent employees will challenge the validity of jury waiver agreements.”); Brody & Oncidi, *supra* note 5, at 7 (noting that there is “little guidance” regarding “whether, when and how an employer may implement a jury trial waiver program”). For a more extensive discussion of the disagreements between various jurisdictions, see *infra*, Part II.B.

waivers and notes specific inconsistencies in the treatment of such waivers in several recent federal employment cases. Part III argues that in the employment context, public policy considerations, and convenience and fairness concerns, all call for assigning the burden of proof to the party seeking enforcement of the waiver.

I. Pre-Dispute Contractual Jury Waivers

The Seventh Amendment to the U.S. Constitution establishes a constitutional right to a jury trial in legal actions in federal court, including diversity jurisdiction cases.¹⁰ In addition, federal employment law statutes such as Title VII, 42 U.S.C. § 2000e *et. seq.* (1994) (“Title VII”) and the Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (2000) (“ADEA”) grant jury trial rights.¹¹ From a risk management perspective, however, many employers find a jury’s legendary unpredictability to be unacceptable.¹²

A. The Problem With Juries

Most employers believe that juries are more likely to find against wealthy or corporate defendants than judges and more likely to award large damages to plaintiff winners than judges.¹³ Furthermore, according to prevailing wisdom, juries generally “favor the little guy against the big one, the simpler case rather than the one more difficult to understand, local interests rather than those

¹⁰ U.S. Const. amend. VII; *Simler v. Conner*, 372 U.S. 221, 222 (1963).

¹¹ *See* 42 U.S.C. § 1981a(a) (amending Title VII to permit jury trials); 29 U.S.C. § 626(c)(2) (granting jury trial rights under the ADEA).

¹² Robert S. Blumberg and Ariel D. Weindling, AISIAIP, A Littler Mendelson Time Sensitive Newsletter, California Edition (August 2005), *available at*, <http://www.littler.com/presspublications/index.cfm?event=pubItem&pubItemID=12181&childViewID=250&type=all> (“Among the greatest fears of many employers is the chance that a runaway jury could impose a potentially ruinous verdict in a wrongful discharge or harassment matter.”); *see* Shultz, *supra* note 5 (“Jury trials . . . are notoriously unpredictable. . . mak[ing] it difficult to assess the wisdom of a decision to continue or settle.”).

¹³ Jerry Custis, LITIGATION MANAGEMENT HANDBOOK, § 8:32 (December 2004).

situated farther away, emotional appeals to right versus wrong rather than strict application of the law and more attractive witnesses rather than those lacking a cordial appearance.”¹⁴ These concerns have motivated many employers to adopt alternative dispute resolution mechanisms to handle employment disputes.

A substantial number of employers currently use arbitration.¹⁵ By submitting disputes to an arbitrator rather than to a jury, both employers and employees expect reduced costs, faster resolutions, greater privacy and increased predictability.¹⁶ But recently, numerous concerns have been raised regarding the continued use of arbitrators in employment disputes.

B. The Problem With Arbitration

Critics of pre-dispute mandatory arbitration agreements argue that by providing a private, less costly way for employees to bring discrimination claims, such agreements expose employers to a greater number of discrimination claims.¹⁷ Employers are also finding that arbitration does not offer a significant improvement over litigation in terms of time and costs saved. Experience has shown that resolution times for disputes that are arbitrated are not significantly faster than disputes that are litigated in court.¹⁸ Moreover, arbitrators typically do not grant summary judgment, further prolonging the case and increasing

¹⁴ *Id.*

¹⁵ Brody & Oncidi, *supra* note 5, at 7 (noting that a “substantial number” of employers “employing millions of employees” have adopted arbitration); see Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 Ohio St. J. on Disp. Resol. 249, 252 (2003) (“The substitution of mandatory arbitration for discrimination lawsuits is the most significant employment law development since the early 1990s.”); LaRocca, *supra* note 3, at 933-34 (writing that in 1997, 19% of private sector employers were using arbitration and that in 2001, 6 million employees were covered by employment arbitration plans administered by the American Arbitration Association).

¹⁶ LaRocca, *supra* note 3, at 935-37.

¹⁷ *Id.* at 938-42; see Shultz, *supra* note 5 (writing that arbitration may encourage claims).

¹⁸ Brody & Oncidi, *supra* note 5, at 7.

costs.¹⁹ Arbitration costs also include fees for preparing and conducting the arbitration, and deciding discovery disputes and law and motion proceedings—all costs which are publicly funded in a court proceeding.²⁰ This is a particular burden on employers as they are often saddled with the entire cost of the arbitration.²¹

Arbitrating a dispute also requires both employers and employees to accept procedures that may differ from those provided by statute, as well as limited judicial recourse in the event of an adverse outcome.²² There is also continuing debate in the courts, as well as among commentators, regarding the judicial enforceability of mandatory arbitration agreements.²³

¹⁹ Shultz, *supra* note 5 (writing that arbitrators “seldom dismiss cases without a hearing, even when there is no arguable basis for a claim”); Brody & Oncidi, *supra* note 5, at 7 (stating that arbitration is often not much faster than, and can be as expensive as, court litigation, that arbitrators rarely grant motions for summary judgment and that arbitrators often “split-the-baby” and issue compromise awards).

²⁰ LaRocca, *supra* note 3, at 939.

²¹ See Brody & Oncidi, *supra* note 5, at 7 (noting that plaintiff’s attorneys often do not oppose arbitration because they can litigate “largely at the employer’s expense”).

²² LaRocca, *supra* note 3, at 940; see LeRoy, *supra* note 3, at 777-780 (noting that the use of arbitrators as adjudicators of employment disputes is now questioned due to, *inter alia*, high damages awards and extremely deferential standard of judicial review).

²³ Leroy & Feuille, *supra* note 15, at 313-326 (noting “surprising evidence of judicial resistance to these mandatory [arbitration] arrangements.”). Much has been written regarding how mandatory arbitration agreements should be enforced, if at all. See generally, 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) (arguing that the Seventh Amendment right to a jury trial should limit the ability of parties to impose binding arbitration). Some argue that a knowing and voluntary standard of consent should be applied to pre-dispute mandatory arbitration agreements. See *id.*; Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 Cal. L. Rev. 1203, 1208 (2002); but see Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and other Contractual Waivers of Constitutional Rights*, 67-SPG Law & Contemp. Probs. 167, 168 (Winter/Spring 2004) (arguing that the Federal Arbitration Act cannot “plausibly be interpreted to require knowing consent or any other standards of consent except those used by contract law”). Still others argue that it is inequitable to enforce executory agreements to arbitrate between employers and employees. See generally, Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. Rev. 449 (1996).

All of these problems with arbitration have spurred many employers to reconsider the use of arbitration to resolve employment disputes.²⁴

C. Are Pre-Dispute Jury Waivers The Solution?

*EACH OF THE PARTIES HERETO IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT.*²⁵

Pre-dispute contractual jury waivers such as the one *supra*, are increasingly being used by employers as an alternative way to mitigate risk.²⁶ Such waivers offer some of the benefits of both arbitration and jury trials. Like a jury trial, a bench trial allows parties to take full advantage of our court system because they provide litigants with procedural and evidentiary protections that may not otherwise be available in arbitration.²⁷ Judges are generally more receptive to dispositive motions than arbitrators.²⁸ Court proceedings also permit greater post-judgment judicial review than is available following an arbitration award.²⁹

²⁴ See Ryan Griffiths, *Jury Waiver Agreements Revisted*, Thompson Coe Labor & Employment News 2 (Spring 2005), available at <http://www.thompsoncoe.com/Portals/0/LEN-06-02.pdf> (law firm newsletter noting more employers are using jury waivers in their employment agreements).

²⁵ This pre-dispute jury waiver is reproduced from an actual employment agreement that was litigated in federal court. *Morris v. McFarland Clinic P.C.*, 2004 WL 306110, at *1, 2004 U.S. Dist. LEXIS 26639 (S.D.Iowa Jan. 29, 2004) (emphasis original).

²⁶ Blumberg & Weindling, *supra* note 12 (stating that many employers use pre dispute jury waivers to avoid “the great uncertainty which comes with jury trial, while both avoiding the cost of arbitration and retaining the right to appeal”); see Shultz, *supra* note 5 (writing that a jury waiver diminishes the value of a plaintiff’s case); LeRoy, *supra* note 3, at 769 (noting some employers are discarding arbitration in favor of jury waivers).

²⁷ LaRocca, *supra* note 3, at 955 (“Because a judge is bound by Title VII and the Federal Rules of Civil Procedure, employees [and employers] are guaranteed appropriate statute of limitations, unbiased selection of the decision maker, appropriate cost allocations, judicial expertise, full appellate rights, appropriate punitive damages, and appropriate remedies.”).

²⁸ Brody & Oncidi, *supra* note 5, at 7.

²⁹ Estreicher & Johnson, *supra* note 5, at 1.

Much like arbitration, bench trials offer potentially significant time and cost savings when compared to jury trials. This is because bench trials are generally concluded much faster than jury trials.³⁰ In addition, in a bench trial, parties are spared the costs of selecting a jury, tailoring the case to a jury, and settling jury instructions.³¹ Finally, submitting a dispute to a judge rather than a jury minimizes employers' fears of excessive jury awards.³²

In certain situations, a pre-dispute contractual jury waiver can offer clear advantages to both employer and employee and serve as “an attractive middle ground between jury trials, on the one hand, and arbitration, on the other.”³³ But as use of such waivers has increased, serious questions have arisen regarding their treatment in the courts.³⁴ Part II of this Article examines the disparate ways federal courts, and in particular federal courts adjudicating employment disputes,³⁵ have analyzed pre-dispute contractual jury waivers.

II. Judicial Treatment of Pre-Dispute Jury Waivers

³⁰ Cohen & Smith, *supra* note 1, at table 2 & 8 (Apr. 2004) (stating that 77% of non-jury cases were decided within 2 years as compared to only 56.9% of jury cases, and that jury trials lasted an average of 4.3 days compared to only 1.9 days for bench trials).

³¹ Custis, *supra* note 13, at § 8:32.

³² See *Grafton Partners L.P.*, 36 Cal. 4th 944 at 969 (Chin, J. concurring)

³³ *Grafton Partners LP v. Superior Court*, 9 Cal.Rptr.3d 511, 519 n. 12 (Cal. App. 2004) (“Agreements to resolve future disputes by court trial may alleviate fears of excessive jury awards while providing greater procedural protections than arbitration in many respects, including discovery, securing an impartial factfinder, and appeal, among others. It is noteworthy that the reduction of such rights in the arbitral forum, as well as the unique costs imposed by arbitration, have troubled California courts . . .”).

³⁴ See *infra* Part II.

³⁵ This Article limits its scope to federal employment cases because federal statutes and federal employment claims make up a prominent portion of the body of employment law and most plaintiffs with both federal and state employment claims will end up litigating their claims in a federal court. See Michael D. Moberly, *Proceeding Geometrically: Rethinking Parallel State and Federal Employment Discrimination Litigation*, 18 Whittier L. Rev. 499, 502-03 (1997) (writing that “individuals who pursue their state and federal rights in the same proceeding may be required to litigate those rights in a federal forum, because an employer against whom both state and federal claims are brought in state court ordinarily can remove the entire action to federal court”); Janet Cooper Alexander, *Judges’ Self-Interest and Procedural Rules: Comment on Macey*, 23 J. Legal Stud. 647, 664 n. 69 (1994) (noting employers routinely remove employment discrimination cases filed in state court to federal court).

The right to a trial by jury in a civil lawsuit may be waived by a prior written agreement.³⁶ Federal courts examining pre-dispute jury waivers have overwhelmingly applied the knowing and voluntary consent standard to such waivers.³⁷ But critically, the courts have not agreed whether the party seeking to enforce or the party seeking to avoid the waiver should bear the burden of proof that the waiver was entered into knowingly and voluntarily.³⁸

This Part reviews judicial treatment of contractual jury waivers and discusses several recent federal district court cases that confronted such waivers in the context of an employer-employee dispute.

A. Knowing Consent Requirement

Prior to the 1970s, most courts examined contractual jury waivers using contract law standards of consent.³⁹ As stated by Professor Stephen J. Ware:

Under contract law's objective standards of consent, signing (or otherwise manifesting assent to) such a document is, with few exceptions, consent to the terms on the document. The signature's "blanket assent" is good enough. Neither reading nor understanding the terms is necessary to make those terms enforceable.⁴⁰

³⁶ See, e.g., *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) ("Agreements waiving the right to trial by jury are neither illegal nor contrary to public policy,"); *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985) ("It is clear that the parties to a contract may by prior written agreement waive the right to jury trial."); *Cooperative Finance Ass'n., Inc. v. Garst* 871 F.Supp. 1168, 1171 (N.D.Iowa 1995) (collecting cases).

³⁷ See, e.g., *K.M.C. Co.*, 757 F.2d at 756 (citing, *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir.1977)); *Schappert v. Bedford, Freeman & Worth Pub. Group, LLC*, 2004 WL 1661073, at *11, 2004 U.S. Dist. LEXIS 14153 (S.D.N.Y. July 22, 2004) (citing, *Morgan Guar. Trust Co. v. Crane*, 36 F.Supp.2d 602, 603 (S.D.N.Y.1999)); *Morris*, 2004 WL 306110, at *1 (citing, *Cooperative Finance Ass'n., Inc. v. Garst* 871 F.Supp. 1168, 1171 (N.D.Iowa 1995)); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F.Supp. 310, 313 (S.D.N.Y.1983); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F.Supp. 402, 403 (D.Colo.1982).

³⁸ *Grafton Partners L.P.*, 36 Cal. 4th at 966 n.12 (2005); see *Medical Air Technology Corp. v. Marwan Inv., Inc.*, 303 F.3d 11, 18 (1st Cir. 2002) ("The circuits are currently split on the question of which party bears the burden of proof as to whether a contractual jury trial waiver was knowing and voluntary.").

³⁹ Ware, *supra* note 23, at 201-202; 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, 444-447 (1997).

⁴⁰ Ware, *supra* note 23, at 171.

In 1977, the Court of Appeals for the Second Circuit became one of the first courts to articulate a knowing-consent requirement in the context of contractual jury waivers.⁴¹ In *National Equipment Rental, Ltd. v. Hendrix*,⁴² H. Walter Hendrix, III (“Hendrix”) purchased a tractor-scraper and a bulldozer from two separate dealers that he was subsequently unable to pay for.⁴³ Hendrix approached National Equipment Rental, Ltd. (“NER”) for a loan to settle his accounts with the two dealers.⁴⁴ The loan agreements were characterized by NER as “equipment leases.”⁴⁵ Hendrix eventually defaulted and NER seized the tractor-scraper and the bulldozer.⁴⁶ NER sold the equipment and sued Hendrix to collect the remaining balance due on the two leases.⁴⁷ A jury found that the lease agreements were actually usurious loan agreements void under New York State law.⁴⁸ NER appealed, claiming, *inter alia*, that Hendrix was improperly granted a jury trial in the face of a contractual clause in the leases waiving such a right.⁴⁹ Affirming the trial court’s decision to grant Hendrix’s demand for a jury trial despite having signed a contractual pre-dispute jury waiver, the Second Circuit reasoned:

It is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Heyman v. Kline*, 456 F.2d 123, 129 (2d Cir. 1972), *cert. denied*, 409 U.S. 847, 93 S.Ct. 53, 34 L.Ed.2d 88 (1972). Indeed, a

⁴¹ *Id.* at 202.

⁴² 565 F.2d 255 (2d Cir. 1977).

⁴³ *Id.* at 256.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 257.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

presumption exists against its waiver. *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 81 L.Ed. 1177 (1937).⁵⁰

The *Hendrix* court found that the jury waiver clause at issue “fail[ed] to overcome this presumption. . . . [because it] was set deeply and inconspicuously in the contract.”⁵¹ The court further found that the waiver was neither knowing nor intentional in light of the “gross inequality in bargaining power” between the parties, given that Hendrix “did not have any choice but to accept the . . . contract as written if he was to get badly needed funds.”⁵²

After *Hendrix*, courts have consistently applied the knowing consent standard to jury waivers, characterizing it using such words as “knowing,” “voluntary” and/or “intentional.”⁵³ As Professor Sternlight observes:

While courts have not adopted an identical phrasing of the factors to be considered in examining contractual jury trial waivers, there is substantial

⁵⁰ 565 F.2d 255, 258. There is considerable scholarship discussing whether the knowing consent standard established in *Hendrix* was adequately supported by precedent. First, the *Hendrix* court fails to acknowledge that it relied on a criminal case involving jury waiver (where courts have long applied higher consent standards for constitutional waivers) and a case involving an attorney’s oral waiver during a pretrial conference (as distinguished from a pre-dispute contractual waiver) for this standard. See *Ware*, *supra* note 23, at 203; *Matties*, *supra* note 39, at 446-447. Second, while the *Hendrix* court acknowledges that the Supreme Court upheld the contractual waiver of the right to personal service without employing a knowing consent standard in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964), the court distinguishes *Szukhent* by stating that “the right to a jury trial . . . is far more fundamental than the right to personal service, and cannot be waived absent a showing that its relinquishment is knowing and intentional.” 565 F.2d 255, 258 n.1. Curiously, the *Hendrix* court provides no authority or reasoning for such a statement or to explain “why the standard for civil waivers of constitutional rights should differ when the right is found in the Seventh Amendment as opposed to the Due Process Clause.” *Ware*, *supra* note 23, at 203; see *Matties*, *supra* note 39, at 447. Indeed, Professor Ware argues that “*Hendrix* was already out of step with the Supreme Court when it was decided in 1977, and it is now farther out of step with a modern Supreme Court.” *Ware*, *supra* note 23, at 203; but see *Matties*, *supra* note 39, 447 (arguing that despite its flaws in reasoning, *Hendrix* correctly recognized the importance of the civil jury in federal court); Sternlight, *Mandatory*, *supra* note 23 at 677-680 (arguing that contractual waivers of jury trial rights are permissible only when the waiver is knowing, voluntary, and intentional and identifying *Hendrix* as a “leading case”).

Given that “lower courts have virtually uniformly held that such waivers are only valid when they meet a high standard variously expressed in words such as knowing, voluntary, and intentional,” Sternlight, *Mandatory*, *supra* note 23, at 679, this Article focuses on clarifying the allocation of the burden of proof when a party resists enforcement of a jury waiver and does not address whether the knowing consent standard is in fact the correct standard.

⁵¹ 565 F.2d 255, 258.

⁵² *Id.*

⁵³ Sternlight, *Mandatory*, *supra* note 23, at 678-79 (observing that courts use different combinations of knowing, voluntary and intentional to describe the standard).

agreement regarding what kinds of information is relevant. Courts typically consider any actual negotiations over the clause, whether the clause was presented on a take-it-or-leave-it basis, the conspicuousness of the waiver, the degree of bargaining disparity between the parties, and the experience and sophistication of the party opposing the waiver. Courts have not been explicit as to how these factors relate to one another, but seem to consider them all together.⁵⁴

B. Allocation of the Burden of Proof⁵⁵

While courts may agree on the types of information relevant to the knowing and voluntary consent inquiry, many have failed to address “the important question” of which party bears the burden of proving that the waiver was knowing, voluntary, and intelligent.⁵⁶ While some district courts have placed the burden of proof on the party seeking enforcement of the waiver,⁵⁷ two circuits

⁵⁴ Sternlight, *Mandatory*, *supra* note 23, at 680-81. Professor Sternlight provides a detailed discussion of the information courts typically find most relevant: (1) negotiability of the waiver; (2) conspicuousness of the waiver; (3) disparity of bargaining power between the parties; and (4) business or professional experience and sophistication of the party opposing the waiver. *See id.* at 681-90.

⁵⁵ The Supreme Court recently observed that “[t]he term ‘burden of proof’ is one of the ‘slipperiest member[s] of the family of legal terms.’” *Schaffer v. Weast*, -- U.S. --, 126 S. Ct. 528, 533, 163 L. Ed. 2d 387, 395 (Nov. 14, 2005), *citing*, 2 J. Strong, MCCORMICK ON EVIDENCE § 342, p. 433 (5th ed.1999). This is because the term “encompasses two separate burdens of proof. One burden is that of producing evidence, satisfactory to the judge, of a particular fact in issue. The second is the burden of persuading the trier of fact that the alleged fact is true.” 2 J. Strong, MCCORMICK ON EVIDENCE § 336 (5th ed.1999); *see Schaffer v. Weast*, 126 S. Ct. at 533-34 (Nov. 14, 2005), *citing*, *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994). However, the term “burden of proof” is now generally limited to the burden of persuasion. *Greenwich Collieries*, 512 U.S. at 272-76.

⁵⁶ Sternlight, *Mandatory*, *supra* note 23, at 691; *see, e.g., Allyn v. Western United Life Assur. Co.*, 347 F.Supp.2d 1246, 1251-52 (M.D.Fla. 2004) (noting that Eleventh Circuit had not resolved the burden question and declining to address it).

⁵⁷ *See, e.g., Morris*, 2004 WL 306110, at *1; *RDO Financial Services 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); *Dreiling*, 539 F Supp at 403.

have expressly split over the issue,⁵⁸ and most other appellate courts have declined to resolve the question.⁵⁹

The confusion surrounding the allocation of the burden of proof may stem from the *Hendrix* court's failure to elaborate on the origin of this presumption or explain how it was to be applied. As support for its "presumption" the *Hendrix* court merely cites to the Supreme Court's decision in *Aetna Insurance Co. v. Kennedy*.⁶⁰ But while the Supreme Court did state in *Aetna* that "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver,"⁶¹ *Aetna* involved a jury waiver during litigation and not a pre-dispute contractual jury waiver.⁶² As discussed *infra*, this is an important distinction that

⁵⁸ *Compare* Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir.1986) (holding that "the party seeking enforcement of the [jury] waiver must prove that consent was both voluntary and informed"), *with*, K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 758 (6th Cir.1985) (holding that "in the context of an express contractual [jury] waiver the objecting party should have the burden of demonstrating that its consent to the provisions was not knowing and voluntary").

⁵⁹ *See*, e.g., Medical Air Technology Corp. v. Marwan Inv., Inc., 303 F.3d 11, 18 (1st Cir. 2002); Pierce v. Atchison Topeka & Santa Fe Ry. Co., 110 F.3d 431, 435 n. 4 (7th Cir.1997); Hulse v. West, 966 F.2d 579, 581 (10th Cir.1992).

⁶⁰ 301 U.S. 389, 393, 57 S.Ct. 809, 81 L.Ed. 1177 (1937).

⁶¹ 301 U.S. at 393.

⁶² The parties in *Aetna*, after introducing their evidence at trial and agreeing upon the amount of loss, each submitted requests for peremptory jury instructions and for a directed verdict in their respective favor. 301 U.S. 389, 392. The trial court refused to direct for either party and submitted the case to the jury. *Id.* The jury found for defendants and plaintiff appealed. *Id.* The appeals court found, *inter alia*, 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." *Id.* The appeals court further held that the evidence was not sufficient to sustain verdicts for defendants and remanded the cases to the trial court with directions to give plaintiff judgment for the agreed amount of the loss. *Id.* The Supreme Court reversed, reasoning:

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. . . . *But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.* . . . 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 is not given, the cases be submitted to the jury. Indeed, we find nothing in the record to support the view that the parties waived their right of trial by jury or authorized the judge to decide any issue of fact.

Id. at 393 (emphasis added).

makes it difficult to analogize the reasoning in *Aetna* to cases involving pre-dispute contractual jury waivers.⁶³

Those courts that have resolved the burden of proof question merely follow the pronouncements of *Hendrix* and *Aetna* without thorough analysis.⁶⁴ Some courts place the burden on the party seeking to avoid the waiver clause in order to preserve society's interest in freedom of contract.⁶⁵ Those courts that assign the burden to the party seeking to enforce the waiver clause contend that the interest in preserving freedom of contract is outweighed by society's "greater interest in guarding the fundamental right to a jury."⁶⁶ The following examination of several recent employment cases that confront pre-dispute jury waivers highlights this disagreement.

C. Review of Case Law Reveals Inconsistent Treatment of Waivers

I have found three federal opinions discussing employee challenges to pre-dispute contractual jury waivers, all decided within the last several years.⁶⁷

Although this sample is small, given that the use of such waivers in the

⁶³ See *infra* notes 128-31 & accompanying text.

⁶⁴ See, e.g., *Leasing Service Corp.*, 804 F.2d at 833 (placing burden on party seeking enforcement of waiver and citing *Hendrix* but failing to distinguish the Sixth Circuit's contrary holding in *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755-56 (6th Cir.1985)); *Morris*, 2004 WL 306110, at *1 (concluding that party seeking enforcement of waiver has burden without analysis); *Schappert*, 2004 WL 1661073, at *11; *RDO Financial Services Co.*, 191 F.Supp.2d at 813 (same); *N. Feldman & Son, Ltd.*, 572 F.Supp. at 313 (same).

⁶⁵ See, e.g., *K.M.C. Co.*, 757 F.2d at 758.

⁶⁶ See, e.g., *Hydramar, Inc. v. General Dynamics Corp.*, 1989 WL 159267, at *2, 1989 U.S. Dist. LEXIS 15784 (E.D.Pa. Dec. 29, 1989).

⁶⁷ There is a fourth case, *Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575 (E.D. Va. 2002), that addresses pre-dispute jury waivers in the context of an ADEA claim. Although the employment agreement that plaintiff signed contained a jury waiver, the court found that the waiver did not conform to the requirements imposed by the OWBPA. *Id.* at 581. In finding that the OWBPA's waiver requirements apply to procedural rights, such as the right to a jury trial, the court declined to follow several circuit court holdings to the contrary. *Id.* at 579-80. As of the date of this Article, no court has followed *Hammaker's* lead and one district court has specifically declined to do so. See *Schappert*, 004 WL 1661073, at *10. Of more relevance to this Article, the *Hammaker* court also does not address the burden of proof question because it was undisputed that the waiver provision at issue did not conform to the OWBPA's requirements. See *id.* at 579.

employment context is relatively new,⁶⁸ and given the number of employment lawyers that are encouraging their clients to use them,⁶⁹ litigation over such waivers is sure to increase. In the meantime, an examination of these three initial cases suggests that employers should tread carefully as judicial treatment of such waivers has been unpredictable.

In *Brown v. Cushman & Wakefield, Inc.*,⁷⁰ a terminated employee sued her employer for breach of employment contract and discrimination on the basis of “sex, pregnancy and childbirth” in violation of Title VII, the New York State Human Rights Law, and the New York City Human Rights Law.

A magistrate judge determined that plaintiff’s employment agreement, which provided, in part that, “[Employer] and Employee shall and hereby do waive a trial by jury in any action, proceeding or counter-claim brought or asserted by either of the parties hereto against the other **on any matters whatsoever arising out of this Agreement**” was a “contractual waiver of a jury trial [that] applies to all of [Plaintiff’s] claims, including those arising under federal and state discrimination statutes.”⁷¹

⁶⁸ See LeRoy, *supra* note 3, at 788-90 (noting that the small number of cases dealing with employee challenges to mandatory jury waivers “underestimates the prevalence of jury waivers” and may be just “the tip of a larger iceberg”).

⁶⁹ See, e.g., Griffiths, *supra* note 24, at 2 (law firm newsletter noting more employers are using jury waivers in their employment agreements); Morse, Barnes-Brown & Pendleton, P.C., Employment Law Advisor (April 2004), available at <http://www.mbbp.com/practices/employment/ela/ela%200404%20-%20offer%20letters.pdf> (law firm newsletter encouraging employers to consider using jury waivers); (Mark N. Reinhartz & Terence M. O’Neil, Jury Waivers: An Alternative to Arbitration, The Nassau Lawyer (Oct. 2002), available at http://www.nassaubar.org/newsletter_article.cfm?ArticleID=79 (partners at the law firm of Rains & Pogrebin, P.C. encouraging employers to consider using jury waivers).

⁷⁰ 235 F.Supp.2d 291 (S.D.N.Y. 2002).

⁷¹ *Brown*, 235 F.Supp.2d at 293 (emphasis original).

The district court judge accepted the magistrate’s finding, noting that “[j]ury trial waivers are enforced if they are knowing and voluntary.”⁷² First, the court found that the jury waiver was a conspicuous part of plaintiff’s employment agreement. Second, given that plaintiff had a M.B.A. from Harvard and had previously worked as an investment banker, the court found that she could “have negotiated about the clause if she tried.”⁷³ The court rejected plaintiff’s argument that she did not read the employment agreement before signing it as having “no merit,” citing authority that absent fraud, duress or some other wrongful act, a party is bound by the contracts she signs whether or not the party has read the contract.⁷⁴

The *Brown* court did not explicitly address the proper allocation of the burden of proof. However, the *Brown* court’s treatment of the waiver in question suggests that it placed the burden of proof on the plaintiff. First, the court provides no support for its finding that the waiver was conspicuous.⁷⁵ Second, although the plaintiff was highly educated and had worked as an investment banker, it does not necessarily follow that the clause was negotiable. The court fails to cite any evidence of negotiability.⁷⁶ There is also no evidence in the record that the plaintiff was represented by counsel during the formation of the

⁷² *Id.*

⁷³ *Id.* at 294.

⁷⁴ *Id.*

⁷⁵ Compare *Morgan Guar. Trust Co. of N.Y. v. Crane*, 36 F.Supp.2d 602, 603 (S.D.N.Y.1999) (finding a conspicuous jury waiver when it was written in all capital letters in the sole paragraph on the signature page itself, it was the last sentence in that paragraph, and it immediately preceded the parties’ signatures); see also *Sternlight, Mandatory*, *supra* note 23, at 684-86 (“At a minimum, courts usually look to see that the typeface was not particularly small, and that the clause was not buried in a long agreement.”).

⁷⁶ Compare *Sternlight, Mandatory*, *supra* note 23, at 681-82 (noting that courts examine “both any negotiations that did take place regarding the clause, and also whether or not the clause was presented on a take-it-or-leave-it basis”).

agreement.⁷⁷ The fact that the court ruled against the plaintiff despite these omissions,⁷⁸ coupled with the court's reliance on authority regarding consent to the unknown,⁷⁹ suggest that it was placing the burden of proof on the plaintiff. By doing so, the *Brown* court was able to uphold the waiver despite the paucity of evidence showing knowing and voluntary consent to such a waiver.

In *Morris v. McFarland Clinic P.C.*,⁸⁰ plaintiff neurosurgeon was hired as Director of Neurological Surgery by defendant clinic.⁸¹ The contract required plaintiff to obtain an Iowa medical license and plaintiff claimed the clinic's medical director represented to her that he had influence with the Iowa Board of Medical Examiners which would enable her to obtain her license within a few weeks.⁸² Plaintiff was subsequently unable to obtain her license and sued the clinic for, *inter alia*, fraudulent misrepresentation and breach of contract.⁸³ Although Plaintiff demanded a jury trial, the court found that she had voluntarily and knowingly waived her right.⁸⁴

The court began by finding, with little analysis, that “the burden of demonstrating a voluntary and knowing waiver is on the proponent of the waiver.”⁸⁵ The court then meticulously examined the formation of the agreement.

⁷⁷ Compare *Sternlight, Mandatory*, *supra* note 23, at 689 (observing that “numerous courts have . . . voided waivers imposed on experienced business persons, particularly where the business person was not represented by an attorney”).

⁷⁸ See *Greenwich Collieries*, 512 U.S. at 272 (noting that burden of proof refers to “the notion that if the evidence is evenly balanced, the party that bears the burden of [proof] must lose”).

⁷⁹ See *Ware*, *supra* note 23, at 174 (stating that “a knowing-consent standard would generally depart from contract law’s norm of consent to the unknown—that is the usual practice of finding consent to form-contract terms about which one party is ignorant”).

⁸⁰ 2004 WL 306110, 2004 U.S. Dist. LEXIS 26639 (S.D.Iowa Jan. 29, 2004).

⁸¹ *Id.* at *1.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at *4.

⁸⁵ *Id.* at *1.

The court found evidence of negotiability given that: (1) the contract did not have the appearance of a standardized, take-it-or-leave it contract; (2) it was undisputed that plaintiff had actually negotiated changes in provisions of interest to her; and (3) there was evidence showing that plaintiff was “quite happy” with the contract.⁸⁶ The court found that there was relative parity in bargaining power given plaintiff’s specialized qualifications and the clinic’s specific needs for someone with her qualifications.⁸⁷ Observing that the waiver was on the fifth page of a six page agreement, that it was in all upper case letters, and set out in a separately numbered paragraph, the court found it to be conspicuous.⁸⁸ With respect to plaintiff’s business acumen, the court found that she was well-educated and specifically noted that she was the contract negotiations manager at her prior clinic.⁸⁹ Carefully considering all of these factors, the court found that defendants had met their burden and demonstrated that plaintiff had voluntarily and knowingly agreed to waive her right to trial by jury.⁹⁰

In *Schappert v. Bedford, Freeman & Worth Pub. Group, LLC*,⁹¹ plaintiff filed suit against her prior employer alleging that she had been wrongly removed

⁸⁶ *Id.* at *2.

⁸⁷ *Id.* at *3.

⁸⁸ *Id.*

⁸⁹ *Id.* Although plaintiff also argued that she did not have the opportunity to discuss the agreement with a lawyer, after reviewing the evidence surrounding the formation of the contract and noting that plaintiff never sought more time to review the contract, the court discounted this argument. *Id.* at *4.

⁹⁰ *Id.* at *4. It is noteworthy that the court made this finding with some reluctance. *Id.* at *5 (“Given the importance of the jury in the history and fabric of our society, the diminishing number of civil jury trials in recent years in our district and in the state courts of Iowa is a trend this Court is not at all anxious to encourage. However, the right to jury trial clearly may be waived and there are many legitimate reasons why parties may wish to do so. Parties are free to enter into agreements as to how they will resolve disputes that may arise in a business or professional relationship. When they have voluntarily and knowingly elected to give up the right to trial by jury it is incumbent on a court to enforce the agreement just as it would be to enforce the right to trial by jury in the absence of such an agreement.”).

⁹¹ 2004 WL 1661073, 2004 U.S. Dist. LEXIS 14153 (S.D.N.Y. July 22, 2004).

from her position on the basis of her age and gender.⁹² Defendants moved to strike plaintiff's jury demand.⁹³

The court first noted that the "burden of demonstrating a plaintiff has waived her right to a jury trial is on the defendant."⁹⁴ Like the court in *Morris*, the *Schappert* court then proceeded to carefully apply the knowing consent standard.

The court found that the terms were negotiable given plaintiff's admission that the agreement had been negotiated and amended to reflect changes made to the financial terms.⁹⁵ The court found evidence that the waiver provision was conspicuous.⁹⁶ With respect to bargaining power, the court stated that the fact that plaintiff negotiated material terms of the agreement belied her argument that there was a gross inequality in bargaining power.⁹⁷ Plaintiff also did not point to any material negative consequences of not signing the agreement and did not deny that she could have retained her job without signing the agreement, further demonstrating her bargaining power.⁹⁸ Finally, plaintiff herself testified that she was a "smart," "savvy," "well educated," and "experienced" business person and that she had over two years to have the provision reviewed by her attorneys.⁹⁹ Given all these facts, the court found that defendants had met their

⁹² *Id.* at *1.

⁹³ *Id.* at *9.

⁹⁴ *Id.* at *11.

⁹⁵ *Id.* at *11. The court did not address plaintiff's argument that she understood that she had no choice but to accept the non-financial terms. *Id.* at *10.

⁹⁶ *Id.* at *11.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

burden of showing that plaintiff had knowingly and voluntarily waived her right to a jury trial.¹⁰⁰

A review of the opinions in *Brown*, *Morris* and *Schappert* reveals that courts are still grappling with the proper allocation of the burden of proof when a party resists enforcement of a contractual jury waiver. Such inconsistencies make it difficult to predict whether a pre-dispute jury waiver will be enforced as shifting the burden of proof directly changes the nature of the inquiry. When the party resisting the waiver bears the burden of proof, as in *Brown*, a jury waiver can be upheld following only a superficial inquiry. In contrast, when the burden of proof is assigned to the party seeking to enforce the waiver, as in *Morris* and *Schappert*, the court conducts an exhaustive factual inquiry into the formation of the agreement before upholding a jury waiver. This unpredictability diminishes the potential value of such waivers to employers and employees alike. In order to encourage the appropriate use of pre-dispute jury waivers, courts must clarify the process through which they analyze such waivers, allocating the burden of proof in a way that takes into account public policy considerations as well as convenience and fairness concerns.

III. Allocating the Burden of Proof

Since most courts substantially agree on what information is relevant when determining whether a contractual waiver of a jury trial right was entered into knowingly and voluntarily,¹⁰¹ allocation of the burden of proof will often be determinative. When the legislature is silent on the burden of proof, courts

¹⁰⁰ *Id.*

¹⁰¹ See *supra* note 54; LaRocca, *supra* note 3, at 944 & 944 n.69.

ordinarily allocate the burden to the party initiating the proceeding and seeking relief.¹⁰² But several factors such as public policy considerations, and convenience and fairness concerns, may support a different allocation of the burden.¹⁰³ A closer examination of pre-dispute contractual waivers against this backdrop suggests that a different allocation of the burden is warranted when such waivers are included in employment agreements.

A. What is Actually Being Waived?

A pre-dispute contractual jury waiver brings two basic societal interests into sharp relief: the right to a trial by jury and freedom of contract. “The resolution of civil disputes by jury is of historic and fundamental importance.”¹⁰⁴ On the other hand, parties have the right to contract as they see fit as long as their agreement does not violate law or public policy.¹⁰⁵ Accordingly, these two interests must be weighed against one another to determine the proper allocation of the burden of proof. As explained, *infra*, because pre-dispute jury waivers

¹⁰² *Schaffer*, 126 S.Ct. at 527 (Ginsburg, J., dissenting). Congress has not explicitly addressed jury waivers in the employment context. See *Matties*, *supra* note 39, at 443 (stating that no federal statute or rule specifically allows parties to waive their right to a jury trial by way of prelitigation contract); see also 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, 1114-1119 (2002) (characterizing the enforcement of jury waivers as a “judicial creation”).

¹⁰³ *Schaffer*, 126 S. Ct. at 537-38 (Nov. 14, 2005) (Ginsburg, J., dissenting); Strong, *supra* note 55, at § 337, p. 415.

¹⁰⁴ *Morris*, 2004 WL 306110, at *11. For a discussion of the important purposes jury trials serve, see *Matties*, *supra* note 39, at 434-440.

¹⁰⁵ *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 129 & 129 n. 11, 47 Tex. Sup. Ct. J. 1104 (Tex. 2004); see, e.g., *American Anglian Environmental Technologies, L.P. v. Environmental Management Corp.*, 412 F.3d 956, 962 (8th Cir. 2005) (stating that it is the policy of Missouri and nine other states “to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements” and collecting statutes); *Badgett v. Federal Express Corp.*, 378 F.Supp.2d 613, 622 (M.D.N.C. 2005) (noting the importance of the parties' freedom of contract absent clear policy to the contrary); *Allan Block Corp. v. E. Dillon & Co.*, 2005 WL 1593010, *8 (D.Minn. 2005), *citing*, *Arrowhead Elec. Coop., Inc. v. LTV Steel Mining Co.*, 568 N.W.2d 875, 879 (Minn.Ct.App.1997) (“Public policy ‘requires that freedom of contract shall remain inviolate, except only in cases which contravene public right or the public welfare.’”); see also *Paul v. Davis*, 424 U.S. 693, 722 n.10, 96 S.Ct. 1155, 1170 n.10 (1976) (Brennan, J., dissenting) (observing that the Constitution contains some protections of the right of the individual to contract); *but see U.S. v. Antzoulatos*, 962 F.2d 720, 725 (7th Cir. 1992) (noting that any substantive due process right to contract “has been sharply curtailed”).

interfere with the role of the jury and our public system of dispute resolution, public policy considerations counsel against emphasizing private contractual autonomy over the right to a jury trial.

First, pre-dispute jury waivers impinge upon the role of the jury within our constitutional structure. The Seventh Amendment does not merely confer an individual jury-trial right, but also acts as a structural constraint on the power of the sovereign and the judge.¹⁰⁶ Indeed, some have called the jury “a primary check on judges’ power.”¹⁰⁷ Thus, a jury waiver presents judges with the opportunity to substantially increase their own power by eliminating this check.

The Supreme Court has recently highlighted the tension between a judge’s power, as opposed to the jury’s, in the criminal context.¹⁰⁸ In *U.S. v. Booker*,¹⁰⁹ the Court addressed the constitutionality of the Federal Sentencing Guidelines (“Guidelines”),¹¹⁰ observing that allowing judges to find facts that enhanced a defendant’s sentence impermissibly served to “increase the judge’s power and

¹⁰⁶ Sternlight, *Mandatory*, *supra* note 23, at 672; Matties, *supra* note 39, at 439-40. In an impassioned concurrence to an opinion addressing pre-dispute arbitration clauses, Montana Supreme Court Justice Nelson states:

[T]he importance of the right of trial by jury derives from it having “developed in harmony with our basic concepts of a democratic society and a representative government.” “Since the time of the Magna Carta, ‘trial by jury has been prized as a shield against oppression . . . [and] the approaches of arbitrary power.’” This entitlement has been “long thought to be a safeguard against tyranny.” The right to trial by jury is a “jealously protected safeguard against government oppression.” And, “[t]he guarantees of jury trial in the Federal and [Montana] State Constitutions reflect a profound judgment about the way in which the law should be enforced and justice administered.”

Kloss v. Edward D. Jones & Co., 310 Mont. 123, 139-140, 54 P.3d 1, 12 (Mont. 2002) (Nelson, J., concurring) (citations omitted).

¹⁰⁷ Matties, *supra* note 39, at 465.

¹⁰⁸ *U.S. v. Booker*, -- U.S. --, 125 S.Ct. 738, 756, 160 L.Ed.2d 621 (2005) (holding that a sentencing judge violates the Sixth Amendment by imposing an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant).

¹⁰⁹ -- U.S. --, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005).

¹¹⁰ Prior to *Booker*, the Guidelines were a mandatory determinate sentencing scheme applicable to federal crimes that decreed sentences within set sentencing ranges but further allowed a judge to enhance or depart from such ranges based on facts found by the judge. *See Booker*, 125 S.Ct. 738, 750 -752 (2005).

diminish that of the jury.”¹¹¹ The *Booker* Court characterized its invalidation of the mandatory Guidelines as preserving the right of jury trial, thereby “guaranteeing that the jury would still stand between the individual and the power of the government.”¹¹²

Admittedly, waivers of constitutional rights are treated differently in the criminal context than in the civil context.¹¹³ This distinction has been criticized given that the Supreme Court has “never explained why constitutionally protected rights should be afforded any less protection in the civil context than in the criminal context.”¹¹⁴ While this Article does not urge the adoption of a criminal waiver standard, the Court’s pronouncements in the criminal context support the assertion that the jury plays an important role as a check on the judiciary and the sovereign. Placing the burden of proof on the party seeking enforcement of the waiver would therefore reemphasize the role of the jury as a limiting force on judicial discretion and power.

Second, pre-dispute jury waivers undermine a party’s procedural right to a jury trial as enshrined within the Federal Rules of Civil Procedure (“FRCP”). Specifically, FRCP 38(a) declares: “The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United

¹¹¹ *Id.* at 751.

¹¹² *Id.* at 752; *see* *Blakely v. Washington*, 542 U.S. 296, 305-06, 124 S.Ct. 2531, 2538-39, 159 L.Ed.2d 403 (2004) (“[The right of jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”).

¹¹³ *See* *Ware*, *supra* note 23, at 181-82.

¹¹⁴ Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration*, 72 *Tul. L. Rev.* 1, 56-57 (1997). Professor Ware posits that one of the reasons that the Supreme Court is less protective of civil waivers is that such waivers are contractual and thus present less danger of overreaching and duress by the party seeking to enforce the waiver. *See* *Ware*, *supra* note 23, at 182 n. 88. This Article argues, however, that given the disparity in bargaining power and legal expertise between employer and employee, such a danger is often present in the employment context. *See infra* Part III.B.

States shall be preserved to the parties inviolate.”¹¹⁵ A party that wants a jury trial must demand one in accordance with FRCP 38; failure to do so constitutes a waiver by the party of trial by jury.¹¹⁶ FRCP 39(b) further allows the court discretion to order a trial by jury notwithstanding the failure of a party to properly demand a jury.¹¹⁷

Two of the main goals of the Federal Rules of Civil Procedure were to establish national uniformity in procedure and to eliminate technical traps found in earlier procedural codes.¹¹⁸ These rules were the product of much debate and deliberation by public bodies,¹¹⁹ and are an integral part of a public system constructed to enable peaceful and orderly resolution of disputes. A pre-dispute jury waiver circumvents the rules by establishing a different set of procedures for the parties bound to it and arguably allows private parties to contractually limit the court’s discretion to order a trial by jury.¹²⁰ Enforcement of such a waiver

¹¹⁵ *Id.*

¹¹⁶ FRCP 38(d). It is important to note the waiver provided for in FRCP 38(d), which occurs during litigation and is specifically authorized by the established rules of our procedural system, does not present the same problems as a pre-dispute jury waiver. *See infra*, notes 128-31& accompanying text; Taylor & Cliffe, *supra* note 102, at 1104-07. As stated by the California Supreme Court: “the initiation of a lawsuit . . . focus[es] the attention of the litigants to produce a considered decision whether to demand—and pay for—a jury trial based on an informed understanding of the stakes involved.” *Grafton Partners L.P.*, 36 Cal. 4th at 964. Moreover, “[o]nce litigation commences and the time to demand a jury trial approaches, parties ordinarily have counsel and their decision whether to demand jury trial is likely to be a part of their litigation strategy.” *Id.* Similarly, the Sixth Circuit observed that this rule “respecting timely demand for trial by jury is a reasonable requirement calculated to insure the orderly presentation of the business of the court.” *K.M.C. Co.*, 757 F.2d at 756 n.4.

¹¹⁷ *Id.* (“Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.”); *see* John D. Perovich, *Discretion of District Court Under Rule 39(b) of Federal Rules of Civil Procedure, Authorizing it to Order Jury Trial Notwithstanding Party’s Failure to Make Seasonable Demand for Jury*, 6 A.L.R. Fed. 217 § 4 (2005) (discussing extent of court’s discretion to order jury trial).

¹¹⁸ Taylor & Cliffe, *supra* note 102, at 1103; *see also* Judith Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 602 (2005) (“The Rules, expressive of and coupled with an impressive investment in the infrastructure of the federal courts, represent a normative commitment to federal regulatory power.”).

¹¹⁹ Taylor & Cliffe, *supra* note 102, at 1100.

¹²⁰ Once a pre-litigation agreement is found to be valid, “courts in near knee-jerk fashion provide automatic specific performance without acknowledging any necessity for first examining the prerequisites for specific

thus defeats the goal of uniformity by allowing “privately tailored procedure for individual suits.”¹²¹

Contractual jury waivers also favor those parties with the means and the ability to strategically exploit such waivers to their advantage;¹²² and in the context of employment agreements, that party is the employer.¹²³ Therefore, these waivers not only impose procedures inconsistent with publicly-established ones, but fashion those procedures in such a way as to favor the same party nearly every time: the employer.

A court that blindly espouses freedom of contract concerns when examining a pre-dispute jury waiver ignores the role of the jury as a check on the government’s power as well as the waiver’s encroachment upon our public dispute resolution system. This concern is especially acute when the system is disrupted in such a way as to consistently favor the same party. In recognition of society’s interest in a public dispute resolution system that is fundamentally fair and the disruptive effect of a jury waiver on the fairness of that system, the burden of proof should be placed on the party seeking to enforce the waiver.

B. The Coercive Employer-Employee Relationship

Employers possess distinct advantages over employees in both bargaining power and in their ability to assess the feasibility and the likely benefit of alternative dispute resolution methods. These advantages, as well as the risk of coercion inherent in the employer-employee relationship, decrease the

performance or injunctive relief required for a ‘normal’ contract.’” Taylor & Cliffe, *supra* note 102, at 1127.

¹²¹ Taylor & Cliffe, *supra* note 102, at 1127.

¹²² *Id.* at 1103-04.

¹²³ *See infra*, Part III.B.

probability that knowing and voluntary consent to a jury waiver can be obtained. These considerations further support placing the burden of proof on the party seeking to enforce the pre-dispute jury waiver.

Employment contracts “are susceptible to the presence of unconscionable terms,”¹²⁴ because they are typically offered on a “take-it or leave-it” basis, drafted entirely by employers, and offered for employees to sign as a condition of employment.¹²⁵ Most applicants lack bargaining power because rejecting the employment agreement is not a viable alternative.¹²⁶ This dilemma discourages applicants from exercising any effort to understand what they are waiving.¹²⁷

¹²⁴ *Gooden v. Village Green Management Co.*, 2002 WL 31557689, at *3, 2002 U.S. Dist. LEXIS 22365 (D.Minn. Nov. 15, 2002) (noting that the “unique nature” of employment contracts “should subject them to special scrutiny”); see *Taylor & Cliffe*, *supra* note 102, at 1087 (noting that “there is a great opportunity for unfairness” when pre-litigation agreements are incorporated into employment agreements).

¹²⁵ *Gooden*, 2002 WL 31557689, at *3; see *Circuit City Stores, Inc. v. Adams* 532 U.S. 105, 139, 121 S.Ct. 1302, 1321 - 1322 (2001) (Souter, J., dissenting) (stating that many employees lack bargaining power); Daniel Roy, Note, *Mandatory Arbitration of Statutory Claims in the Union Workplace After Wright v. Universal Maritime Service Corp.*, 74 Ind. L.J. 1347, 1360 (1999) (“When employees are presented with such form agreements, they are not ‘asked’ by their employers to accept, or make a counter-offer. They are instead required to accept, or look for another job.”); Steven Cherenky, Note, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 Cal. L. Rev. 597, 621 (1993) (“Today, the majority of employment contracts are offered on a ‘take-it-or-leave-it’ basis.”).

¹²⁶ See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 115, 6 P.3d 669 (Cal. 2000) (observing that “the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute” and that “few employees are in a position to refuse a job because of an arbitration requirement”); Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 Or. L. Rev. 861, 871 (2004) (“In the end, the employee’s choice is between a job in which employment discrimination disputes are arbitrated and no job whatsoever. Such a choice is really no choice at all.”); Lucy T. France & Timothy C. Kelly, *Mandatory Arbitration of Civil Rights Claims in the Workplace: No Enforceability Without Equivalency*, 64 Mont. L. Rev. 449, 463 (2003) (“Most employees lack bargaining power. Rarely do non-management level employees negotiate the terms of their employment at arms length.”); Reilly, *supra* note 23, at 1258-1259 (arguing that efforts to find other jobs are curtailed by limited information and resources and by the view that jobs are a person’s most valuable possession and that meaningful choices between jobs assumes worker mobility and healthy job market); William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, 4 O hio St. J. on Disp. Resol. 29, 72 -73 (1998) (noting employees may lack the personal economic security and effective bargaining power to avoid unfavorable terms in employment agreements).

¹²⁷ Reilly, *supra* note 23, at 1235 (“A potential employee is unlikely to devote resources to try to understand something the he or she cannot change or escape.”).

Even if an applicant wishes to carefully deliberate over the terms of the proffered employment agreement, and is granted the opportunity to do so, most lack the means to adequately evaluate the impact of a jury waiver. By definition, a pre-dispute jury waiver is presented and agreed to prior to litigation. Thus, at the time the right is waived, it is extremely difficult to anticipate the nature of the dispute that may arise from the agreement. Yet the nature of the dispute is a crucial factor when considering whether to ask for a jury trial.¹²⁸ Cases with simple issues and good witnesses and which involve the potential for emotionally based damages are often the best in which to demand a jury.¹²⁹ Complex cases, and those cases that rely heavily on legal issues, are poorer for jury treatment.¹³⁰ The nature of the actual dispute also appreciably affects the cost-benefit analysis, as cases tried to a jury cost more than those tried to a judge.¹³¹

Employers are “repeat players in the employment marketplace”¹³² and are more educated and skilled in legal matters than employees. Thus, they are more likely to take these concerns into account, given that they have better access to legal information, greater expertise with drafting and negotiating employment agreements, and more experience with taking cases to trial.

Most employees, on the other hand, do not even think that sometime in the future they may become involved in a legal dispute with their employer, let alone carefully weigh the ramifications of something as abstract as waiving their right to a jury trial in a case that has yet to be filed, regarding a dispute that has

¹²⁸ Custis, *supra* note 13, at § 8:32.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Reilly, *supra* note 23, at 1236-37.

yet to materialize.¹³³ Their ignorance of the law¹³⁴ and other “cognitive biases”¹³⁵ prevent employees from realizing the significance of what they are agreeing to. Therefore, at the time the waiver is entered into, most employees have not adequately considered the consequences of waiving their right to a jury.

This disparity in power, expertise and resources creates a two-fold problem for employees. The employer’s greater expertise and resources produces employment agreements that are naturally drafted in terms that favor the employer. This means that the employer determines whether or not a jury waiver provision will be inserted into the employment agreement in the first instance. And since employees are in the unenviable position of having neither bargaining power nor legal expertise, these employment agreements, which already heavily favor the employer, are rarely negotiated. Consequently, employment agreements, and jury waivers in particular, are entered into with little deliberation by the employee, despite the evident biases against them.

Clearly, the employer’s resources and expertise make it better able to demonstrate that a pre-dispute jury waiver was entered into knowingly and voluntarily. However, this is not the only reason it should bear the burden of

¹³³ See Reilly, *supra* note 23, at 1229-30 (noting that many employees dismiss the possibility of engaging in a dispute with their employers); see also *Howard v. Bank South, N.A.*, 209 Ga.App. 407, 410, 433 S.E.2d 625, 628 (Ga. App. 1993) (finding that since plaintiff could not have known when he signed the contract what the basis and circumstances of a future claim on that contract might be, his waiver of jury trial could not have been knowing and voluntary).

¹³⁴ Reilly, *supra* note 23, at 1225 (“Most employees have little knowledge of their legal rights in employment.”).

¹³⁵ Some cognitive biases include a systematic underestimation of risk and the use of a small sample of positive or neutral interactions as reliable predictors of the relationship in the future. Reilly, *supra* note 23, at 1228-34.

proof.¹³⁶ A frequent significant consideration in the allocation of the burden of proof is the judicial estimate of the probabilities of the situation.¹³⁷ That is, “it is usually fairer to act as if the exceptional situation did not exist and therefore to place the burden of proof and persuasion on the party claiming its existence.”¹³⁸ With respect to pre-dispute jury waivers entered into between employers and employees, knowing and voluntary consent to such a waiver would be exceptional, given the employer’s natural advantages in light of the employee’s natural disadvantages, and the likelihood of bias and coercion. As an example, consider Elizabeth, the hypothetical employee presented at the beginning of this Article. Elizabeth has only a high school education and applied for an entry-level job with a large corporation. Her education level, the complexity of the legal right being waived, and the large number of potential applicants qualified for that same position make it highly unlikely that her employer invested the time required to ensure that Elizabeth’s waiver was knowing and voluntary. This probability, coupled with the fact that the employer has better access to legal information and greater resources, warrant assigning the burden to the employer.

C. Assigning the Burden of Proof

Allocating the burden of proof to the party seeking enforcement of the waiver strikes the appropriate balance between freedom of contract and the right to a jury trial.¹³⁹ First, employment agreements are uniquely susceptible to unfair

¹³⁶ See *Weast v. Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004), *aff’d*, *Schaffer*, --- U.S. ---, 126 S. Ct. 528, 163 L. Ed. 2d (2005) (noting that courts “do not automatically assign the burden of proof to the side with the bigger guns”).

¹³⁷ Strong, *supra* note 55, at § 337.

¹³⁸ *Id.*

¹³⁹ *But see* Joel Andersen, Note, *The Indulgence of Reasonable Presumptions: Federal Court Contractual Civil Jury Trial Waivers*, 102 Mich. L. Rev. 104, 112 & 112 n.50 (2003). Andersen advocates for the use

terms. Second, the parties to those agreements differ greatly with respect to their bargaining power and legal sophistication. Third, it is more likely than not that a jury waiver will not be entered into knowingly and voluntarily. Fourth, pre-dispute jury waivers diminish the role of the jury and circumvent our public dispute resolution system. Thus, sound public policy, convenience and fairness concerns all establish that the burden of demonstrating that a jury waiver was voluntary and knowing is properly placed on the proponent of the waiver.

Applying this allocation to the *Brown* case demonstrates how significantly it can affect the outcome. In *Brown*, plaintiff claims that her waiver was not knowing and voluntary. Accordingly, her employer must now persuade the court that plaintiff's waiver *was* knowing and voluntary in light of the following factors: (1) negotiability of the contract terms; (2) conspicuousness of the waiver provision; (3) the relative bargaining power of the parties; and (4) the business acumen of the party opposing the waiver. The employer presents evidence that the waiver is conspicuous and that plaintiff has a M.B.A. from Harvard and was formerly employed as an investment banker. No evidence is presented regarding the negotiability of the contract terms or the relative bargaining power of the parties. In fact, plaintiff presents evidence that she did not even read the waiver

of a permissive presumption in cases involving pre-dispute jury waivers. *Id.* at 111. Using the permissive presumption, if a party claims her waiver was not knowing and voluntary then the court may find that there was no waiver even if her claim is the only evidence. *Id.* at 116-17. However, the court may still find against the party resisting enforcement of the waiver if the evidence is "weak." *Id.* at 117. Andersen argues that this presumption protects the right to a jury trial and the contractual interests of the parties while leaving intact the "normal mechanisms found in an ordinary contract dispute." *Id.* According to Anderson, shifting the burden of production and persuasion to the party seeking to enforce the waiver does not adequately protect freedom of contract. *Id.* at 116 n. 86. But, as argued in this Article, in the context of employment agreements, society's interest in freedom of contract is outweighed by the right to a jury trial. Furthermore, convenience and fairness concerns warrant assigning the burden of proof to the party with greater expertise and resources, and the party claiming the existence of an unlikely situation, which in most cases is an employer seeking enforcement of a pre-dispute jury waiver.

before signing it. Because the burden of proof is on the employer, failure to present any evidence to suggest that the contract terms were negotiable and/or that the plaintiff had some modicum of bargaining power means that the employer has not satisfied its burden. In light of the evidence presented, the court would clearly find that the employer failed to meet its burden and would disregard the waiver.

CONCLUSION

Bench trials offer employers and employees distinct advantages over arbitration and jury trials. But as parties attempt to leverage these advantages by using pre-dispute contractual jury waivers to manage litigation risk and cost, it is important to clarify judicial enforcement of such waivers to encourage their thoughtful and appropriate use. This Article argues that public policy considerations, coupled with convenience and fairness concerns, call for assigning the burden of proving the validity of a pre-dispute contractual jury waiver to the party seeking enforcement of the waiver. By assigning the burden of proof in this way, courts can ensure that such waivers are treated consistently. Consistent judicial treatment of pre-dispute contractual waivers will, in turn, allow both employers and employees alike to utilize such waivers where appropriate.