

# Saving the Jury-Trial Waiver Through Forum Selection

Andrew Gray

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# SAVING THE JURY-TRIAL WAIVER THROUGH FORUM SELECTION

*Andrew Gray*<sup>1</sup>

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## INTRODUCTION

When a business signs an employment contract with a new employee neither party expects to sue the other. Nevertheless, both parties typically look through the contract to ensure their legal rights are protected. Many employment contracts include a clause waiving both

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parties' rights to a jury trial.<sup>2</sup> Typically, the rationale is "if we sue, we want the issues to be adjudicated quickly, efficiently, and without much publicity." This clause is called a contractual jury-trial waiver. Employers use this clause, because they believe the notorious unpredictability of juries presents an unacceptable risk.<sup>3</sup> Indeed, even the Supreme Court has recognized civil juries are susceptible to "[a]rbitrariness, caprice, passion, bias, and even malice," which can "replace reasoned judgment and law."<sup>4</sup> A waiver agreement of this kind requires each party, when suing the other in court, to adjudicate their claims in a bench trial to avoid a jury they think might be unreasonable. But because one of the parties may conclude a jury presents a better ear for their dispute, the enforceability of a jury-trial waiver may become an issue.

To test the validity of a contractual jury-trial waiver a plaintiff must first make a demand for a jury trial pursuant to Federal Rule of Civil Procedure 38.<sup>5</sup> The judge is then presented with a motion to adjudicate the validity of the contractual jury-trial waiver.<sup>6</sup> Yet, the issue is rarely straightforward.

A contractual jury-trial waiver can waive a party's rights under the Seventh Amendment, which guarantees the availability of a jury trial in federal court for most civil lawsuits.<sup>7</sup> But jury-trial waivers are not the only contractual provision that can waive a constitutional right.

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

3. See Chad Shultz, *The Jury's Still Out - Way Out: Subtracting the Jury From the Equation Decreases Uncertainty in Employment Cases*, 50 HR MAG., Jan. 2005 ("In Las Vegas, the odds may be against you, but at least they are consistent. Jury trials, by contrast, are notoriously unpredictable. Whenever you face a jury trial, you face ever-changing odds that make it difficult to assess the wisdom of a decision to continue or settle.").

4. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 474 (1993) (O'Connor, J., dissenting) ("But jurors are not infallible guardians of the public good. They are ordinary citizens whose decisions can be shaped by influences impermissible of our system of justice. In fact, they are much more susceptible to such influence than judges.").

5. FED. R. CIV. P. 38.

6. The most common method of presenting a jury-trial waiver is through a motion to strike the demand for a jury trial, made under Federal Rule of Civil Procedure 39, although other procedural methods of presenting the issue exist. See Jarod S. Gonzalez, *A Tale of Two Waivers: Waiver of the Jury Waiver Defense Under the Federal Rules of Civil Procedure*, 87 NEB. L. REV. 675 (outlining how a jury-trial waiver can be presented within the Federal Rules of Civil Procedure).

7. U.S. CONST. amend. VII. The Constitution reads:

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 reexamined in any court of the United States, than according to the rules of the common law.

*Id.*

Similarly, arbitration agreements and forum-selection clauses<sup>8</sup> can constitute a waiver of these rights. These three clauses accomplish the same goal: altering a party's means of dispute resolution. However, courts have held each to a different standard of enforcement. There is no sound reason for the difference. This inconsistency in the law causes confusion, inefficiency, and unnecessary expense for the courts as well as the parties in the litigation.

A contractual jury-trial waiver agreement, sometimes referred to as a bench-trial clause, is subject to different standards in courts throughout the United States.<sup>9</sup> Federal courts have endorsed three competing views on how to determine the validity of such a waiver. In most federal courts a waiver agreement is held to a "knowing and voluntary" standard.<sup>10</sup> Like a criminal defendant's *Miranda* rights, a party's waiver of the right to a jury trial must be made knowingly and voluntarily.<sup>11</sup> In most courts using this standard the burden of proving a "knowing and voluntary" waiver will be placed on the waiver's proponent.<sup>12</sup> Conversely, in the Sixth Circuit Court of Appeals, the party that opposes the jury-trial waiver bears the burden of proving the waiver was *not* knowingly and voluntarily made.<sup>13</sup>

Most recently, the Seventh Circuit Court of Appeals has taken a very different approach.<sup>14</sup> The rationale underlying most circuits' methods for determining the validity of jury-trial waivers is based upon waivers of other constitutional rights.<sup>15</sup> However, the Seventh

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Note, however, that the Seventh Amendment only provides the right to a jury trial in suits "at common law." Courts generally interpret the Seventh Amendment to provide a jury-trial right only in cases arising at law, as opposed to cases arising in equity. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–48 (1998) (discussing cases in which the right to a jury trial applies).

8. While forum selection clauses can be either permissive (an agreement to allow suit in a particular venue without attempting to bar suit elsewhere) or mandatory (mandating suit be brought in a particular venue), this Article discusses forum selection in the context of mandatory clauses only. For more on this distinction, *see generally* Stephen E. Sachs, *The Forum Selection Defense*, 10 DUKE J. CONST. L. & PUB. POL'Y 1, 2 (2014) (outlining different types of forum selection clauses).

9. *E.g.*, *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 991 (7th Cir. 2008) (referring to the waiver as a "bench-trial clause").

10. *See* 38 MOORE'S FEDERAL PRACTICE – CIVIL § 38.52(3)(a) (3d. ed. 2007) (listing cases).

11. *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("The defendant may waive effectuation of [his *Miranda* rights], provided the waiver is made voluntarily, knowingly and intelligently.").

12. *See, e.g.*, *RDO Fin. Services Co. v. Powell*, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) (outlining the burden of proof in waiving the right to a jury trial).

13. *K.M.C. Co., Inc., v. Irving Trust Company*, 757 F. Supp. 2d 752, 758 (6th Cir. 1984).

14. *See IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989 (7th Cir. 2008).

15. *Id.* at 994–95.

Circuit based its rationale on an analogy to the enforceability of arbitration agreements.<sup>16</sup> Accordingly, the Seventh Circuit enforces jury-trial waiver agreements the same way it enforces arbitration clauses within contracts.<sup>17</sup>

The views advanced within this circuit split are each inherently flawed.<sup>18</sup> The Seventh Circuit, breaking from established law, ignores the fact that arbitration agreements are governed by the Federal Arbitration Act.<sup>19</sup> Other circuits fail to articulate why jury-trial waivers should be held to such a strict standard, while other important constitutional rights are waived more easily. The “knowing and voluntary” standard advanced in most circuits stems from inaccurate applications of both precedent and the Seventh Amendment.

This Article proposes a new solution: jury-trial waivers should be enforced similarly to forum-selection clauses. This change would accomplish two things: (1) eliminate an inconsistency in the law surrounding enforcement of jury-trial waivers, arbitration agreements, and forum-selection clauses and (2) provide an efficient, clear, and inexpensive method for adjudicating disputes involving jury-trial waivers. As Professor Ware<sup>20</sup> argues, “[i]f the law governing jury-waiver clauses is the only major body of law regularly applying knowing-consent standards to civil waivers of constitutional rights, then perhaps *it* is the area of law that should change.”<sup>21</sup>

This Article argues that the current treatment of contractual jury-trial waivers is improper and proposes a new standard for enforcing such waivers. Federal courts, currently analogizing these waivers to the waiver of *Miranda* rights or to clauses requiring arbitration, would be better served using the standard for enforcing forum-selection clauses. Part I of this Article explains the history of the contractual jury-trial waiver and compares it to how arbitration and forum-selection clauses are enforced. This Article then explains why a party might choose one over the other. Part II describes the three standards courts currently use to enforce contractual jury-trial waivers. Part III explains the inherent problems with the current standards. It then discusses how forum-selection clauses relate to contractual jury-trial

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16. *Id.*

17. *Id.*

18. See *infra* Part III.A (explaining the flaws behind current enforcement standards of jury-trial waivers).

19. 9 U.S.C. § 2 (2012).

20. Professor Stephen J. Ware is a professor of Law at the University of Kansas, focusing on judicial selection and alternative dispute resolution.

21. Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 198 (2004).

waivers<sup>22</sup> and why forum-selection clauses provide the best model for judicial treatment of jury-trial waivers.

## I. THE HISTORY OF THE CONTRACTUAL JURY-TRIAL WAIVER AND A COMPARISON TO OTHER CONTRACTUAL CLAUSES.

### A. Preference for One Clause Over Another

Why might parties agree to a contractual jury-trial waiver? Why might an employer choose to include a contractual jury-trial waiver within an employment contract in lieu of an arbitration agreement? An employer will often include some form of alternative dispute resolution within employment contracts to avoid the risk of runaway jury verdicts.<sup>23</sup> Juries, sometimes indifferent to substantive law, may award plaintiffs millions of dollars in employment suits.<sup>24</sup> Employers, particularly large corporations, often assume a jury will be biased against them, and more sympathetic to an aggrieved plaintiff.<sup>25</sup> Thus, even with procedural safeguards against bias, such as summary judgment or judgment as a matter of law, an employer may be hesitant to allow a jury to act as fact-finder.

Arbitration clauses are seldom used between two individual parties, mainly because of the expense of arbitration.<sup>26</sup> Parties are not only responsible for filing fees, but also the expense of the arbitrator herself.<sup>27</sup> While the cost of arbitration for an employer will certainly be

22. Although this Article is the first to argue the topic to its full extent, Professor Stephen Ware first mentioned the idea of harmonizing the law of contractual jury-trial waivers with the law of forum-selection clauses in 2004 when he wrote:

There is an appeal to harmonizing the law on civil waivers of constitutional rights. Harmonization could occur in two ways—either by making jury-waiver cases conform to arbitration law, property-deprivation cases, forum selection cases, and consent-to jurisdiction cases, or by making these latter cases all conform to jury-waiver cases.

*Id.* at 205.

23. See David F. Johnson, *Arbitration, Forum Selection, and Contractual Jury Waiver Clauses: Why Differing Standards For Enforceability?*, 2009 State Bar of Texas Advanced Civil Appellate Course 11, [http://www.winstead.com/portalresource/lookup/wosid/cp-base-4-12838/overrideFile.name=/state%20Bar%20App%20%20Course%20Contractual%20Clause%20Art%20%20V%20%202\\_v1.pdf](http://www.winstead.com/portalresource/lookup/wosid/cp-base-4-12838/overrideFile.name=/state%20Bar%20App%20%20Course%20Contractual%20Clause%20Art%20%20V%20%202_v1.pdf).

24. See, e.g., *Settlements and Verdicts*, HADSELL STORMER RENICK LLP, <http://www.hadsellstormer.com/Settlements-Verdicts.shtml> (last visited Feb. 25, 2017) (a law firm website advertising jury verdicts the firm received, typically in the millions of dollars); see also *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 474 (1993) (O'Connor, J., dissenting) (discussing the unreasonableness of a civil jury).

25. Jay M. Zitter, Annotation, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R. 5TH 53, § 2 (1996).

26. See Ozekie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 404 (2014) (discussing the expenses related to arbitration).

27. Johnson, *supra* note 23.

lower than a jury trial, it may be more economical to adjudicate a claim in a bench trial. Arbitration requires the contracting parties to agree to procedures and rules, which may differ from those provided by statute. Most importantly, there is no avenue for appellate review within arbitration.<sup>28</sup> An arbitrator's decision is almost impossible to overturn, regardless of the facts or substantive law surrounding the issue.<sup>29</sup> When deciding how a potential claim should be tried, employers may favor trying cases in the court system, where appellate courts can remedy an incorrect application of the law or overturn a decision based on insufficient evidence.<sup>30</sup>

When crafting employment contracts, employers weigh the expense and uncertainty of a jury trial against the expense and finality of an arbitration proceeding. A jury-trial waiver arguably provides the best of both worlds.<sup>31</sup> Like arbitration, bench trials can save both time and money in comparison to jury trials.<sup>32</sup> Thus, an employer may prefer a jury-trial waiver, perceiving a bench trial as a middle ground between a jury trial and an arbitration proceeding.

While historical precedent has been inconsistent, modern Supreme Court decisions favor enforcement of both arbitration clauses and forum-selection clauses. This Article argues not only that contractual jury-trial waivers are in the same family as these two clauses, but that they can accomplish the same goal. Arbitration clauses, forum-selection clauses, and jury-trial waivers are all forms of a waiver.<sup>33</sup> Why

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28. See, e.g., Michael H. LeRoy, *Jury Revival or Jury Reviled? When Employees are Compelled to Waiver Jury Trials*, 7 U. PA. J. LAB. & EMP. L. 767, 777–80 (2005) (noting that use of arbitration in employment disputes is less favored due to, high damages awards and extremely deferential standard of judicial review—courts cannot determine if an arbitrator misapplied the fact or the law, and can only review an award on its face).

29. *Id.*

30. *Id.*

31. See Chester Chuang, *Assigning the Burden of Proof in Contractual Jury Waiver Challenges: How Valuable is Your Right to a Jury Trial?*, 10 EMPL. RTS. & EMPL. POL'Y J. 205, 209–13 (discussing benefits and disadvantages of arbitration agreements versus jury-trial waivers); Johnson, *infra* note 64, at 650–52 (discussing similarly).

32. Chuang, *supra* note 31, at 211 (“Much like arbitration, bench trials offer potentially significant time and cost savings when compared to jury trials.”); Thomas H. Cohen & Steven K. Smith, *Bureau of Justice Statistics Bulletin: Civil Trial Cases and Verdicts in Large Counties, 2001*, tbls. 2 & 8 (Apr. 2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/mmtv1c01.pdf> (stating that 77% of non-jury cases were decided within two years compared to only 56.9% of jury cases. Jury trials lasted an average of 4.3 days compared to only 1.9 days for bench trials).

33. See Sachs, *supra* note 8 (“To start with, forum selection is best understood as a form of waiver.”); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1 WIS. L. REV. 33, 121 (1997) (“The policy against prospective waivers should bar any express prospective waiver built into an arbitration clause. But that sort of overreaching upon overreaching should not obscure the degree to which even a facially-neutral arbitration clause works a prospective waiver of substantive rights.”).

then, has the Court refused to grant jury-trial waivers the same deference as the two others?

### B. Arbitration Agreements

The rise of arbitration started in 1925 after Congress passed the Federal Arbitration Act (FAA).<sup>34</sup> In brief, the FAA allows for courts to facilitate alternative dispute resolution through arbitration and ensures that arbitration agreements are enforced similarly to other contractual provisions. Despite attacks on the viability and efficacy of the arbitration process since the FAA's enactment, the Supreme Court has consistently held in favor of enforcing arbitration clauses.<sup>35</sup>

When considering arbitration and its validity as a method for alternative dispute resolution, the following five governing principles apply: (1) courts favor arbitration; (2) arbitration clauses are upheld without a showing of knowing and intelligent consent; (3) the party opposing arbitration bears the burden of proof; (4) arbitration can sometimes be imposed using unsigned envelope "stuffers," handbooks, and warranties; and (5) ambiguous contracts are construed broadly so as to support arbitration.<sup>36</sup> These principles are a consequence of the Supreme Court's continued position in favor of enforcing arbitration clauses,<sup>37</sup> most notably in *Gilmer v. Interstate/Johnson Lane Corporation*.<sup>38</sup> The Court in *Gilmer* rejected the argument that arbitration agreements should not be enforced due to a disparity in bargaining power. Specifically, the Court stated:

Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we nevertheless held in *Rodriguez de Quijas* and *McMahon* that

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34. 9 U.S.C. § 2 (2012).

35. See, e.g., *AT&T Techs. v. Commc'ns. Workers of Am.*, 475 U.S. 643, 653 (1986) (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)). The court noted:

[I]n light of the congressional policy making arbitration the favored method of dispute resolution, such a provision requires arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

*Id.*

36. Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 673–74 (2001).

37. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.").

38. 500 U.S. 20 (1991).

agreements to arbitrate in that context are enforceable. . . . [T]he FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable "save upon such grounds as exist in law or in equity for the revocation of any contract."<sup>39</sup>

Arbitration agreements are favored by courts, and as a result, defenses such as fraud, duress, and unconscionability are used to invalidate these clauses in only the most egregious cases. Some courts have even held that a non-signatory can enforce an arbitration clause or that a party can enforce an arbitration clause against a non-signatory.<sup>40</sup> Under this doctrine, a party cannot ignore an arbitration agreement in the contract at issue in the lawsuit.

An arbitration clause, however, does more than waive a party's right to a jury trial.<sup>41</sup> It essentially waives the *entire trial*.<sup>42</sup> Yet, these clauses have enjoyed long-standing favor within federal courts around the nation. In fact, only one case has refused to uphold an arbitration agreement on Seventh Amendment grounds.<sup>43</sup> However, the unpublished opinion was quickly overturned by the Fourth Circuit.<sup>44</sup>

As discussed above, the Supreme Court has aggressively enforced arbitration clauses. Yet while arbitration agreements inherently stem from forum-selection clauses, each are subject to different standards of review.<sup>45</sup>

### C. *Forum-Selection Clauses*

Unlike arbitration agreements, forum-selection clauses in the early 20th century were not favored by federal courts.<sup>46</sup> Many courts have historically declined to enforce contractual forum-selection clauses

39. *Id.* at 33.

40. *See, e.g.*, *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.* 170 F.3d 349, 353 (2d Cir. 1999) (binding non-signatory to a contract under which it received direct benefits of lower insurance and the ability to sail under the French flag).

41. *Chuang, supra* note 31, at 231 n.146 ("[A]n agreement to arbitrate includes a waiver of jury trial rights.").

42. *See, e.g.*, *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 716 F. Supp. 268, 270 (S.D. Miss. 1989) (holding that the implicit waiver of a jury trial in an arbitration agreement constitutes a waiver of the entire litigation process in the judicial system).

43. *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 304 (4th Cir. 2001) (referencing the bench opinion of the trial court by stating that "Judge Richard L. Williams denied Conseco's motion to compel arbitration. As basis for his ruling, Judge Williams found that plaintiffs did not knowingly and voluntarily waive their right to a jury trial").

44. *Id.* at 307.

45. *Southland Corp. v. Keating*, 465 U.S. 1, 7-17 (1984) (comparing the Supreme Court's analysis of contractual forum-selection clauses with binding arbitration clauses, and discussing the Court's view of each).

46. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have

while simultaneously enforcing arbitration agreements.<sup>47</sup> But modern federal courts favor forum-selection clauses, reasoning that such clauses should be considered *prima facie* valid.<sup>48</sup> When state law is at issue, the problem becomes even more complex.<sup>49</sup>

In 1972, the Supreme Court in *The Bremen v. Zapata Off-Shore Co.*<sup>50</sup> held that contractual forum-selection clauses were enforceable within federal courts.<sup>51</sup> Although *The Bremen* discussed the issue in the context of courts sitting in admiralty, its reasoning has been applied to federal courts exercising diversity jurisdiction as well.<sup>52</sup> Post-*Bremen*, the Supreme Court has strongly favored forum-selection clauses, holding they are valid except in uncommon, unusual circumstances.<sup>53</sup> The Court in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas* went so far as to state:

When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less conve-

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declined to enforce such clauses on the ground that they were ‘contrary to public policy,’ or that their effect was to ‘oust the jurisdiction’ of the court.”).

47. *Id.*

48. *Id.* at 10.

49. A forum-selection clause which mandates that a claim, which would otherwise be adjudicated in state court, be tried in federal court, the clause presents a significant choice of law issue, particularly as applied to jury-trial waivers. While this Article is primarily focused only on federal law and claims adjudicated in federal court, this issue should not be overlooked. Indeed, courts have struggled with the application of state law in forum-selection clauses, and the issue has been subject to academic review as well. See *Stewart Org. v. Ricoh Corp.*, 487 U.S. 1, 22 (1988) (engaging in a full *Erie* analysis to determine the applicability of state law claims when parties agreed to a forum-selection clause); Sachs, *supra* note 8, at 2 (stating that whether forum-selection clauses: are valid—that is, whether they succeed in waiving the rights they purport to waive—is a question of procedure, not just of contract law. And as a procedural question, it depends on the law of the forum: state procedure in state court and federal procedure in federal court, no matter what law gives rise to the claim. *Id.*

50. 407 U.S. 1 (1972).

51. *Id.* at 10 (“[A view in federal courts], is that such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be “unreasonable” under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty.”).

52. *Stewart Org. v. Ricoh Corp.*, 487 U.S. 1, 33 (1988) (Kennedy, J., concurring). The Court noted:

[E]nforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system. Although our opinion in *The Bremen v. Zapata Off-Shore Co.*, involved a federal district court sitting in admiralty, its reasoning applies with much force to federal courts sitting in diversity. The justifications we noted in *The Bremen* to counter the historical disfavor forum-selection clauses had received in American courts, should be understood to guide the District Court’s analysis under § 1404(a).

See also *Atl. Marine Constr. Co. v. United States Dist. Court*, 134 S. Ct. 568, 582 (2013) (affirming Justice Kennedy’s assertion in *Stewart*).

53. *Atl. Marine*, 134 S. Ct. at 582.

nient for themselves or their witnesses, or for their pursuit of the litigation. . . . As we have explained in a different but instructive context, “[w]hatever ‘inconvenience’ [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was clearly foreseeable at the time of contracting.” . . . [T]he practical result is that forum-selection clauses should control except in unusual cases. Although it is “conceivable in a particular case” that the district court “would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause,” such cases will not be common.<sup>54</sup>

Later, the Court went on to state:

When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties’ settled expectations. A forum-selection clause, after all, may have figured centrally in the parties’ negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, “the interest of justice” is served by holding parties to their bargain.<sup>55</sup>

In modern federal courts, forum-selection clauses and arbitration clauses are subject to similar standards. However, the precise standard surrounding the enforcement of forum-selection clauses is less concrete.<sup>56</sup> A court will typically hold a forum-selection clause *prima facie* valid and will only decline jurisdiction if it is reasonable to do so.<sup>57</sup> A party seeking to avoid the clause has the burden of proving either the clause will cause undue hardship or that the clause was unfairly bargained for.<sup>58</sup>

54. *Id.* (citations omitted).

55. *Id.* at 583.

56. See Sachs, *supra* note 8 (discussing criticisms of current federal-forum-selection-clause standards and the lack of a uniform, codified standard for enforcement).

57. Francis M. Daugherty, *Validity of Contractual Provisions Limiting Place or Court in Which Action May be Brought*, 31 A.L.R. 4th 404, 2.

[T]he view that such provisions are *prima facie* valid has been followed in numerous recent cases. . . . Under this more modern view, the courts treat the contractual provision not as one which seeks to oust the court of jurisdiction, but rather as a provision which will allow the court to decline jurisdiction if it is reasonable to do so. Where no additional expense is created, the witnesses are available at either location, the party will not lose his remedy, and the provision was freely bargained for, the courts have declined jurisdiction and enforced the contract. On the other hand, where the party seeking to avoid the clause has satisfied his burden of proof and shown that enforcement of the clause will cause undue hardship or has not been freely bargained for, the courts have refused to enforce it.

*Id.*

58. *Id.*

### D. Contractual Jury-Trial Waivers

In the context of employment disputes, several federal statutes provide a right to a jury trial, such as the Age Discrimination in Employment Act<sup>59</sup> and Title VII of the Civil Rights Act.<sup>60</sup> For lawsuits arising under Title VII, the right to a jury trial was not available until 1991.<sup>61</sup> Prior to the passage of this law, judges, not juries, acted as factfinder in most employment discrimination cases—bench trials only occurred if racial bias was a concern.<sup>62</sup> After the change in 1991, the rate at which employees won these lawsuits skyrocketed due to the increased use of juries.<sup>63</sup>

Employers reacted by including one of two provisions in employment contracts: an arbitration clause or a jury-trial waiver clause. While arbitration clauses have distinct benefits, jury-trial waivers have found a prominent niche in employment contracts that has continued to this day. An example of such a clause might look like this:

THE PARTIES HEREBY UNCONDITIONALLY WAIVE THEIR RIGHT TO A JURY TRIAL AND ANY AND ALL CLAIMS OR CAUSES OF ACTION ARISING FROM OR RELATING TO THEIR RELATIONSHIP. THE PARTIES ACKNOWLEDGE THAT A RIGHT TO A JURY IS A CONSTITUTIONAL RIGHT, THAT THEY HAVE HAD AN OPPORTUNITY TO CONSULT WITH INDEPENDENT COUNSEL, AND THAT THIS JURY WAIVER HAS BEEN ENTERED INTO KNOWINGLY AND VOLUNTARILY BY ALL PARTIES TO THIS AGREEMENT. IN THE EVENT OF

59. 29 U.S.C. § 626(c)(2) (2016) (granting jury trial rights under the ADEA).

60. 42 U.S.C. §§ 2000(e)(1)–(17) (2016).

61. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 2 U.S.C. & 42 U.S.C.); see also Robert Frankhauser, *The Enforceability of Pre-Dispute Jury Waiver Agreements in Employment Discrimination Cases*, 8 DUQ. BUS. L. J. 55, 63–64 (2006) (discussing jury-trial rights in the Civil Rights Act).

62. See 137 Cong. Rec. S15,445-02, S15,452 (daily ed. Oct. 30, 1991) (statement of Sen. Nickles) (stating during floor debates on the Civil Rights Act of 1991 that “[w]e have not had jury trials in Title VII cases before in the private sector”); see also M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN’S STUD. 311, 357. Medina explains the absence of jury trials pre-1991 by stating:

The legislative record for the 1964 Act reveals legislative unease with juries because they were perceived to be hostile or unfriendly to civil rights claimants. This was certainly the case with racial discrimination, plainly the driving force behind the 1964 Act. It was a fair inference for legislators to make from the response to the federal judiciary-driven push to desegregate the South, that federal judges would be more receptive to victims of racial discrimination than primarily white, male juries in the South.

*Id.*

63. Steven F. Fink, *Insist on Bench Trials*, NAT’L L.J., Jan. 13, 2003, at A17; Gonzalez, *supra* note 6, at 679 (explaining that plaintiffs tended to do better in front of juries than they had in front of federal judges, in terms of liability and higher damages awards).

LITIGATION, THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.<sup>64</sup>

Employers will often write such clauses to be as repetitive and comprehensive as possible to ensure the clause is enforced.<sup>65</sup>

Today, federal courts agree that contractual jury-trial waivers are neither illegal nor contrary to public policy.<sup>66</sup> This has not always been the case. More than 140 years ago, the Supreme Court decided *Insurance Co. v. Morse*,<sup>67</sup> which implied that a contract waiving the right to a jury trial was unenforceable.<sup>68</sup> States, which are not bound by the Seventh Amendment,<sup>69</sup> continued allowing the waivers.<sup>70</sup> As time progressed, federal courts began validating jury-trial waivers. By the 1960s, jury-trial waivers were not only prevalent, but known to be generally enforceable.<sup>71</sup>

*Morse* has been implicitly overruled by cases such as *The Bremen*,<sup>72</sup> which allow parties to waive their rights through a specifically en-

64. David F. Johnson, *The Enforcement of Contractual Jury Waiver Clauses in Texas*, 62 BAYLOR L. REV. 649, 650 (2010). This example of a jury-trial waiver clause is repeated here in all-caps, as formatted in the original work. This typeface is common in jury-trial waiver agreements, as courts will refuse to enforce these clauses based upon its conspicuousness in the underlying contract. See *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811, 814 (N.D. Tex. 2002) (declining to enforce a jury-trial waiver clause when the text was not “set off from the rest of the text through differential bold, larger print, italics, or any other form of emphasis or distinction”).

65. See *Bear, Stearns Funding, Inc. v. Interface Grp.-Nev., Inc.*, 2007 U.S. Dist. LEXIS 82557, at \*3 (S.D.N.Y. Nov. 7, 2007) (interpreting a similarly written jury-trial waiver, in the context of a loan agreement, stating that “[i]t is hard to imagine a more complete, all-encompassing, repetitive waiver of a right to trial by jury. One is reminded of Lewis Carroll’s *The Hunting of the Snark* ‘What I tell you three times is true.’”).

66. MOORE’S FEDERAL PRACTICE, *supra* note 10.

67. 87 U.S. 445 (1874) (recognized as superceded by statute in *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148 (S.D. Cal. 1993)) (finding that an arbitration clause preempts an individual’s constitutional right to have his matter heard in federal court, and discussing numerous other cases that also invalidated contracts requiring arbitration).

68. *Morse*, 87 U.S. at 451. The Supreme Court held:

A man may not barter away his life or his freedom, or his substantial rights. . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. . . . He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

*Id.*

69. *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (“The States, so far as [the Seventh Amendment] is concerned, are left to regulate trials in their own courts in their own way.”); *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 432 (1996) (citing *Walker*, 92 U.S. at 92) (“The Seventh Amendment, which governs proceedings in federal court, but not in state court.”).

70. See, e.g., *Trizec Properties, Inc. v. Superior Court*, 280 Cal. Rptr. 885, 886 (Cal. Ct. App. 1991) (stating that the California Constitution does not prohibit contractual jury-trial waivers).

71. *Rodenbur v. Kaufmann*, 320 F.2d 679, 684 (D.C. Cir. 1963) (“Without pausing to explore the many nuances inherent in varying situations, we observe simply that a jury trial lawfully may be waived, both before and after a given cause of action shall arise.”).

72. 407 U.S. 1 (1972).

forceable contract. Yet post-*Morse*, the Supreme Court has never directly addressed how to enforce contractual jury-trial waivers. Jury-trial waivers have been discussed by the Court, but the discussion has generally been limited to criminal jury-trial waivers, waivers by statute, or temporary waivers.<sup>73</sup> Enforcement of contractual jury-trial waivers in civil cases has been considered only by lower courts.

Like other waivers of constitutional rights, most courts hold jury-trial waivers to a strict standard; however, several courts have never explicitly addressed the issue.<sup>74</sup> Like the waiver of a criminal defendant's *Miranda* rights, any waiver must be made knowingly and intelligently.<sup>75</sup> Similar to the evolution of *Miranda* rights, modern courts have become increasingly lenient towards enforcing jury-trial waivers.<sup>76</sup>

## II. HOW FEDERAL COURTS TREAT THE VALIDITY OF CONTRACTUAL JURY-TRIAL WAIVERS.

### A. The “Knowing and Voluntary” Standard

While the Supreme Court has never endorsed any standard for enforcing jury-trial waivers, Courts in almost every circuit court have addressed the issue in some way. There are three ways modern federal courts view contractual jury-trial waivers. The three views underlying this complex circuit split are based upon a reasonable rationale, but each of these views has serious faults. Since the jury-trial waiver has become commonplace, most federal courts have held that a contractual jury-trial waiver is enforceable subject to a “knowing and voluntary” standard.<sup>77</sup>

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73. See, e.g., *Serfass v. United States*, 420 U.S. 377, 389 (1975) (discussing the waiver of a jury trial in a criminal context).

74. *Crescent Res. Litig. Tr. by & ex rel. Bensimon v. Duke Energy Corp.*, No. A-12-CA-009-SS, 2013 U.S. Dist. LEXIS 62676, at \*19 (W.D. Tex. May 1, 2013) (stating that the Fifth Circuit has yet to address the issue).

75. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (“[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”).

76. See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 126 (1998) (“Although the Justices are unlikely to overrule *Miranda* in the foreseeable future, one can say fairly that the court has retreated from the holding of *Miranda* in several significant respects.”).

77. Note that some courts view the standard not as requiring a “voluntary and knowing” waiver, but as requiring that a party “knowingly and intentionally” waiving the right to a jury trial, or any other variation on the phrase. However, the difference between these phrases seems to be nothing more than semantic. See *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986) (“The seventh amendment right is of course a fundamental one, but it is one that can be *knowingly and intentionally* waived by contract.”) (emphasis added); see also Sternlight, *supra* note 36, at 678–79. Jean Sternlight writes:

One of the first courts to articulate this standard was the Second Circuit in *National Equipment Rental Ltd. v. Hendrix*.<sup>78</sup> H. Walter Hendrix was the proprietor of a small construction company and contracted with two separate companies for the purchase of equipment.<sup>79</sup> After realizing that he would be unable to pay for the equipment, Hendrix contacted National Equipment Rental (NER) to obtain a loan. Under the terms of the loan, Hendrix was advanced the cash to purchase the equipment and paid a monthly fee.<sup>80</sup> After Hendrix defaulted on the loan, NER brought suit against Hendrix. The trial court judge dismissed NER's motion to strike Hendrix's demand for a jury trial.<sup>81</sup> On appeal to the Second Circuit, NER cited a jury-trial waiver clause within the loan contract, which stated, "Lessee hereby waives a trial by jury."<sup>82</sup>

In its analysis, the *Hendrix* court cited the Seventh Amendment and explained the presumption against jury-trial waivers.<sup>83</sup> In affirming the denial of NER's motion, the court proceeded to discuss several factors to explain why the jury-trial waiver was invalid.<sup>84</sup> First, the court stated that the waiver was "literally buried in the eleventh paragraph of a fine print, sixteen clause agreement."<sup>85</sup> Second, the court recognized the gross disparity in bargaining power between NER and Hendrix.<sup>86</sup> Hendrix had little choice but to accept the contract as written in order to get the money he so badly needed.<sup>87</sup> Finally, the court discussed the business acumen of the parties, addressing NER's assertion that Hendrix used the funds for a business purpose, and was not the "hapless consumer" which these laws were designed to protect.<sup>88</sup> Here, the court stated:

Hendrix was compelled to borrow from NER on NER's terms to avoid losing the equity he had in the equipment, the equipment it-

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Other federal courts have upheld contractual waivers only when they were "knowing and intentional," "knowing, voluntary and intentional," "knowing, voluntary and intelligent," "voluntary and intentional," "knowing and intentional," "knowing and intelligent," or "knowing and voluntary." The courts have not drawn any distinctions based on the slight differences in the wording of these phrases.

*Id.* (citations omitted).

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

79. *Id.* at 256.

80. *Id.* at 257.

81. *Id.*

82. *Id.* at 258.

83. *Hendrix*, 565 F.2d at 258.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Hendrix*, 565 F.2d at 259.

self, and his livelihood. The usury laws were clearly intended to apply to just such a situation: of a needy individual forced, because of the creditor's greater bargaining power, to borrow at oppressive rates.<sup>89</sup>

While the *Hendrix* court may not have intended to create a formal standard for these issues, subsequent courts have nevertheless followed the *Hendrix* rationale closely. For example, the Northern District of Texas followed *Hendrix* in *RDO Financial Services v. Powell*.<sup>90</sup> In *RDO*, the court specifically stated not only that a valid jury-trial waiver must be made “knowingly and voluntarily,” but that the court will “indulge every reasonable presumption against a waiver of [a party’s Seventh Amendment right].”<sup>91</sup> The court then proceeded to enumerate several factors in determining the “knowing and voluntary” requirement, which are strikingly similar to the original analysis in *Hendrix*:

(1) whether there was gross disparity in bargaining power between the parties, (2) the business or professional experience of the party opposing the waiver, (3) whether the opposing party had an opportunity to negotiate contract terms, and (4) whether the clause containing the waiver was inconspicuous.<sup>92</sup>

The *RDO* court found the jury-trial waiver was written in small print, “buried in the middle of a lengthy paragraph, not set off from the rest of the text through differential bold, larger print, italics, or any other form of emphasis or distinction.”<sup>93</sup> The court went on to note that the waiver was wholly one-sided, in that RDO had the option of whether to enforce the waiver at its discretion.<sup>94</sup> Accordingly, the court held the jury-trial waiver unenforceable.<sup>95</sup>

On the other hand, when both parties to the contract are relatively sophisticated, courts adhering to the “knowing and voluntary” standard find no problem enforcing a jury-trial waiver, even absent absolute equity in the parties’ bargaining power.<sup>96</sup> Courts have also

89. *Id.*

90. 191 F. Supp. 2d 811, 812 (N.D. Tex. 2002) (citing *Hendrix*, 565 F.2d at 255) (“[T]he Court turns to federal law for guidance [in determining the standard of waiving the right to a jury trial].”).

91. *Id.* at 813.

92. *Id.* at 813–14.

93. *Id.* at 814.

94. *Id.*

95. *RDO Fin. Servs. Co.*, 191 F. Supp. 2d at 814.

96. See, e.g., *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999). The court noted:

[A]lthough there was clearly a difference in bargaining power between the sides — as there would be between a major bank and virtually any two individuals — the Cranes were not financial neophytes. They had established relationships with a number of

recognized that in a contract between two *companies*, one company often has the option to simply walk away from the transaction if a jury-trial waiver is attached.<sup>97</sup>

*Hendrix* has been the leading case for most courts articulating the “knowing and voluntary” standard. The *Hendrix* standard for assessing jury-trial waivers has been adopted in the First,<sup>98</sup> Second,<sup>99</sup> Fourth,<sup>100</sup> Sixth,<sup>101</sup> Ninth,<sup>102</sup> and Eleventh<sup>103</sup> Circuits.

Today, courts applying the *Hendrix* standard use a list of factors, similar to those enumerated in *RDO*.<sup>104</sup> Discussing the use of jury-trial waivers, Moore’s Federal Practice lists the factors courts consider:

Negotiability of contract terms and negotiations between the parties concerning the waiver provision; conspicuousness of the provision in the contract; the relative bargaining power of the parties; business acumen of the party opposing waiver; whether counsel for the

Morgan officials over approximately one year, and the fact that the Cranes had previously negotiated changes to agreements made with Morgan further demonstrates their ability to negotiate with the bank.

*Id.*

97. *See, e.g., Westside-Marrero Jeep Eagle v. Chrysler Corp.*, 56 F. Supp. 2d 694, 709 (E.D. La. 1999) (holding that although there was an inequity of bargaining power between the two corporate parties, this was not enough to void a jury-trial waiver when “[the plaintiffs] have produced no evidence that they could not have gone elsewhere for financing had they found CFC’s terms oppressive”).

98. *Med. Air Tech. Corp. v. Marwan Inv., Inc.*, 303 F.3d 11, 18 (1st Cir. 2002) (“There is a presumption against denying a jury trial based on waiver, and waivers must be strictly construed.”).

99. *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007) (“Although the right is fundamental and a presumption exists against its waiver, a contractual waiver is enforceable if it is made knowingly, intentionally, and voluntarily.”).

100. *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (“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.”). Although the Fourth Circuit seems to adopt the *Hendrix* standard here, the court left some aspects of their holding ambiguous, which this Article discusses *infra* note 137.

101. *K.M.C. Co. v. Irving Tr. Co.*, 757 F.2d 752, 755 (6th Cir. 1985) (“Those cases in which the validity of a contractual waiver of jury trial has been in issue have overwhelmingly applied the knowing and voluntary standard.”).

102. *Cnty. of Orange v. United States Dist. Court*, 784 F.3d 520, 531 (9th Cir. 2015) (recognizing that the “knowing and voluntary” standard is the federal constitutional minimum, but holding that “federal courts sitting in diversity must apply the relevant state law to evaluate the validity of a pre-dispute jury trial waiver when that law is more protective than federal law”).

103. *Bakrac, Inc. v. Villager Franchise Sys.*, 164 F. App’x 820, 823 (11th Cir. 2006) (Unpublished table decision) (“A party may validly waive its Seventh Amendment right to a jury trial so long as the waiver is knowing and voluntary.”).

104. *See, e.g., Morris v. McFarland Clinic P.C.*, No. Civ. 4:03-CV-30439, 2004 WL 306110, at 1 (S.D. Iowa Jan. 29, 2004); *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); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982).

party opposing waiver had an opportunity to review the agreement.<sup>105</sup>

Most courts consider these factors, but many courts overlook or expressly decline to address the issue of which party has the burden of proving the waiver was “knowing and voluntary.”<sup>106</sup>

### B. *The Burden of Proof in Jury-Trial Waivers*

Determining which party has the burden of proof when enforcing a jury-trial waiver is a difficult issue that has never been fully resolved.<sup>107</sup> The circuits are split on how to assign the burden. The uncertainty may stem from *Hendrix*. While the *Hendrix* court expressly stated that a waiver must be “knowing and voluntary,” the court declined to address how this standard was created and how it should be applied in practice.<sup>108</sup> Many courts have blindly cited *Hendrix* for the proposition that the burden is on the party seeking enforcement, failing to recognize that *Hendrix* does not answer that question.<sup>109</sup>

The most prominent recognition of the burden of proof issue came in the Sixth Circuit case of *K.M.C. v. Irving Trust*.<sup>110</sup> K.M.C. and Irving entered into a financing agreement, whereby K.M.C. was extended a \$3 million line of credit.<sup>111</sup> Irving refused to advance the funds, which caused the collapse of K.M.C.’s business; K.M.C. subsequently filed suit.<sup>112</sup> The trial court judge ordered a jury trial over Irving’s objection that the financing agreement included an enforceable jury-trial waiver.<sup>113</sup> The trial court judge based his decision upon the statement of K.M.C.’s president Leonard Butler. Butler stated he was assured by a representative of Irving, prior to signing the agreement, that the waiver provision would not be enforced absent fraud.<sup>114</sup>

105. MOORE’S FEDERAL PRACTICE, *supra* note 10.

106. *See, e.g., In re Reggie Packing Co.*, 671 F. Supp. 571, 573 (N.D. Ill. 1987) (“The courts are sharply divided as to which party should bear the burden of proving knowing and voluntary consent. . . . This court, however, need not decide this difficult issue.”).

107. Although this Article focuses on whether a court assigns the burden of proof to the opponent or the proponent of a jury-trial waiver, there also exists an issue of what the standard of proof is. *See Bonfield v. Aamco Transmissions, Inc.*, 717 F. Supp. 589, 595 (N.D. Ill. 1989) (“No decision appears to have touched on the required standard of proof — whether by a preponderance of the evidence or something greater.”).

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

109. *See Chuang, supra* note 31, at 217 (providing a thorough, albeit slightly outdated, analysis of the burden of proof issue) (“Those courts that have resolved the burden of proof question merely follow the pronouncements of *Hendrix* . . . without thorough analysis.”).

110. *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985)

111. *Id.* at 754.

112. *Id.*

113. *Id.* at 755.

114. *Id.*

The *K.M.C.* court's discussion of the general standard governing jury-trial waivers is unsurprising. The court adopted the "knowing and voluntary" standard<sup>115</sup> and then proceeded to discuss the burden of proof issue. The court noted that the *Hendrix* standard relies only on objective circumstances and not on alleged oral representations.<sup>116</sup> Irving argued, and the court agreed, that admitting the statement of *K.M.C.*'s president would force Irving to shoulder "the impossible burden of proving or rebutting the subjective understanding of the party seeking to invalidate the waiver of a constitutional right."<sup>117</sup> The court then reasoned:

However, the explanation of the clause allegedly given by Irving's representative to Butler of *K.M.C.* is no less an "objective circumstance" than whether or not the parties bargained over a particular provision. In none of the cited cases were oral representations varying the express language of the contractual waiver alleged. This case is not like *Global Industries* and *Mountain Village*, in which the party seeking to escape the waiver provision claimed that it did not intend or understand that in signing the contract there at issue it was waiving jury trial or some other right, and the court regarded that allegation as insufficient to overcome an inference from the objective circumstances surrounding the signing of the contract that the waiver was in fact knowing and voluntary.<sup>118</sup>

Thus, the court departed from standard practice and held that the burden of proof should fall on the opponent of a jury-trial waiver.<sup>119</sup> Specifically, the opponent of a jury-trial waiver is required to prove that the waiver was *not* made knowingly and voluntarily.<sup>120</sup>

No other circuit has followed *K.M.C.*'s reasoning.<sup>121</sup> Although the rationale behind the burden issue is questionable, other circuits have continued to follow the traditional stance that the burden falls upon the proponent of enforcing the jury-trial waiver clause.<sup>122</sup> Further,

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115. *K.M.C. Co.*, 757 F.2d at 756.

116. *Id.* at 757.

117. *Id.*

118. *Id.*

119. *Id.* at 758.

120. *K.M.C. Co.*, 757 F.2d at 758.

121. See MOORE'S FEDERAL PRACTICE, *supra* note 10 (listing cases).

122. See *Chuang*, *supra* note 31, at 215–18. Chester Chuang argues:

As support for its "presumption" the *Hendrix* court merely cited to *Aetna Insurance Co. v. Kennedy*. 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,' *Aetna* involved a jury waiver during litigation and not a pre-dispute contractual jury waiver . . . . [T]his is an important distinction that makes it difficult to analogize the reasoning in *Aetna* to cases involving pre-dispute contractual jury waivers.

some courts have specifically declined to address the burden issue, while other courts have broken from the *Hendrix* mold entirely.<sup>123</sup>

### C. *Treating Jury-Trial Waivers as Arbitration Agreements*

The most recent and perhaps most controversial standard for enforcing a jury-trial waiver likens the waiver to arbitration agreements. In 2007, the Seventh Circuit introduced the idea in *IFC Credit Corp. v. United Business and Industrial Federal Credit Union*.<sup>124</sup> While the case represents a significant departure from the traditional standard, the rationale for this departure is reasonable.

In *IFC*, NorVergence sold telecommunications equipment to several contractors.<sup>125</sup> However, because the equipment had none of the advertised benefits many contractors stopped making payments.<sup>126</sup> After NorVergence folded, IFC Credit Corp. brought suit seeking to enforce the contracts against United Business and Industrial Federal Credit Union.<sup>127</sup> The equipment sales contract contained a jury-trial waiver, which the district court deemed invalid.<sup>128</sup> IFC then appealed.<sup>129</sup>

Judge Easterbrook writing for the Seventh Circuit, began by stating that contracts for the sale or rental of equipment are governed by the Uniform Commercial Code.<sup>130</sup> Terms in form contracts are routinely enforced, save for a “battle of forms” or if the term is deemed “unconscionable.”<sup>131</sup> Citing general contract law under the UCC, Judge Easterbrook stated there was nothing ambiguous about the bench-trial clause within the contract.<sup>132</sup>

Judge Easterbrook found the *Hendrix* standard for determining the validity of a jury-trial waiver was not persuasive, citing both *Hendrix* and *K.M.C.*<sup>133</sup> He reasoned that if a contract is silent on the issue of jury trials, then Federal Rule of Civil Procedure 38 governs.<sup>134</sup> Rule

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123. See, e.g., *Hulsey v. West*, 966 F.2d 579, 581 (10th Cir. 1992); *Bakrac, Inc. v. Villager Franchise Sys.*, 164 F. App'x 820, 823 (11th Cir. 2006) (Unpublished table decision).

124. *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989 (7th Cir. 2008).

125. *Id.* at 991.

126. *Id.*

127. *Id.*

128. *Id.*

129. *IFC*, 512 F.3d at 991.

130. *Id.* at 992.

131. *Id.*

132. *Id.*

133. *Id.* at 993.

134. *IFC*, 512 F.3d at 993.

38 states that a jury trial can be waived by mere omission of a jury demand within the complaint.<sup>135</sup> Specifically, the court stated:

Omissions may occur by accident or lack of foresight. If accidental forfeitures can blot out any right to a jury trial—for no one argues that Rule 38 is unconstitutional—then there is no federal rule that bench-trial agreements must be attended by extra negotiation or depend on evidence of voluntariness beyond what is required to make the rest of the contract legally effective.<sup>136</sup>

A jury trial can be waived easily through procedure. Why then do courts hold these potential waivers in such low regard? The court in *IFC* recognized this inconsistency, citing two other circuits that have also held bench-trial clauses are no less valid than the underlying contract in which they appear.<sup>137</sup>

After rejecting the *Hendrix* “knowing and voluntary” standard, the court addressed arbitration agreements. In the context of jury-trial waivers, the court stated:

Consider an agreement to arbitrate, which surrenders not only a jury trial but also the right to any judicial forum. Courts do not impose special negotiation requirements on arbitration clauses in form contracts. So too with forum-selection clauses; parties may agree to a forum in another nation, where juries are unknown, but this does not make forum-selection clauses suspect. Even confession-of-judgment clauses in *cognovit* notes are enforceable. Agreement to a bench trial cannot logically be treated less favorably than agreement to confess judgment, or arbitrate, or litigate in a forum that will not use a jury.<sup>138</sup>

Thus, the court remanded the case.<sup>139</sup>

135. *Id.*; FED. R. CIV. P. 38(d) (“A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.”).

136. *IFC*, 512 F.3d at 993.

137. *Id.* at 994 (citing *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986)); *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837–38 (10th Cir. 1988). Note that while *IFC* cites these cases as courts which hold “that an agreement to resolve a dispute in a bench trial is no less valid than the rest of the contract in which the clause appears,” the court then proceeds to recognize the inconsistency in these holdings. Specifically, the court noted that:

Although both *Leasing Service* and *Telum* hold bench-trial agreements valid as components of otherwise-valid contracts, they also state (inconsistently, it seems to us) that an agreement to resolve a dispute by a bench trial must be assessed by the standards of ‘waiver.’ Moreover, *National Equipment, K.M.C., Leasing Service*, and *Telum* all approach the inquiry on the assumption (which the parties to those cases apparently did not contest) that federal law governs the validity of such a clause, even when state law applies to the substance of the parties’ dispute. None of the four decisions mentions or attempts to justify the disparate treatment of bench-trial and arbitration agreements, or the oddity of applying a waiver standard to a contract when Rule 38 does not use a waiver approach once the case gets to court.

*Id.*

138. *Id.* (internal citations omitted).

139. *Id.* In resolving the fraud in the factum defense, the court states:

The Seventh Circuit's decision in *IFC* was controversial and no other court has adopted its reasoning.<sup>140</sup> However, the issue of jury-trial waivers rarely reaches the appellate level. In fact, the *IFC* court was the first appellate court to discuss jury-trial waivers since 1986 when *K.M.C.* was decided.<sup>141</sup>

The *IFC* court recognized the inconsistent application of the *Hendrix* standard.<sup>142</sup> A plaintiff can easily waive the right to a jury trial through omission. Even when the party is represented by an attorney this waiver is subject to a much lower bar than contractual jury-trial waivers. To the *IFC* court, this disparate treatment between the two styles of waiver is unjustified.<sup>143</sup> While *IFC* accurately depicted the problems inherent in the *Hendrix* standard, the court's solution leaves much to be desired.

### III. A NOVEL STANDARD FOR ADDRESSING CONTRACTUAL JURY-TRIAL WAIVERS.

#### A. *Problems with Current Standards*

Circuit courts seldom address issues related to the enforceability of jury-trial waivers. However, the current standards applied by federal courts each have flaws. If a new rationale is to be adopted, it must address and resolve the problems with both the *Hendrix* and *IFC* standards.

#### i. *Hendrix's Shaky Foundation*

*IFC* discussed many problems with the *Hendrix* standard and the cases that followed it.<sup>144</sup> Nevertheless, courts have blindly cited *Hen-*

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If the judge determines before trial that the contract is void, and that the jury waiver falls with it, then there is nothing to be tried to a jury. If the facts leave a material dispute requiring resolution by a trier of fact—here *IFC* maintains that the Credit Union knew full well exactly what it was signing, and that its defense of fraud in the factum is just a misnamed defense of fraud in the inducement—then the jury-waiver clause might be applied to determine whether a judge or a jury makes the critical decision.

*Id.*

140. See, e.g., Crescent Re 1s. Litig. Tr. by & ex rel. Bensimon v. Duke Energy Corp., No. A-12-CA-009-SS, 2013 U.S. Dist. LEXIS 62676, at \*21 (W.D. Tex. May 1, 2013) (declining to follow *IFC*).

141. David Horton, *The Shadow Terms: Contract Procedure and Unilateral Agreements*, 57 UCLA L. REV. 605, 642 (2010).

142. 512 F.3d at 993.

143. *Id.* at 994.

144. *Id.* at 992–94.

*drix* for decades.<sup>145</sup> The “knowing and voluntary” standard outlined in *Hendrix* was not adequately supported by precedent. In fact, none of the cases cited by *Hendrix* involved contractual jury-trial waivers. When the *Hendrix* court stated categorically that “[i]t is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally,” the court cited two cases: *Johnson v. Zerbst*<sup>146</sup> and *Heyman v. Kline*.<sup>147</sup> The jury-trial waiver in *Hendrix* was made in a civil contract, without anticipating litigation. *Johnson v. Zerbst* was a criminal case. Courts have long applied higher consent standards to waiving constitutional rights in criminal cases.<sup>148</sup> *Heyman v. Kline* involved an attorney’s oral waiver during a pretrial conference, as distinguished from a pre-dispute contractual waiver.<sup>149</sup> The *Hendrix* court did not acknowledge the important differences between these two cases and the issue it was addressing.

The *Hendrix* court compared its holding to the Supreme Court’s decision in *National Equipment Rental, Ltd. v. Szukhent*.<sup>150</sup> In *Szukhent*, the Court upheld a contractual waiver of personal service.<sup>151</sup> However, the *Hendrix* court, referencing *Szukhent*, noted that “[t]he right to a jury trial, however, is far more fundamental than the right to personal service, and cannot be waived absent a showing that its relinquishment is knowing and intentional.”<sup>152</sup> Yet, the *Hendrix* court is incorrect in this regard. Waiver of personal service is equivalent to a waiver of personal jurisdiction, which is a due process right.<sup>153</sup> Although the court mentioned that the rights were comparable, *Hendrix* did not provide any authority or reasoning as to *why* the Seventh

145. See, e.g., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832–33 (4th Cir. 1986) (citing *Hendrix* with little analysis of the case).

146. 304 U.S. 458 (1938).

147. 456 F.2d 123 (2d Cir. 1972); *Nat’l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977).

148. *Zerbst*, 304 U.S. at 464 (“A waiver [of right to counsel] is ordinarily an intentional relinquishment or abandonment of a known right or privilege.”).

149. *Kline*, 456 F.2d at 123. See *K.M.C. Co. v. Irving Tr. Co.*, 757 F.2d 752, 756 n.4 (6th Cir. 1985) (discussing the “significant distinction to be drawn” between pre-dispute waivers and waivers made after litigation has commenced); *Ware*, *supra* note 21, at 203 (“[A]n oral waiver during litigation [is] an inapt analogue to a jury-waiver clause found in a contract.”).

150. *Hendrix*, 565 F.2d at 258; *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

151. *Szukhent*, 375 U.S. at 312.

152. *Hendrix*, 565 F.2d at 258 n.1.

153. See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 4 FEDERAL PRACTICE AND PROCEDURE § 1074 (2002) (“The decisions of the Supreme Court make it clear that the requirement of reasonable notice must be regarded as part of the constitutional due process limitations on the jurisdiction of a state or federal court.”); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 180 (1972) (“The due process rights to notice and hearing prior to a civil judgment are subject to waiver.”).

Amendment right to a jury trial should be subject to a different standard than Fifth Amendment due process rights. As Professor Ware points out, “*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. . . . Thus, the case for overruling the *Hendrix* court’s knowing-consent requirement is strong.”<sup>154</sup>

ii. *The “Knowing and Voluntary” Standard as an Absolute Bar*

The “knowing and voluntary” standard has been subject to additional criticism. For example, critics have argued that the “knowing and voluntary” standard for contractual jury-trial waivers is often an absolute bar, since an unsophisticated party is inherently unable to make an informed decision prior to the necessity of trial.<sup>155</sup> To that effect, one author argues:

Although courts generally will not invalidate a contract based on insufficient consideration, when an unsophisticated entity enters into a contract where a right is waived prior to the occurrence of an event that gives rise to the need to exercise the right, the value of that right is indeterminable. For an individual who does not plan to use the right to a jury trial, the right may not seem valuable at all. Then a dispute between the parties arises. Suddenly the right to a jury trial becomes very valuable, yet has been waived prior to the time for exercising the right, often without consideration. The only explanation for entering these contracts is due to lack of meaningful choice, a form of coercion, or lack of knowledge, either of which should defeat enforcement of the contract.<sup>156</sup>

This argument is bolstered by certain courts’ near-outright refusal to uphold jury-trial waivers. For example, the court in *Luis Acosta Inc. v. Citibank*<sup>157</sup> refused to enforce a jury-trial waiver even after recognizing that the opponent of the waiver was a “shrewd and experienced businessman.” The court went on to state that the proponent “provided no evidence whatsoever as to the parties’ specific negotiations over the waiver, the conspicuousness of the provision, nor the parties’ relative bargaining power.”<sup>158</sup> This searching application of the “knowing and voluntary” standard shows that courts can find contractual jury-trial waivers unenforceable in any setting, even when sophisticated parties are involved.

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154. Ware, *supra* note 21, at 203 (arguing generally that the law of contractual jury-trial waivers should be treated similarly to arbitration clauses).

155. E.g., Wayne Klomp, Note, *Harmonizing the Law in Waiver of Fundamental Rights: Jury Waiver Provisions in Contracts*, 6 NEV. L. J. 545 (2005).

156. *Id.* at 567.

157. 920 F. Supp. 15 (D.P.R. 1996).

158. *Id.* at 18–19.

Further, representation by counsel in some cases can be a dispositive factor in whether a court chooses to enforce a jury-trial waiver.<sup>159</sup> Courts regularly inquire as to whether the party opposing the waiver was represented by counsel at the time the agreement containing the waiver was signed.<sup>160</sup> In the context of an employment contract or employee severance agreement, this factor can be an absolute bar to the waiver's validity. Large corporations and other sophisticated parties will often retain attorneys to review contracts before signing.<sup>161</sup> Yet a new hire, or recently fired employee will not usually retain an attorney to review a contract. So, when courts look to whether a party opposing a jury-trial waiver is represented by counsel, they are implying that an unsophisticated party is entirely unable to, on their own, waive a constitutional right. Thus, the "knowing and voluntary" standard often bars enforcement of contractual jury-trial waivers against unrepresented parties. Although application of the "knowing and voluntary" standard often protects the Seventh Amendment rights of parties, there is nevertheless a strong policy argument against the use of this standard, which will be discussed later in this Article.

### *iii. Arbitration and the Seventh Amendment*

As discussed in Part I(d) of this Article, companies have signaled an increasing reliance on jury-trial waivers. The purpose of the FAA was to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."<sup>162</sup> If a court wishes to treat employment contracts and other more general contracts equitably, then reliance on an arbitration-clause standard is misplaced.

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159. See *Green v. Wyndham Vacation Resorts, Inc.*, No. 6:08-cv-01997-ORL-22DAB, 2010 U.S. Dist. LEXIS 145652, at \*14 (M.D. Fla. July 12, 2010) (stating how an employee's right to seek legal counsel before signing a contract can show a lack of disparity in bargaining power); *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1106 (N.D. Ill. 1994) (declining to enforce a jury-trial waiver because counsel was unable to review the contract before the party signed it); *Conn. Nat'l Bank v. Smith*, 826 F. Supp. 57, 60 (D.R.I. 1993) (enforcing a jury-trial waiver when parties were represented by counsel, a factor "which courts have considered important in deciding to enforce jury waiver clauses").

160. *Allyn v. W. United Life Assur. Co.*, 347 F. Supp. 2d 1246, 1252 (M.D. Fla. 2004) (noting that courts often consider whether a party was represented by counsel when determining whether a jury-trial waiver was knowing and voluntary).

161. See, e.g., *Bear, Stearns Funding, Inc. v. Interface Grp.-Nev., Inc.*, 2007 U.S. Dist. LEXIS 82557, at \*3-4 (S.D.N.Y. Nov. 7, 2007) (discussing a jury-trial waiver between corporate parties, and their use of a "squad" of attorneys to write and review the waiver).

162. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

Furthermore, Congress has considered amending the FAA to limit its applicability. On April 29, 2015, the House and Senate simultaneously introduced the “Arbitration Fairness Act of 2015.”<sup>163</sup> The proposed bill states that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”<sup>164</sup> Similar bills were introduced in 2011, 2009, and 2007.<sup>165</sup> If the legislation passes employers will no longer be able to rely on arbitration clauses, but rather, will have to use jury-trial waivers to guard against the risks of a trial by jury. Thus, the *IFC* standard of interpreting contractual jury-trial waivers under the FAA would no longer be applicable in the contexts mentioned in the proposed legislation.

The underlying procedural differences between contractual jury-trial waivers and arbitration clauses make interpreting the clauses under the same standard problematic. If a jury-trial waiver is enforced, the ensuing bench trial is still subject to appellate review and oversight.<sup>166</sup> Yet if an arbitration clause is upheld, the arbitration proceeding is shrouded in secrecy and is not subject to same level of judicial scrutiny.<sup>167</sup> Because arbitration clauses require parties to avoid a trial court altogether, they also limit the parties’ avenues for remedying an unfair result.<sup>168</sup>

Additionally, *IFC*’s analogy to arbitration clauses is based on a false equivalence with the Seventh Amendment. If a binding arbitration clause is held to be valid, the parties are no longer entitled to an Article III forum *at all*.<sup>169</sup> Thus, arbitration clauses cannot be an apt analogy to a waiver of the Seventh Amendment, because while arbitration clauses waive the right to an Article III forum altogether, a jury-trial waiver merely affects the identity of the trier of fact. Furthermore, in non-Article III forums, the Seventh Amendment “simply does not ap-

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163. S. 1133, 114th Cong. § 1 (2015); H.R. 2087, 114th Cong. § 1 (2015).

164. *Id.*

165. S. 987, 112th Cong. § 1 (2011); H.R. 1020, 111th Cong. § 4 (2009); S. 1782, 110th Cong. § 4 (2007).

166. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132 (Tex. 2004). The court opined: [I]f parties are willing to agree to a non-jury trial, we think it preferable to enforce that agreement rather than leave them with arbitration as their only enforceable option. By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal.

167. *Id.*

168. *Id.*

169. *See Geldermann, Inc. v. CFTC*, 836 F.2d 310, 323–24 (7th Cir. 1987) (“Because we hold that Geldermann is not entitled to an Article III forum, the Seventh Amendment is not implicated.”).

ply.”<sup>170</sup> It therefore seems dubious that a proceeding not constrained by the Seventh Amendment, could in fact be instructive as to how waiver of that method should be adjudicated in an Article III forum. Only a right that stems from Article III of the Constitution can serve as an accurate analogy for jury-trial waivers. To enforce jury-trial waivers through a standard created to govern non-Article III forums, would logically result in the Seventh Amendment being ignored in its entirety. For these reasons, one must judge arbitration proceedings, and the enforcement of clauses which facilitate their use, by a different standard than waivers of Seventh Amendment rights. Given these criticisms, the need for a fair, efficient, and uniform solution arises. Ergo, this Article proposes that courts deciding whether to enforce jury-trial waivers should eschew both the *Hendrix* and *IFC* standards, instead treating jury-trial waivers as though they were forum-selection clauses.

### B. The “Forum Selection” Standard

Arbitration clauses not only waive a party’s right to a *jury* trial, they waive a party’s right to a *trial*. The underlying issues must then be adjudicated in a non-Article III forum. Conversely, a valid jury-trial waiver allows the case be tried in court, subject to Due Process and the Seventh Amendment. When the waiver at issue is a party’s Seventh Amendment rights, a more apt comparison would be to the forum-selection clause, rather than an arbitration agreement.

Forum-selection clauses, like arbitration agreements and jury-trial waivers, constrain parties’ rights in future disputes. Forum-selection clauses also implicate waivers of parties’ constitutional rights.<sup>171</sup> Consider, for example, a forum-selection clause that provides the following:

All disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in India, to the exclusion of the Courts of any other country.

When the available forum is constrained to a foreign country, there may not be a right to a jury trial.<sup>172</sup> Despite this disconnect, American

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170. *Id.*

171. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (noting that the enforcement of freely negotiated forum-selection provisions “does not offend due process” when the provisions are neither unreasonable nor unjust); *infra* note 173 and accompanying text (explaining how forum-selection clauses can be a waiver of Seventh Amendment rights).

172. See, e.g., *K.M. Nanavati vs. State of Maharashtra*, 1962 AIR 605 1962 SCR Supl. (1) 567, India (disallowing a jury trial, citing a doubt that common people could come to independent and objective legal determination).

courts have readily enforced these types of forum-selection clauses, which effectively waive those parties' Seventh Amendment right to a jury trial.<sup>173</sup>

In addition, the language of Supreme Court decisions regarding forum-selection clauses is readily adaptable to jury-trial waivers. In fact, these decisions may implicitly allow a more lenient standard for enforcing jury-trial waivers. In contrast, the Supreme Court never hesitates to distinguish arbitration agreements from other form contracts. In *Gilmer*, the Court stated that “[a]lthough all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>174</sup> Here, the Court explicitly referenced the manner in which arbitration agreements are to be governed, as intended by Congress in the FAA.<sup>175</sup>

There is no similar language in forum-selection cases. The principal case addressing forum-selection clauses is *Carnival Cruise Lines, Inc. v. Shute*.<sup>176</sup> The Court required the plaintiffs, who were from Washington state, to sue in Florida due to a forum-selection clause within a form contract.<sup>177</sup> The Court then proceeded to enforce the contract using standards of consent from contract law, with no mention of the “knowing and voluntary” standard.

The Court's rationale in *Carnival Cruises* shows that jury-trial waivers should be construed similar to forum-selection clauses. The Court listed three reasons as to why the form contract at issue was permissible:

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173. See, e.g., *Interamerican Trade Corp. v. Companhia Fabricadora De Pecas*, 973 F.2d 487 (6th Cir. 1992) (where the forum in question was Brazil); *Paper Express, Ltd. v. Pfankuch Maschinen*, 972 F.2d 753 (7th Cir. 1992) (where the forum in question was Germany); *Spradlin v. Lear Siegler Mgt. Servs. Co., Inc.*, 926 F.2d 865 (9th Cir. 1991) (where the forum in question was Saudi Arabia).

174. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

175. *Id.* at 24 (“[The FAA’s] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts”).

176. 499 U.S. 585 (1991). Although *Carnival Cruise* has been preempted by Congress in the context of passenger cruise tickets, this does not affect the Court's reasoning in the case, and this Article's discussion of the case in the context of constitutional waivers. 46 U.S.C. app. § 183c(a)(2) (2000).

177. *Carnival Cruise*, 499 U.S. at 587–88. Note that *Carnival Cruises* was an admiralty case, and no Seventh Amendment right to a jury trial has been established in admiralty. See *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847) (holding that the Seventh Amendment does not give a right to a jury trial in admiralty cases).

First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.<sup>178</sup>

In the context of a jury-trial waiver within an employment contract, the Court's justifications are equally relevant. An employer has a special interest in ensuring that disputes are adjudicated through a bench trial. Further, a jury-trial waiver similarly contains the salutary effect of "sparing litigants the time and expense of pretrial motions . . . and conserving judicial resources that otherwise would be devoted" to deciding issues of who will act as fact-finder.<sup>179</sup> Finally, if an employer is forced to try a case before a jury, it must incur increased risk and expense. It stands to reason then, that employees who agree to contracts containing a jury-trial waiver may benefit in the form of increased salary or benefits reflecting the savings that the employer enjoys by limiting the method by which it may be sued.

Enforcing jury-trial waivers similarly to forum-selection clauses may result in a party waiving its Seventh Amendment rights through a form contract. Yet, the Supreme Court has allowed a waiver of constitutional rights in other form contracts. One example of this is in *Mitchell v. W.T. Grant Co.*<sup>180</sup> *Mitchell* was a property deprivation case, involving a debtor's default on a conditional sales contract.<sup>181</sup> State statute allowed the creditor to obtain a writ instructing the sheriff or constable to take possession of the goods from the debtor.<sup>182</sup> The Court rejected *Mitchell's* argument that due process entitled him to a hearing before the goods were seized.<sup>183</sup> The Court treated the contract granting a lien as a waiver of the due process right to a pre-deprivation hearing, without regard for whether the waiver was

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178. *Id.* at 593–94 (internal citations omitted).

179. *Id.* at 593–94 (internal citations omitted).

180. 416 U.S. 600 (1974).

181. *Id.* at 601–02.

182. *Id.* at 621–23.

183. *Id.* at 607.

“knowing and voluntary.” The *Mitchell* Court stated that but for the contract granting a lien, the due process result would have been different. *Mitchell*, which remains good law,<sup>184</sup> involved a party’s due process rights. Jury-trial waivers involve the Seventh Amendment right to a jury trial. But courts citing *Hendrix* have so far been unable to provide any authority for why the standard for a constitutional waiver should differ based on the amendment it arises out of.

In effect, federal courts and Congress—the authors of the FAA—have created disparity between the enforcement of different constitutional waivers. As this Article has noted, arbitration clauses waive the right to a jury trial but are favored in courts due to the FAA.<sup>185</sup> Jury-trial waivers under *Hendrix* are subject to a “knowing and voluntary” standard, despite the standard’s creation from a lack of authority and an inaccurate application of precedent.<sup>186</sup> Yet forum-selection clauses are both favored in courts and free from the constraints of a governing statute.<sup>187</sup> Accordingly, courts should apply the standard the Supreme Court has created for the enforcement of forum-selection clauses to jury-trial waivers.

### C. Practical Implementation of the “Forum Selection” Standard

Adopting the “forum selection” standard for enforcing jury-trial waivers would be straightforward. First, the Supreme Court in *The Bremen* held that forum-selection clauses are prima facie valid and should not be set aside unless the party challenging enforcement can show that it is “unreasonable” under the circumstances.<sup>188</sup> Similarly, a jury-trial waiver agreement should be prima facie valid and subject to the same “reasonableness” standard.

Second, in determining whether a jury-trial waiver is “unreasonable” a court using the “forum selection” standard should use a test

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184. See, e.g., *Quinata v. Nishimura*, 2013 U.S. Dist. LEXIS 121191, at \*14 (D. Haw. Aug. 26, 2013); *Blackhorse Oilfield Specialty & Supply, LLC v. LK Trading, LLC*, 2014 U.S. Dist. LEXIS 71376, at \*13 (S.D. Tex. May 23, 2014) (citing *Mitchell*).

185. *Supra* Part I.B.

186. *Supra* Part III.A.

187. *Supra* Part I.C.

188. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1971). The court stated:

[O]ther courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view . . . is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be “unreasonable” under the circumstances. We believe this is the correct doctrine to be followed.

*Id.*

inspired by *The Bremen*.<sup>189</sup> Under this test, a jury-trial waiver would be unreasonable if (1) its inclusion within the underlying contract was the result of fraud, undue influence, or overweening bargaining power<sup>190</sup> or (2) enforcement of the clause would contravene a strong public policy.<sup>191</sup>

Third, under the proposed “forum selection” standard parties would be limited in how they can oppose a jury-trial waiver. However, they are no more limited than a party opposing a forum-selection clause within a form contract. Given the preference for arbitration clauses within federal courts, parties opposing a jury-trial waiver under this standard will have a higher probability of invalidating the clause than under the *IFC* standard.<sup>192</sup>

“Agreement to a bench trial cannot logically be treated less favorably than agreement to confess judgment, or arbitrate, or litigate in a forum that will not use a jury.”<sup>193</sup> It is for this reason that jury-trial waivers are best governed by the standards used in forum-selection clauses. The “forum selection” standard not only side-steps the criticisms in *Hendrix*, but it is also free from the criticisms of an arbitration-clause standard, and is thus correct where the *IFC* court’s reasoning fails.

Uniformity in jury-trial waiver standards is necessary for judicial efficiency. Many critics recognize that a lenient standard has the potential for greater judicial efficiency. These critics, however, argue the *Hendrix* standard is desirable because it preserves Seventh Amendment rights and constrains the power of federal judges.<sup>194</sup> While addressing the reasoning behind the *IFC* court’s decision, one critic argued:

When courts make [the analogy between jury trial waivers and arbitration agreements], they disregard the judge’s relationship to the jury and the purposes of the Seventh Amendment. The FAA

189. The test given here is inspired by the Court of Appeals for the Ninth Circuit, which outlined the requirements for enforcement given in *The Bremen*. *Argueta v. Banco Mexicano*, S.A., 87 F.3d 320, 325 (9th Cir. 1996).

190. *The Bremen*, 407 U.S. at 12–13 (“There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect.”).

191. *Id.* at 15 (“A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy . . . whether declared by statute or by judicial decision.”).

192. See *Southland Corp. v. Keating*, 465 U.S. 1, 2 (1984) (explaining how arbitration clauses are favored in federal court).

193. *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 994 (7th Cir. 2008).

194. 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, 463–64 (1997).

removes cases from federal court completely, decreasing the power of federal judges. In contrast, enforcement of contractual jury waivers increases the power of federal judges because they can decide both issues of law and issues of fact. Thus, analogy to the FAA is inapposite because arbitration decreases judges' power, which is not contrary to the purposes of the Seventh Amendment, whereas contractual jury waivers increase judges' power, which is contrary to the purposes of the Seventh Amendment. Because judges are independent and have few checks upon their daily powers, they should not be allowed to remove one of those few checks—the jury—without strict requirements.<sup>195</sup>

This criticism is an ineffective argument against the “forum selection” standard. First, the argument does not address forum-selection clauses, which allow a judge to decide issues of both law and fact, the result the critic finds undesirable in the jury-trial waiver context.<sup>196</sup> Second, while providing a more lenient standard for jury-trial waivers may remove the jury from a case more often, it is inaccurate to state that judges interpreting this issue have few checks on their power. Judicial review of arbitration is extremely limited,<sup>197</sup> but jury-trial waiver agreements are ripe for appeal.<sup>198</sup> In addition, while courts have historically been extremely hesitant to overturn jury fact-finding,<sup>199</sup> appellate courts readily review issues of fact in a bench trial for clear error.<sup>200</sup>

Further, the “forum selection” standard will bring uniformity and efficiency to the law of jury-trial waivers. When courts, employers, and employees do not know the proper standard by which to treat these waivers, the following generally takes place. After the parties introduce evidence of the jury-trial waiver and follow the proper procedure for objecting, the court will require briefs on the issue.<sup>201</sup> The

195. *Id.* at 464.

196. *See supra* notes 177–80 and accompanying text (illustrating how a forum-selection clause can be a waiver of constitutional rights).

197. *See LeRoy, supra* note 28, at 777–80 (appellate review of arbitration is limited to the award of damages and not to misapplication of the facts or law).

198. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132 (Tex. 2004) (explaining how a bench trial retains the right to appeal, whereas arbitration proceedings do not).

199. *See, e.g., Tanner v. United States*, 483 U.S. 107, 127 (1987). In *Tanner*, the Supreme Court declined to overturn a jury verdict, even when the jury had been consuming copious amounts of marijuana, cocaine, and alcohol during the trial and deliberations. The Court notes that “long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry.” *Id.*

200. FED. R. CIV. P. 52(a) (“In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. . . . Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous.”).

201. *See supra* notes 3–5 and accompanying text (outlining the typical procedure for disputing the validity of a jury-trial waiver).

issue may then even necessitate argument before the court. The court will then be forced to wade through a sea of inconsistent and confusing opinions. Far too much time and money is spent on deciding this issue and efficiency is lost, which was one of the main reasons the parties opted to bypass a jury trial.

Uniformity in the “forum selection” standard ensures that all contracting parties—whether the agreement in question is between employer and employee, business and customer, or between two sophisticated corporations—are treated equitably. If the *Hendrix* standard for governing jury-trial waivers continues to be applied in federal courts, then a weak, “unsophisticated” consumer is incapable of alienating his right to adjudication. The consumer may enter into a contract that contains a jury-trial waiver, but in courts that apply the *Hendrix* standard it will be impossible to enforce that waiver.<sup>202</sup> This standard is inconsistent with Federal Rule 38, which allows the same party to waive their right to a jury trial by omission or inaction.<sup>203</sup> If Rule 38 allows a party to waive that right inadvertently—for no court argues that Rule 38 is unconstitutional<sup>204</sup>—it does not make sense for the standard for waiver before Rule 38 applies, to be more stringent than Rule 38 itself.

This uniformity and efficiency will ensure the purpose of jury-trial waivers is met: economical and predictable dispute resolution. This is preferable for both parties to a contract. The “forum-selection” standard of enforcing jury-trial waivers is not only simple for courts to follow, but easy for parties to interpret and predict results.

#### CONCLUSION

When judges are faced with reviewing a contractual jury-trial waiver, the issue is never straightforward. Even when a district court has the guidance of its appellate court, interpretation of the current standards can lead to confusion and misapplication of law. This leads to inconsistency and variation between courts, which in turn causes the litigating parties additional headache and expense. Therefore, federal courts need a clear, concise, and efficient standard to judge the validity of jury-trial waivers.

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202. See *supra* notes 151–54 and accompanying text (in support of the argument that the *Hendrix* standard presents an absolute bar to a party’s ability to waive their right to a jury trial).

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

204. *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 993 (7th Cir. 2008).

The benefits of the “forum selection” standard are clear. The “forum selection” standard creates an avenue for easy enforcement of jury-trial waivers—a result that arguably favors employers in potential disputes. Nevertheless, uniformity and efficiency undoubtedly benefit both parties. The *Hendrix* standard stems from an inconsistent application of prior law and can limit a party’s ability to contract. Meanwhile, the *IFC* standard is limited by statute, the FAA, and cannot be properly analogized to an issue arising under the Constitution. The “forum selection” standard is efficient, fair, sufficiently protective of the Seventh Amendment, and unifies the inconsistency between different civil waivers of constitutional rights.

After all, contractual jury-trial waivers are simple in nature. Although the interpretation of such waivers is a long and complicated process, the waivers themselves serve only one purpose: to ensure that disputes between parties are litigated fairly, efficiently, and without unnecessary expense.

The public views arbitration as a forum that results in decisionmaking superior to that of a jury.<sup>205</sup> In fact, over eighty percent of respondents in one survey stated that arbitrators are equally or more fair than juries.<sup>206</sup> Unlike arbitrators, federal judges are reviewed for their competence, integrity, and qualifications before assuming the role. In addition, these judges are subject to appellate review and risk being overturned on any wrong decision.<sup>207</sup> When an employment dispute is litigated, a bench trial may be the *ideal* method of adjudication. As Justice O’Connor asserted, “[juries] are ordinary citizens whose decisions can be shaped by influences impermissible in our system of justice. In fact, they are much more susceptible to such influence than judges. Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking.”<sup>208</sup>

The “forum-selection” standard for interpreting jury-trial waivers can be adopted by federal courts seeking the best of both the *Hendrix*

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205. See Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 458 (1988) (evaluating the effectiveness and fairness of arbitration proceedings).

206. *Id.* Thomas Stipanowich reports:

On the other hand, arbitrators compared favorably with juries and judges in perceived decisionmaking capability. Almost 40% of those responding rated arbitrators as generally fairer than juries, and another 43% believed they were equally as fair. Twenty-four percent ranked arbitration below bench trial in terms of fairness, but an equal number ranked it higher. The remaining half of the group rated the two equally fair.

*Id.*

207. LeRoy, *supra* note 28, at 777–80.

208. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 474 (1993) (O’Connor, J., dissenting).

and *IFC* standards. Employers will, by any means necessary, continue to avoid the jury trial. By allowing the more lenient standard of interpreting jury-trial waivers, a court ensures that employers and employees are both allowed access to the judiciary, without overly limiting the procedure within.