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

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ASSIGNING THE BURDEN OF PROOF IN CONTRACTUAL
JURY WAIVER CHALLENGES: HOW VALUABLE IS YOUR
RIGHT TO A JURY TRIAL?

BY
CHESTER S. CHUANG*

I.	INTRODUCTION	205
II.	PRE-DISPUTE CONTRACTUAL JURY WAIVERS	208
	A. <i>The Problem with Juries</i>	209
	B. <i>The Problem with Arbitration</i>	209
	C. <i>Are Pre-Dispute Jury Waivers The Solution?</i>	211
III.	JUDICIAL TREATMENT OF PRE-DISPUTE JURY WAIVERS.....	212
	A. <i>Knowing Consent Requirement</i>	213
	B. <i>Allocation of the Burden of Proof</i>	215
	C. <i>Review of Case Law Reveals Inconsistent Treatment of Waivers</i>	217
IV.	ALLOCATION THE BURDEN OF PROOF.....	222
	A. <i>What is Actually Being Waived?</i>	223
	B. <i>The Coercive Employer-Employee Relationship</i>	227
	C. <i>Assigning the Burden of Proof</i>	230
V.	CONCLUSION.....	231

I. INTRODUCTION

Consider the following two hypotheticals:

Elizabeth, an eighteen-year-old high school graduate, applies for a cashier position at a prominent national retailer. Following a successful interview, she is offered the position and presented with an employment contract to sign on a take-it-or-leave-it basis. The employment agreement includes a waiver of Elizabeth's right to a

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jury trial. Elizabeth signs the agreement. Elizabeth works for the retailer full-time for five years and in that time is promoted to shift supervisor. She notices, however, that all male employees with similar performance reviews and seniority have been promoted to store managers. Elizabeth strongly believes that she has been denied opportunities for promotion on the basis of her gender and decides to sue her employer. Elizabeth takes her case to various plaintiff's attorneys but none will take it for fear that her jury trial waiver will result in a *de minimis* recovery. Undaunted, Elizabeth files a lawsuit against her employer *in pro per*. Throughout the litigation, she makes critical mistakes due to her legal inexperience. Finally, her employer offers her \$5,000.00 to settle the matter. Elizabeth accepts the settlement.

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

As exemplified by the foregoing hypotheticals, a jury trial waiver can significantly affect the perceived value of a plaintiff's case. Indeed, in 2004, the U.S. Department of Justice found that the amount awarded to victorious plaintiffs varied significantly depending on whether the case was decided by a jury or a judge.¹ The difference

1. THOMAS H. COHEN & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE

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

But while jury waivers can be an attractive alternative to arbitration on the one hand and jury trials on the other, judicial treatment of such waivers has been quite varied.⁶ Two state supreme courts, California and Georgia, have ruled that pre-dispute contractual jury waivers are not enforceable.⁷ Those jurisdictions that permit such waivers use a wide array of “safeguards not typical of

STATISTICS BULLETIN: CIVIL JUSTICE SURVEY OF STATE COURTS, 2001: CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, AT 5-6 (Apr. 2004), available at <<http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf>>.

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

3. See, e.g., Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, 80 CHI.-KENT L. REV. 933, 934 (2005); Michael H. LeRoy, *Jury Revival or Jury Reviled? When Employees are Compelled to Waiver Jury Trials*, 7 U. PA. J. LAB. & EMP. L. 767, 768-70 (2005).

4. See *infra*, Part II.B.

5. See, e.g., Harold M. Brody & Anthony J. Oncidi, *Careful What You Wish For: Is Arbitration the Employer's Panacea? Perhaps There is a Better Alternative*, 9 HR ADVISOR: LEGAL & PRACTICAL GUIDANCE, Nov./Dec. 2003, at 7 (noting that jury trial waivers, as opposed to arbitration, are a “better way to shield employers from the risk and expense associated with jury trials”); Samuel Estreicher & Rene M. Johnson, *Contractual Jury Trial Waivers in Federal Employment Litigation*, N.Y.L.J., May 2, 2003, at 3 (noting that “practitioners are increasingly considering contractual jury trial waivers”); LaRocca, *supra* note 3, at 954-59 (arguing that jury trial waivers allow employers and employees to avoid the disadvantages of arbitration); Chad Shultz, *The Jury's Still Out – Way Out: Subtracting the Jury From the Equation Decreases Uncertainty in Employment Cases*, 50 HR MAG., Jan. 2005, at 97 (suggesting that employers use jury waivers in lieu of arbitration).

6. See *infra*, Part III.B & C.

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

commercial law”⁸ to protect the constitutional right to jury trial. The multiple safeguards used by courts, and the different ways of applying them led the California Supreme Court to note “the difficulties experienced in other jurisdictions [with respect to pre-dispute jury waivers], where disagreements persist concerning such matters as allocation of the burden of proof when a party resists enforcement of a contractual waiver of jury trial.”⁹ These disagreements must be settled before such waivers can be used appropriately and effectively.

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

Part II of this Article assesses the use of pre-dispute jury waivers in the employment context and explains their appeal. Part III analyzes the various ways that federal courts have treated pre-dispute jury waivers and notes specific inconsistencies in the treatment of such waivers in several recent federal employment cases. Part IV argues that in the employment context, public policy considerations, and convenience and fairness concerns, all call for assigning the burden of proof to the party seeking enforcement of the waiver.

II. PRE-DISPUTE CONTRACTUAL JURY WAIVERS

The Seventh Amendment to the U.S. Constitution establishes a constitutional right to a jury trial in legal actions in federal court, including diversity jurisdiction cases.¹⁰ In addition, federal employment law statutes such as Title VII¹¹ and the Age Discrimination in Employment Act (ADEA)¹² grant jury trial rights.¹³

8. *Grafton Partners*, 116 P.3d at 491 & n.12. For a more extensive discussion of the safeguards used by courts, see *infra*, note 57 & accompanying text.

9. *Grafton Partners*, 116 P.3d at 492; see also Shultz, *supra* note 5 (“It is safe to assume that lawyers who represent employees will challenge the validity of jury waiver agreements.”); Brody & Oncidi, *supra* note 5, at 7 (noting that there is “little guidance” regarding “whether, when and how an employer may implement a jury trial waiver program”). For a more extensive discussion of the disagreements between various jurisdictions, see *infra*, Part III.B.

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

11. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

12. U.S.C. §§ 621-634 (2000).

13. See 42 U.S.C. § 1981a(a) (2006) (amending Title VII to permit jury trials); 29 U.S.C. § 626(c)(2) (2000) (granting jury trial rights under the ADEA).

From a risk management perspective, however, many employers find a jury's legendary unpredictability to be unacceptable.¹⁴

A. *The Problem with Juries*

Most employers believe that juries are more likely than judges to find against wealthy or corporate defendants and more likely than judges to award large damages to victorious plaintiffs.¹⁵ Furthermore, according to prevailing wisdom, juries generally "favor the little guy against the big one, the simpler case rather than the one more difficult to understand, local interests rather than those situated farther away, emotional appeals to right versus wrong rather than strict application of the law and more attractive witnesses rather than those lacking a cordial appearance."¹⁶ These concerns have motivated many employers to adopt alternative dispute resolution mechanisms to handle employment disputes.

A substantial number of employers currently use arbitration.¹⁷ By submitting disputes to an arbitrator rather than to a jury, both employers and employees expect reduced costs, faster resolutions, greater privacy and increased predictability.¹⁸ But recently, numerous concerns have been raised regarding the continued use of arbitrators in employment disputes.

B. *The Problem with Arbitration*

Critics of pre-dispute mandatory arbitration agreements argue that by providing a private, less costly way for employees to bring

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

15. See Jerry Custis, LITIGATION MANAGEMENT HANDBOOK, § 8:32 (2004).

16. *Id.*

17. See Brody & Oncidi, *supra* note 5, at 7 (noting that a "substantial number" of employers "employing millions of employees" have adopted arbitration); LaRocca, *supra* note 3, at 933-34 (writing that in 1997, 19 percent of private sector employers were using arbitration and that in 2001, six million employees were covered by employment arbitration plans administered by the American Arbitration Association); Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Pre-dispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 252 (2003) ("The substitution of mandatory arbitration for discrimination lawsuits is the most significant employment law development since the early 1990s.").

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

discrimination claims, such agreements expose employers to a greater number of discrimination claims.¹⁹ Employers are also finding that arbitration does not offer a significant improvement over litigation in terms of time and costs saved. Experience has shown that resolution times for disputes that are arbitrated are not significantly faster than disputes that are litigated in court.²⁰ Moreover, arbitrators typically do not grant summary judgment, further prolonging the case and increasing costs.²¹ Arbitration costs also include fees for preparing and conducting the arbitration, and deciding discovery disputes and law and motion proceedings – all costs which are publicly funded in a court proceeding.²² This is a particular burden on employers as they are often saddled with the entire cost of the arbitration.²³

Arbitrating a dispute also requires both employers and employees to accept procedures that may differ from those provided by statute, as well as limited judicial recourse in the event of an adverse outcome.²⁴ There is also continuing debate in the courts, as well as among commentators, regarding the judicial enforceability of mandatory arbitration agreements.²⁵ All of these problems with

19. See *id.* at 938-42; Shultz, *supra* note 5 (writing that arbitration may encourage claims).

20. See Brody & Oncidi, *supra* note 5, at 7.

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

22. See LaRocca, *supra* note 3, at 939.

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

24. See LaRocca, *supra* note 3, at 940; LeRoy, *supra* note 3, at 777-80 (noting that the use of arbitrators as adjudicators of employment disputes is now questioned due to, *inter alia*, high damages awards and extremely deferential standard of judicial review).

25. See Leroy & Feuille, *supra* note 17, at 313-26 (noting “surprising evidence of judicial resistance to these mandatory [arbitration] arrangements.”). Much has been written regarding how mandatory arbitration agreements should be enforced, if at all. See generally Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 676 (2001) (arguing that the Seventh Amendment right to a jury trial should limit the ability of parties to impose binding arbitration). Some argue that a knowing and voluntary standard of consent should be applied to pre-dispute mandatory arbitration agreements. See *id.*; Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1208 (2002); but see Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 167, 168 (arguing that the Federal Arbitration Act cannot “plausibly be interpreted to require knowing consent or any other standards of consent except those used by contract law”). Still others argue that it is inequitable to enforce executory agreements to arbitrate between employers and employees. See generally, Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. Rev. 449, 450-54 (1996).

arbitration have spurred many employers to reconsider the use of arbitration to resolve employment disputes.²⁶

C. Are Pre-Dispute Jury Waivers The Solution?

“EACH OF THE PARTIES HERETO IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT.”²⁷

Pre-dispute contractual jury waivers such as the one quoted above, are increasingly being used by employers as an alternative way to mitigate risk.²⁸ Such waivers offer some of the benefits of both arbitration and jury trials. Like a jury trial, a bench trial allows parties to take full advantage of our court system because it provides litigants with procedural and evidentiary protections that may not otherwise be available in arbitration.²⁹ Judges are generally more receptive to dispositive motions than are arbitrators.³⁰ Court proceedings also permit greater post-judgment judicial review than is available following an arbitration award.³¹

Much like arbitration, bench trials offer potentially significant time and cost savings when compared to jury trials. This is because bench trials are generally concluded much faster than jury trials.³² In addition, in a bench trial, parties are spared the costs of selecting a jury, tailoring the case to a jury, and settling jury instructions.³³

26. See Ryan Griffiths, *Jury Waiver Agreements Revisited*, THOMPSON COE LAB. & EMP. NEWS, Spring 2005, at 2, available at <<http://www.thompsoncoe.com/Portals/0/LEN-06-02.pdf>> (law firm newsletter noting more employers are using jury waivers in their employment agreements).

27. This pre-dispute jury waiver is reproduced from an actual employment agreement that was litigated in federal court. *Morris v. McFarland Clinic P.C.*, No. Civ. 4:03-CV-30439, 2004 WL 306110, at *1 (S.D. Iowa Jan. 29, 2004) (emphasis original).

28. See Blumberg & Weindling, *supra* note 14 (stating that many employers use pre dispute jury waivers to avoid “the great uncertainty which comes with jury trial, while both avoiding the cost of arbitration and retaining the right to appeal”); LeRoy, *supra* note 3, at 769 (noting some employers are discarding arbitration in favor of jury waivers); see also Shultz, *supra* note 5 (writing that a jury waiver diminishes the value of a plaintiff’s case).

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

30. See Brody & Oncidi, *supra* note 5, at 7.

31. See Estreicher & Johnson, *supra* note 5, at 1.

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

33. See Custis, *supra* note 15, at § 8:32.

Finally, submitting a dispute to a judge rather than a jury minimizes employers' fears of excessive jury awards.³⁴

In certain situations, a pre-dispute contractual jury waiver can offer clear advantages to the employer,³⁵ and serve as "an attractive middle ground between jury trials, on the one hand, and arbitration, on the other."³⁶ But as use of such waivers has increased, serious questions have arisen regarding their treatment in the courts.³⁷ Part III of this Article examines the disparate ways federal courts, and in particular federal courts adjudicating employment disputes,³⁸ have analyzed pre-dispute contractual jury waivers.

III. JUDICIAL TREATMENT OF PRE-DISPUTE JURY WAIVERS

The right to a trial by jury in a civil lawsuit may be waived by a prior written agreement.³⁹ Federal courts examining pre-dispute jury

34. See *Grafton Partners L.P. v. Super. Ct.*, 116 P.3d 479, 493 (Cal. 2005) (Chin, J. concurring).

35. If the choice is between a bench trial and arbitration, the additional procedural and evidentiary protections afforded by a bench trial can also be beneficial to the employee. If the choice is between a bench trial and a jury trial, however, few employees are likely to choose the bench trial because from the employee's perspective, the cost and time savings afforded by a bench trial are minor considerations, since most cases are taken on a contingency basis. See David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 89 (1999) (noting that few employee-plaintiffs can afford attorneys and most retain them on a contingency basis). Moreover, the potential cost savings must be weighed against the perception that juries are more likely than judges to find for employee-plaintiffs. See *supra* Part II.A.

36. *Grafton Partners v. Super. Ct.*, 9 Cal. Rptr. 3d 511, 519 n.10 (Cal. App. 2004), *depublished by*, 88 P.3d 204 (Cal. 2004), *aff'd and superseded by*, 116 P.3d 479 (Cal. 2005) ("Agreements to resolve future disputes by court trial may alleviate fears of excessive jury awards while providing greater procedural protections than arbitration in many respects, including discovery, securing an impartial factfinder, and appeal, among others. It is noteworthy that the reduction of such rights in the arbitral forum, as well as the unique costs imposed by arbitration, have troubled California courts.").

37. See *infra* Part III.

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

39. See, e.g., *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) ("Agreements waiving the right to trial by jury are neither illegal nor contrary to public policy."); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985) ("It is clear that the

waivers have overwhelmingly applied the knowing and voluntary consent standard to such waivers.⁴⁰ But critically, the courts have not agreed whether the party seeking to enforce or the party seeking to avoid the waiver should bear the burden of proof that the waiver was entered into knowingly and voluntarily.⁴¹

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

A. Knowing Consent Requirement

Prior to the 1970s, most courts examined contractual jury waivers using contract law standards of consent.⁴² As stated by Professor Stephen J. Ware:

Under contract law's objective standards of consent, signing (or otherwise manifesting assent to) such a document is, with few exceptions, consent to the terms on the document. The signature's "blanket assent" is good enough. Neither reading nor understanding the terms is necessary to make those terms enforceable.⁴³

In 1977, the Court of Appeals for the Second Circuit became one of the first courts to articulate a knowing-consent requirement in the context of contractual jury waivers.⁴⁴ In *National Equipment Rental, Ltd. v. Hendrix*,⁴⁵ H. Walter Hendrix, III ("Hendrix") purchased a tractor-scraper and a bulldozer from two separate dealers that he was

parties to a contract may by prior written agreement waive the right to jury trial."); *Cooperative Finance Ass'n., Inc. v. Garst*, 871 F.Supp. 1168, 1171 (N.D. Iowa 1995) (collecting cases).

40. See, e.g., *K.M.C. Co.*, 757 F.2d at 756 (citing, *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir.1977)); *Schappert v. Bedford, Freeman & Worth Publ'g Group, LLC*, No. 03 Civ. 0058 (RMB), 2004 WL 1661073, at *11 (S.D.N.Y. July 22, 2004) (citing, *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 603 (S.D.N.Y.1999)); *Morris v. McFarland Clinic, P.C.*, No. Civ. 4:03-CV-30439, 2004 WL 306110, at *1 (S.D. Iowa Jan. 29,2004) (citing, *Coop. Fin. Ass'n., Inc. v. Garst*, 871 F. Supp. 1168, 1171 (N.D. Iowa 1995)); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 313 (S.D.N.Y.1983); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F.Supp. 402, 403 (D. Colo. 1982).

41. *Grafton Partners L.P. v. Super. Ct.*, 116 P.3d 479, 491 n.12 (Cal. 2005); see *Med. Air Tech. Corp. v. Marwan Inv., Inc.*, 303 F.3d 11, 18 (1st Cir. 2002) ("The circuits are currently split on the question of which party bears the burden of proof as to whether a contractual jury trial waiver was knowing and voluntary.").

42. Ware, *supra* note 25, at 201-02; Deborah J. Matties, Note, *A Case for Judicial Self-Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court*, 65 GEO. WASH. L. REV. 431, 444-47 (1997).

43. Ware, *supra* note 25, at 171.

44. *Id.* at 202.

45. 565 F.2d 255 (2d Cir. 1977).

subsequently unable to pay for.⁴⁶ Hendrix approached National Equipment Rental, Ltd. (“NER”) for a loan to settle his accounts with the two dealers.⁴⁷ The loan agreements were characterized by NER as “equipment leases.”⁴⁸ Hendrix eventually defaulted and NER seized the tractor-scraper and the bulldozer.⁴⁹ NER sold the equipment and sued Hendrix to collect the remaining balance due on the two leases.⁵⁰ A jury found that the lease agreements were actually usurious loan agreements, void under New York State law.⁵¹ NER appealed, claiming, *inter alia*, that Hendrix was improperly granted a jury trial in the face of a contractual clause in the leases waiving such a right.⁵² Affirming the trial court’s decision to grant Hendrix’s demand for a jury trial despite having signed a contractual pre-dispute jury waiver, the Second Circuit reasoned, “It is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally. Indeed, a presumption exists against its waiver.”⁵³

46. *Id.* at 256.

47. *Id.*

48. *Id.*

49. *Id.* at 257.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 258 (citations omitted). There is considerable scholarship discussing whether the knowing consent standard established in *Hendrix* was adequately supported by precedent. First, the *Hendrix* court failed to acknowledge that it relied on a criminal case involving jury waiver (where courts have long applied higher consent standards for constitutional waivers) and a case involving an attorney’s oral waiver during a pretrial conference (as distinguished from a pre-dispute contractual waiver) for this standard. See Matties, *supra* note 42, at 446-47; Ware, *supra* note 25, at 203. Second, while the *Hendrix* court acknowledged that the Supreme Court upheld the contractual waiver of the right to personal service without employing a knowing consent standard in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), the court distinguished *Szukhent* by stating that “the right to a jury trial . . . is far more fundamental than the right to personal service, and cannot be waived absent a showing that its relinquishment is knowing and intentional.” 565 F.2d at 258 n.1. Curiously, the *Hendrix* court provided no authority or reasoning for such a statement or to explain “why the standard for civil waivers of constitutional rights should differ when the right is found in the Seventh Amendment as opposed to the Due Process Clause.” Ware, *supra* note 25, at 203; see Matties, *supra* note 42, at 447. Indeed, Professor Ware argues that “*Hendrix* was already out of step with the Supreme Court when it was decided in 1977, and it is now farther out of step with a modern Supreme Court.” Ware, *supra* note 25, at 203; but see Matties, *supra* note 42, at 447 (arguing that despite its flaws in reasoning, *Hendrix* correctly recognized the importance of the civil jury in federal court); Sternlight, *supra* note 25, at 677-80 (arguing that contractual waivers of jury trial rights are permissible only when the waiver is knowing, voluntary, and intentional and identifying *Hendrix* as a “leading case”).

Given that “lower courts have virtually uniformly held that such waivers are only valid when they meet a [knowing consent] standard,” *id.* at 679, this Article focuses on clarifying the allocation of the burden of proof when a party resists enforcement of a jury waiver and does not address whether the knowing consent standard is the correct standard.

The *Hendrix* court found that the jury waiver clause at issue “fail[ed] to overcome this presumption. . . [because it] was set deeply and inconspicuously in the contract.”⁵⁴ The court further found that the waiver was neither knowing nor intentional in light of the “gross inequality in bargaining power” between the parties, given that Hendrix “did not have any choice but to accept the . . . contract as written if he was to get badly needed funds.”⁵⁵

After *Hendrix*, courts have consistently applied the knowing consent standard to jury waivers, characterizing it using such words as “knowing,” “voluntary” and/or “intentional.”⁵⁶ As Professor Jean R. Sternlight observes:

While courts have not adopted an identical phrasing of the factors to be considered in examining contractual jury trial waivers, there is substantial agreement regarding what kinds of information is relevant. Courts typically consider any actual negotiations over the clause, whether the clause was presented on a take-it-or-leave-it basis, the conspicuousness of the waiver, the degree of bargaining disparity between the parties, and the experience and sophistication of the party opposing the waiver. Courts have not been explicit as to how these factors relate to one another, but seem to consider them all together.⁵⁷

*B. Allocation of the Burden of Proof*⁵⁸

While courts may agree on the types of information relevant to the knowing and voluntary consent inquiry, many have failed to address “the important question” of which party bears the burden of proving that the waiver was knowing, voluntary, and intelligent.⁵⁹

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

55. *Id.*

56. Sternlight, *supra* note 25, at 678-79 (observing that courts use different combinations of knowing, voluntary and intentional to describe the standard).

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

58. The Supreme Court recently observed that “[t]he term ‘burden of proof’ is one of the ‘slipperiest member[s] of the family of legal terms.’” *Schaffer v. Weast*, 126 S. Ct. 528, 533 (Nov. 14, 2005) (citing 2 MCCORMICK ON EVIDENCE §342, at 433 (John William Strong ed., 5th ed. 1999)). This is because the term “encompasses two separate burdens of proof. One burden is that of producing evidence, satisfactory to the judge, of a particular fact in issue. The second is the burden of persuading the trier of fact that the alleged fact is true.” 2 MCCORMICK ON EVIDENCE § 336; *see Schaffer*, 126 S. Ct. at 533-34 (citing *Dir., Off. Workers’ Comp. Progs. v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)). However, the term “burden of proof” is now generally limited to the burden of persuasion. *Greenwich Collieries*, 512 U.S. at 272-76.

59. Sternlight, *supra* note 25, at 691; *see, e.g., Allyn v. Western United Life Assur. Co.*, 347 F. Supp. 2d 1246, 1251-52 (M.D. Fla. 2004) (noting that Eleventh Circuit had not resolved the

While some district courts have placed the burden of proof on the party seeking enforcement of the waiver,⁶⁰ two circuits have expressly split over the issue,⁶¹ and most other appellate courts have declined to resolve the question.⁶²

The confusion surrounding the allocation of the burden of proof may stem from the *Hendrix* court's failure to elaborate on the origin of this presumption or explain how it was to be applied. As support for its "presumption" the *Hendrix* court merely cited to *Aetna Insurance Co. v. Kennedy*.⁶³ 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,"⁶⁴ *Aetna* involved a jury waiver during litigation and not a pre-dispute contractual jury waiver.⁶⁵ As discussed *infra*, this is an important distinction that makes it difficult to analogize the reasoning in *Aetna* to cases

burden question and declining to address it).

60. 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).

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

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

63. 301 U.S. 389, 393 (1937).

64. *Id.* at 393.

65. The parties in *Aetna*, after introducing their evidence at trial and agreeing upon the amount of loss, each submitted requests for peremptory jury instructions and for a directed verdict in their respective favor. *Id.* at 392. The trial court refused to direct for either party and submitted the case to the jury. *Id.* The jury found for defendants and plaintiff appealed. *Id.* The appeals court found, *inter alia*, that "by their requests for peremptory instructions, plaintiff and defendants assumed the facts to be undisputed and submitted to the trial judge the determination of the inferences to be drawn from the evidence and so took the cases from the jury." *Id.* The appeals court further held that the evidence was not sufficient to sustain verdicts for defendants and remanded the cases to the trial court with directions to give plaintiff judgment for the agreed amount of the loss. *Id.* The Supreme Court reversed, reasoning:

The established rule is that where plaintiff and defendant respectively request peremptory instructions, and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences properly to be drawn from them. . . . But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver. . . . Here neither the plaintiff nor the defendants applied for directed verdicts without more. With their requests for peremptory instructions they submitted other requests that reasonably may be held to amount to applications that, if a peremptory instruction is not given, the cases be submitted to the jury. Indeed, we find nothing in the record to support the view that the parties waived their right of trial by jury or authorized the judge to decide any issue of fact.

Id. at 393-94 (emphasis added).

involving pre-dispute contractual jury waivers.⁶⁶

Those courts that have resolved the burden of proof question merely follow the pronouncements of *Hendrix* and *Aetna* without thorough analysis.⁶⁷ Some courts place the burden on the party seeking to avoid the waiver clause to preserve society's interest in freedom of contract.⁶⁸ Those courts that assign the burden to the party seeking to enforce the waiver contend that the interest in preserving freedom of contract is outweighed by society's "greater interest in guarding the fundamental right to a jury."⁶⁹ The following examination of several recent employment cases that confronted pre-dispute jury waivers highlights this disagreement.

C. Review of Case Law Reveals Inconsistent Treatment of Waivers

I have found three federal opinions discussing employee challenges to pre-dispute contractual jury waivers, all decided within the last several years.⁷⁰ Although this sample is small, given that the use of such waivers in the employment context is relatively new,⁷¹ and given the number of employment lawyers that are encouraging their

66. See *infra* notes 133-36 and accompanying text.

67. See, e.g., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir.1986) (placing burden on party seeking enforcement of waiver and citing *Hendrix* but failing to distinguish the Sixth Circuit's contrary holding in *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755-56 (6th Cir.1985)); *Morris v. McFarland Clinic P.C.*, No. Civ. 4:03-CV-30439, 2004 WL 306110, at *1 (S.D. Jan. 29, Iowa 2004) (concluding that party seeking enforcement of waiver has burden without analysis); *Schappert v. Bedford, Freeman & Worth Publ'g Group, LLC*, No. 03 Civ. 0058 (RMB), 2004 WL 1661073, at *11 (S.D.N.Y. July 22, 2004) (same); *RDO Fin. Servs. Co. v. Powell* 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) (same); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F.Supp. 310, 313 (S.D.N.Y.1983) (same).

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

69. *Hydramar, Inc. v. General Dynamics Corp.*, Civ. A. No.85-1788, 1989 WL 159267, at *2 (E.D. Pa. 1989).

70. There is a fourth case, *Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575 (E.D. Va. 2002), that addresses pre-dispute jury waivers in the context of an ADEA claim. Although the employment agreement that plaintiff signed in *Hammaker* contained a jury waiver, the court found that the waiver did not conform to the requirements imposed by the Older Workers Benefits Protection Act (OWBPA). *Id.* at 581. In finding that the OWBPA's waiver requirements apply to procedural rights, such as the right to a jury trial, the court declined to follow several circuit court holdings to the contrary. *Id.* at 579-80. As of the date of this Article, no court has followed *Hammaker's* lead and one district court has specifically declined to do so. See *Schappert*, No. 03 Civ. 0058 (RMB), 2004 WL 1661073, at *10; see also *Browning v. 24 Hour Fitness, Inc.*, No. C05-5152RB, 2006 WL 151933 at *2 (W.D. Wash. Jan. 19, 2006). Of more relevance to this Article, the *Hammaker* court also did not address the burden of proof question because it was undisputed that the waiver provision at issue did not conform to the OWBPA's requirements. See *Hammaker*, 214 F. Supp. at 579.

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

clients to use them,⁷² litigation over such waivers is sure to increase. In the meantime, an examination of these three initial cases suggests that employers should tread carefully as judicial treatment of such waivers has been unpredictable.

In *Brown v. Cushman & Wakefield, Inc.*,⁷³ a terminated employee sued her employer for breach of employment contract and discrimination on the basis of “sex, pregnancy and childbirth” in violation of Title VII, the New York State Human Rights Law, and the New York City Human Rights Law.⁷⁴ A magistrate judge determined that plaintiff’s employment agreement, which provided, in part that, “[Employer] and Employee shall and hereby do waive a trial by jury in any action, proceeding or counter-claim brought or asserted by either of the parties hereto against the other *on any matters whatsoever arising out of this Agreement*” was a “contractual waiver of a jury trial [that] applies to all of [Plaintiff’s] claims, including those arising under federal and state discrimination statutes.”⁷⁵

The district court judge accepted the magistrate’s finding, noting that “[j]ury trial waivers are enforced if they are knowing and voluntary.”⁷⁶ First, the court found that the jury waiver was a conspicuous part of plaintiff’s employment agreement. Second, given that plaintiff had an M.B.A. from Harvard and had previously worked as an investment banker, the court found that she could “have negotiated about the clause if she tried.”⁷⁷ The court rejected plaintiff’s argument that she did not read the employment agreement before signing it as having “no merit,” citing authority that absent fraud, duress, or some other wrongful act, a party is bound by the contracts she signs whether or not the party has read the contract.⁷⁸

The *Brown* court did not explicitly address the proper allocation

72. See, e.g., Griffiths, *supra* note 26, at 2 (law firm newsletter noting more employers are using jury waivers in their employment agreements); see also MORSE, BARNES-BROWN & PENDLETON, P.C., EMPLOYMENT LAW ADVISOR, Apr. 2004, available at <<http://www.mbbp.com/practices/employment/ela/ela%200404%20-%20offer%20letters.pdf>> (law firm newsletter encouraging employers to consider using jury waivers); Mark N. Reinharz & Terence M. O’Neil, *Jury Waivers: An Alternative to Arbitration*, THE NASSAU LAWYER (Oct. 2002), available at <http://www.nassaubar.org/newsletter_article.cfm?ArticleID=79> (partners at the law firm of Rains & Pogrebin, P.C. encouraging employers to consider using jury waivers).

73. 235 F. Supp. 2d 291 (S.D.N.Y. 2002).

74. *Id.* at 292.

75. *Id.* at 293 (emphasis in original).

76. *Id.*

77. *Id.* at 294.

78. *Id.*

of the burden of proof. However, the *Brown* court's treatment of the waiver in question suggests that it placed the burden of proof on the plaintiff. First, the court provided no support for its finding that the waiver was conspicuous.⁷⁹ Second, although the plaintiff was highly educated and had worked as an investment banker, it does not necessarily follow that the clause was negotiable. The court failed to cite any evidence of negotiability.⁸⁰ There was also no evidence in the record that the plaintiff was represented by counsel during the formation of the agreement.⁸¹ The court's ruling against the plaintiff despite these omissions,⁸² coupled with the court's reliance on authority regarding consent to the unknown,⁸³ suggest that it was placing the burden of proof on the plaintiff. By doing so, the *Brown* court was able to uphold the waiver despite the paucity of evidence showing knowing and voluntary consent to such a waiver.

In *Morris v. McFarland Clinic P.C.*,⁸⁴ plaintiff neurosurgeon was hired as Director of Neurological Surgery by defendant clinic.⁸⁵ The contract required plaintiff to obtain an Iowa medical license and plaintiff claimed the clinic's medical director represented to her that he had influence with the Iowa Board of Medical Examiners which would enable her to obtain her license within a few weeks.⁸⁶ Plaintiff was subsequently unable to obtain her license and sued the clinic for, *inter alia*, fraudulent misrepresentation and breach of contract.⁸⁷ Although Plaintiff demanded a jury trial, the court found that she had

79. Compare *Morgan Guar. Trust Co. of N.Y. v. Crane*, 36 F. Supp. 2d 602, 603 (S.D.N.Y.1999) (finding a conspicuous jury waiver when it was written in all capital letters in the sole paragraph on the signature page itself, it was the last sentence in that paragraph, and it immediately preceded the parties' signatures); see also *Sternlight*, *supra* note 25, at 684-86 ("At a minimum, courts usually look to see that the typeface was not particularly small, and that the clause was not buried in a long agreement.").

80. Compare *Sternlight*, *supra* note 25, at 681-82 (noting that courts examine "both any negotiations that did take place regarding the clause, and also whether or not the clause was presented on a take-it-or-leave-it basis").

81. Compare *id.* at 689 (observing that "numerous courts have . . . voided waivers imposed on experienced business persons, particularly where the business person was not represented by an attorney").

82. See *Dir., Off. Workers' Comp. Progs. v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (noting that burden of proof refers to "the notion that if the evidence is evenly balanced, the party that bears the burden of [proof] must lose").

83. See *Ware*, *supra* note 25, at 174 (stating that "a knowing-consent standard would generally depart from contract law's norm of consent to the unknown – that is the usual practice of finding consent to form-contract terms about which one party is ignorant").

84. No. Civ. 4:03-CV-30439, 2004 WL 306110 (S.D.Iowa Jan. 29, 2004).

85. *Id.* at *1.

86. *Id.*

87. *Id.*

voluntarily and knowingly waived her right.⁸⁸

The court began by finding, with little analysis, that “the burden of demonstrating a voluntary and knowing waiver is on the proponent of the waiver.”⁸⁹ The court then meticulously examined the formation of the agreement. The court found evidence of negotiability given that: (1) the contract did not have the appearance of a standardized, take-it-or-leave-it contract; (2) it was undisputed that plaintiff had actually negotiated changes in provisions of interest to her; and (3) there was evidence showing that plaintiff was “quite happy” with the contract.⁹⁰ The court found that there was relative parity in bargaining power given plaintiff’s specialized qualifications and the clinic’s specific needs for someone with her qualifications.⁹¹ Observing that the waiver was on the fifth page of a six page agreement, that it was in all upper case letters, and set out in a separately numbered paragraph, the court found it to be conspicuous.⁹² With respect to plaintiff’s business acumen, the court found that she was well-educated and specifically noted that she was the contract negotiations manager at her prior clinic.⁹³ Carefully considering all of these factors, the court found that defendants had met their burden and demonstrated that plaintiff had voluntarily and knowingly agreed to waive her right to trial by jury.⁹⁴

88. *Id.* at *4.

89. *Id.* at *1.

90. *Id.* at *2.

91. *Id.* at *3.

92. *Id.*

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

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

In *Schappert v. Bedford, Freeman & Worth Pub. Group, LLC*,⁹⁵ plaintiff filed suit against her prior employer alleging that she had been wrongly removed from her position on the basis of her age and gender.⁹⁶ Defendants moved to strike plaintiff's jury demand.⁹⁷

The court first noted that the "burden of demonstrating a plaintiff has waived her right to a jury trial is on the defendant."⁹⁸ Like the court in *Morris*, the *Schappert* court then proceeded to carefully apply the knowing consent standard.

The court found that the terms were negotiable given plaintiff's admission that the agreement had been negotiated and amended to reflect changes made to the financial terms.⁹⁹ The court found evidence that the waiver provision was conspicuous.¹⁰⁰ With respect to bargaining power, the court stated that the fact that plaintiff negotiated material terms of the agreement belied her argument that there was a gross inequality in bargaining power.¹⁰¹ Plaintiff also did not point to any material negative consequences of not signing the agreement and did not deny that she could have retained her job without signing the agreement, further demonstrating her bargaining power.¹⁰² Finally, plaintiff herself testified that she was a "smart," "savvy," "well educated," and "experienced" business person and that she had over two years to have the provision reviewed by her attorneys.¹⁰³ Given all these facts, the court found that defendants had met their burden of showing that plaintiff had knowingly and voluntarily waived her right to a jury trial.¹⁰⁴

Initially, it should be noted that all the employee-plaintiffs in these cases were highly educated and the employee-plaintiffs in *Morris* and *Schappert* were found to have wielded significant bargaining power. As discussed in Part IV.B, this is very unusual. Accordingly, these cases should not be relied upon for the general proposition that pre-dispute jury waivers in employment agreements are enforceable. Indeed, when the employee is unsophisticated and

95. No. 03 Civ. 0058(RMB), 2004 WL 1661073 (S.D.N.Y. July 22, 2004).

96. *Id.* at *1.

97. *Id.* at *9.

98. *Id.* at *11.

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

100. *Id.* at *11.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

lacks bargaining power, as she will be in most cases, other factors, including the negotiability of the waiver and the conspicuousness of the waiver, will also need to be carefully weighed and considered. This increases the complexity of the decision making process as well as the uncertainty of the ultimate outcome, making clear resolution of the burden question all the more crucial.¹⁰⁵ A review of the opinions in *Brown*, *Morris* and *Schappert*, however, reveals that courts are still grappling with the proper allocation of the burden of proof when a party resists enforcement of a contractual jury waiver. Such inconsistencies make it difficult to predict whether a pre-dispute jury waiver will be enforced as shifting the burden of proof directly changes the nature of the inquiry. When the party resisting the waiver bears the burden of proof, as in *Brown*, a jury waiver can be upheld following only a superficial inquiry. In contrast, when the burden of proof is assigned to the party seeking to enforce the waiver, as in *Morris* and *Schappert*, the court conducts an exhaustive factual inquiry into the formation of the agreement before upholding a jury waiver. This unpredictability diminishes the potential value of such waivers. In order to encourage the appropriate use of pre-dispute jury waivers, courts must clarify the process through which they analyze such waivers, allocating the burden of proof in a way that takes into account public policy considerations as well as convenience and fairness concerns.

IV. ALLOCATING THE BURDEN OF PROOF

Since most courts substantially agree on what information is relevant when determining whether a contractual waiver of a jury trial right was entered into knowingly and voluntarily,¹⁰⁶ allocation of the burden of proof will often be determinative. When the legislature is silent on the burden of proof, courts ordinarily allocate the burden

105. In contrast, many courts in commercial contract disputes have declined to squarely address the burden of proof issue when is it "clear" that the waiver is valid or invalid regardless of which party bears the burden of proof. *See, e.g.*, *Allyn v. Western United Life Assur. Co.*, 347 F. Supp. 2d 1246, 1252 (M.D. Fla. 2004) (declining to address burden question because validity of waiver was clearly demonstrated by the facts); *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 56 F. Supp. 2d 694, 707 (E.D. La. 1999) ("Because the court finds clear contractual waiver in this case, it need not determine whether the burden is on plaintiffs or defendants."); *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994) ("Although this circuit has not decided which party bears the burden of proving the validity of an alleged waiver, it is clear in this case that Sevaux did not voluntarily and knowingly waive his right to a jury trial.").

106. *See supra* note 57; LaRocca, *supra* note 3, at 944 & n.69.

to the party initiating the proceeding and seeking relief.¹⁰⁷ But several factors such as public policy considerations, and convenience and fairness concerns, may support a different allocation of the burden.¹⁰⁸ A closer examination of pre-dispute contractual waivers against this backdrop suggests that a different allocation of the burden is warranted when such waivers are included in employment agreements.

A. What is Actually Being Waived?

A pre-dispute contractual jury waiver brings two basic societal interests into sharp relief: the right to a trial by jury and freedom of contract. “The resolution of civil disputes by jury is of historic and fundamental importance.”¹⁰⁹ On the other hand, parties have the right to contract as they see fit as long as their agreement does not violate law or public policy.¹¹⁰ Accordingly, these two interests must be weighed against one another to determine the proper allocation of the burden of proof. As explained, *infra*, because pre-dispute jury waivers interfere with the role of the jury and our public system of dispute resolution, public policy considerations counsel against emphasizing private contractual autonomy over the right to a jury trial.

107. See *Schaffer v. Weast*, 126 S.Ct. 528, 538 (2005) (Ginsburg, J., dissenting). Congress has not explicitly addressed jury waivers in the employment context. See *Matties*, *supra* note 42, at 443 (stating that no federal statute or rule specifically allows parties to waive their right to a jury trial by way of prelitigation contract); see also David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1114-1119 (2002) (characterizing the enforcement of jury waivers as a “judicial creation”).

108. *Schaffer*, 126 S. Ct. at 537-38 (Ginsburg, J., dissenting); 2 MCCORMICK ON EVIDENCE, *supra* note 58, § 337, at 415.

109. *Morris v. McFarland Clinic, P.C.*, No. Civ. 4:03-CV-30439, 2004 WL 306110, at *11 (S.D. Iowa Jan. 29, 2004), at *11. For a discussion of the important purposes jury trials serve, see *Matties*, *supra* note 42, at 434-40.

110. *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 129 & n.11 (Tex. 2004); see, e.g., *Am. Anglian Env. Tech., L.P. v. Env. Mgmt. Corp.* 412 F.3d 956, 962 (8th Cir. 2005) (stating that it is the policy of Missouri and nine other states “to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements” and collecting statutes); *Badgett v. Fed. Express Corp.* 378 F. Supp. 2d 613, 622 (M.D.N.C. 2005) (noting the importance of the parties’ freedom of contract absent clear policy to the contrary); *Allan Block Corp. v. E. Dillon & Co.*, No. Civ. 04-3511JNEJGL, 2005 WL 1593010, *8 (D. Minn. July 1, 2005) (citing *Arrowhead Elec. Coop., Inc. v. LTV Steel Mining Co.*, 568 N.W.2d 875, 879 (Minn. Ct. App. 1997)) (“Public policy ‘requires that freedom of contract shall remain inviolate, except only in cases which contravene public right or the public welfare.’”); see also *Paul v. Davis* 424 U.S. 693, 722 n.10 (1976) (Brennan, J., dissenting) (observing that the Constitution contains some protections of the right of the individual to contract); but see *U.S. v. Antzoulatos* 962 F.2d 720, 725 (7th Cir. 1992) (noting that any substantive due process right to contract “has been sharply curtailed”).

First, pre-dispute jury waivers impinge upon the role of the jury within our constitutional structure. The Seventh Amendment does not merely confer an individual jury-trial right, but also acts as a structural constraint on the power of the sovereign and the judge.¹¹¹ Indeed, some have called the jury “a primary check on judges’ power.”¹¹² Thus, a jury waiver presents judges with the opportunity to substantially increase their own power by eliminating this check.

The Supreme Court has recently highlighted the tension between a judge’s power, as opposed to the jury’s, in the criminal context.¹¹³ In *U.S. v. Booker*,¹¹⁴ the Court addressed the constitutionality of the Federal Sentencing Guidelines (“Guidelines”),¹¹⁵ observing that allowing judges to find facts that enhanced a defendant’s sentence impermissibly served to “increase the judge’s power and diminish that of the jury.”¹¹⁶ The *Booker* Court characterized its invalidation of the mandatory Guidelines as preserving the right of jury trial, thereby “guaranteeing that the jury would still stand between the individual and the power of the government.”¹¹⁷

Admittedly, waivers of constitutional rights are treated

111. Sternlight, *supra* note 25, at 672; Matties, *supra* note 42, at 439-40. In an impassioned concurrence to an opinion addressing pre-dispute arbitration clauses, Montana Supreme Court Justice Nelson stated:

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

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

112. Matties, *supra* note 42, at 465.

113. *U.S. v. Booker*, 543 U.S. 220, 226-27 (2005) (holding that a sentencing judge violates the Sixth Amendment by imposing an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant).

114. 543 U.S. 220 (2005).

115. Prior to *Booker*, the Guidelines were a mandatory determinate sentencing scheme applicable to federal crimes that decreed sentences within set sentencing ranges but further allowed a judge to enhance or depart from such ranges based on facts found by the judge. *See id.* at 233-37.

116. *Id.* at 235.

117. *Id.* at 236; *see Blakely v. Washington*, 542 U.S. 296, 305-06 (“[The right of jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”).

differently in the criminal context than in the civil context.¹¹⁸ This distinction has been criticized given that the Supreme Court has “never explained why constitutionally protected rights should be afforded any less protection in the civil context than in the criminal context.”¹¹⁹ While this Article does not urge the adoption of a criminal waiver standard, the Court’s pronouncements in the criminal context support the assertion that the jury plays an important role as a check on the judiciary and the sovereign. Placing the burden of proof on the party seeking enforcement of the waiver would therefore reemphasize the role of the jury as a limiting force on judicial discretion and power.

Second, pre-dispute jury waivers undermine a party’s procedural right to a jury trial as enshrined within the Federal Rules of Civil Procedure (FRCP). Specifically, FRCP 38(a) declares: “The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.”¹²⁰ A party that wants a jury trial must demand one in accordance with FRCP 38; failure to do so constitutes a waiver by the party of trial by jury.¹²¹ FRCP 39(b) further allows the court discretion to order a trial by jury notwithstanding the failure of a party to properly demand a jury.¹²²

118. See Ware, *supra* note 25, at 181-82.

119. Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration*, 72 TUL. L. REV. 1, 56-57 (1997). Professor Ware posits that one of the reasons that the Supreme Court is less protective of civil waivers is that such waivers are contractual and thus present less danger of overreaching and duress by the party seeking to enforce the waiver. See Ware, *supra* note 25, at 182 n. 88. This Article argues, however, that given the disparity in bargaining power and legal expertise between employer and employee, such a danger is often present in the employment context. See *infra* Part IV.B.

120. FED. RULE CIV. P. 38(a).

121. FED. RULE CIV. P. 38(d). It is important to note that the waiver provided for in Federal Rule of Civil Procedure 38(d), which occurs during litigation and is specifically authorized by the established rules of our procedural system, does not present the same problems as a pre-dispute jury waiver. See *infra*, notes 133-36 and accompanying text; Taylor & Cliffe, *supra* note 107, at 1104-07. As stated by the California Supreme Court: “the initiation of a lawsuit . . . focus[es] the attention of the litigants to produce a considered decision whether to demand — and pay for — a jury trial based on an informed understanding of the stakes involved.” *Grafton Partners L.P. v Super. Ct.*, 116 P.3d 479, 490 (Cal. 2005). Moreover, “[o]nce litigation commences and the time to demand a jury trial approaches, parties ordinarily have counsel and their decision whether to demand jury trial is likely to be a part of their litigation strategy.” *Id.* The Sixth Circuit observed that this rule “respecting timely demand for trial by jury is a reasonable requirement calculated to insure the orderly presentation of the business of the court.” *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 756 n.4 (6th Cir. 1985).

122. FED. RULE CIV. P. 38(b). (“Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.”); see John D. Perovich, *Discretion of*

Two of the main goals of the Federal Rules of Civil Procedure were to establish national uniformity in procedure and to eliminate technical traps found in earlier procedural codes.¹²³ These rules were the product of much debate and deliberation by public bodies,¹²⁴ and are an integral part of a public system constructed to enable peaceful and orderly resolution of disputes. A pre-dispute jury waiver circumvents the rules by establishing a different set of procedures for the parties bound to it and arguably allows private parties to contractually limit the court's discretion to order a trial by jury.¹²⁵ Enforcement of such a waiver thus defeats the goal of uniformity by allowing "privately tailored procedure for individual suits."¹²⁶

Contractual jury waivers also favor those parties with the means and the ability to strategically exploit such waivers to their advantage;¹²⁷ and in the context of employment agreements, that party is the employer.¹²⁸ Therefore, these waivers not only impose procedures inconsistent with publicly-established ones, but fashion those procedures in such a way as to favor the same party nearly every time: the employer.

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

District Court Under Rule 39(b) of Federal Rules of Civil Procedure, Authorizing it to Order Jury Trial Notwithstanding Party's Failure to Make Seasonable Demand for Jury, 6 A.L.R. FED. 217 § 4 (2005) (discussing extent of court's discretion to order jury trial).

123. Taylor & Cliffe, *supra* note 107, at 1103; see also Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 602 (2005) ("The Rules, expressive of and coupled with an impressive investment in the infrastructure of the federal courts, represent a normative commitment to federal regulatory power.").

124. Taylor & Cliffe, *supra* note 107, at 1100.

125. Once a pre-litigation agreement is found to be valid, "courts in near knee-jerk fashion provide automatic specific performance without acknowledging any necessity for first examining the prerequisites for specific performance or injunctive relief required for a 'normal' contract." *Id.* at 1127.

126. *Id.* at 1127.

127. *Id.* at 1103-04.

128. See *infra*, Part IV.B.

B. The Coercive Employer-Employee Relationship

Employers possess distinct advantages over employees in both bargaining power and in their ability to assess the feasibility and the likely benefit of alternative dispute resolution methods. These advantages, as well as the risk of coercion inherent in the employer-employee relationship, decrease the probability that knowing and voluntary consent to a jury waiver can be obtained. These considerations further support placing the burden of proof on the party seeking to enforce the pre-dispute jury waiver.

Employment contracts “are susceptible to the presence of unconscionable terms,”¹²⁹ because they are typically offered on a “take-it or leave-it” basis, drafted entirely by employers, and offered for employees to sign as a condition of employment.¹³⁰ Most applicants lack bargaining power because rejecting the employment agreement is not a viable alternative.¹³¹ This dilemma discourages applicants from exercising any effort to understand what they are

129. *Gooden v. Village Green Mgmt. Co.*, No. Civ. 02-835 (JRT/SRN), 2002 WL 31557689, at *3 (D. Minn. Nov. 15, 2002) (noting that the “unique nature” of employment contracts “should subject them to special scrutiny”); see Taylor & Cliffe, *supra* note 107, at 1087 (noting that “there is a great opportunity for unfairness” when pre-litigation agreements are incorporated into employment agreements).

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

131. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (observing that “the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute” and that “few employees are in a position to refuse a job because of an arbitration requirement”); Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 871 (2004) (“In the end, the employee’s choice is between a job in which employment discrimination disputes are arbitrated and no job whatsoever. Such a choice is really no choice at all.”); William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, 14 OHIO ST. J. ON DISP. RESOL. 29, 72-73 (1998) (noting employees may lack the personal economic security and effective bargaining power to avoid unfavorable terms in employment agreements); Lucy T. France & Timothy C. Kelly, *Mandatory Arbitration of Civil Rights Claims in the Workplace: No Enforceability Without Equivalency*, 64 MONT. L. REV. 449, 463 (2003) (“Most employees lack bargaining power. Rarely do non-management level employees negotiate the terms of their employment at arms length.”); Reilly, *supra* note 25, at 1258-59 (arguing that efforts to find other jobs are curtailed by limited information and resources and by the view that jobs are a person’s most valuable possession and that meaningful choices between jobs assumes worker mobility and healthy job market).

waiving.¹³²

Even if an applicant wishes to carefully deliberate over the terms of the proffered employment agreement, and is granted the opportunity to do so, most lack the means to adequately evaluate the impact of a jury waiver. By definition, a pre-dispute jury waiver is presented and agreed to prior to litigation. Thus, at the time the right is waived, it is extremely difficult to anticipate the nature of the dispute that may arise from the agreement. Yet the nature of the dispute is a crucial factor when considering whether to ask for a jury trial.¹³³ Cases with simple issues and good witnesses and which involve the potential for emotionally based damages are often the best in which to demand a jury.¹³⁴ Complex cases, and those cases that rely heavily on legal issues, are poorer for jury treatment.¹³⁵ The nature of the actual dispute also appreciably affects the cost-benefit analysis, as cases tried to a jury cost more than those tried to a judge.¹³⁶

Employers are “repeat players in the employment marketplace”¹³⁷ and are more educated and skilled in legal matters than employees. Thus, they are more likely to take these concerns into account, given that they have better access to legal information, greater expertise with drafting and negotiating employment agreements, and more experience with taking cases to trial.

Most employees, on the other hand, do not even think that sometime in the future they may become involved in legal disputes with their employers, let alone carefully weigh the ramifications of something as abstract as waiving their right to a jury trial in a case that has yet to be filed, regarding a dispute that has yet to materialize.¹³⁸ Their ignorance of the law¹³⁹ and other “cognitive biases”¹⁴⁰ prevent employees from realizing the significance of what

132. Reilly, *supra* note 25, at 1235 (“A potential employee is unlikely to devote resources to try to understand something that he or she cannot change or escape.”).

133. Custis, *supra* note 15, at § 8:32.

134. *Id.*

135. *Id.*

136. *Id.*

137. Reilly, *supra* note 25, at 1236-37.

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

139. Reilly, *supra* note 25, at 1225 (“Most employees have little knowledge of their legal rights in employment.”).

140. Some cognitive biases include a systematic underestimation of risk and the use of a small sample of positive or neutral interactions as reliable predictors of the relationship in the

they are agreeing to. Therefore, at the time the waiver is entered into, most employees have not adequately considered the consequences of waiving their right to a jury.

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

Clearly, the employer's resources and expertise make it better able to demonstrate that a pre-dispute jury waiver was entered into knowingly and voluntarily. However, this is not the only reason it should bear the burden of proof.¹⁴¹ A frequent significant consideration in the allocation of the burden of proof is the judicial estimate of the probabilities of the situation.¹⁴² That is, "it is usually fairer to act as if the exceptional situation did not exist and therefore to place the burden of proof and persuasion on the party claiming its existence."¹⁴³ With respect to pre-dispute jury waivers entered into between employers and employees, knowing and voluntary consent to such a waiver would be exceptional, given the employer's natural advantages in light of the employee's natural disadvantages, and the likelihood of bias and coercion. As an example, consider Elizabeth, the hypothetical employee presented at the beginning of this Article. Elizabeth has only a high school education and applied for an entry-level job with a large corporation. Her education level, the complexity of the legal right being waived, and the large number of potential applicants qualified for that same position make it highly unlikely that her employer invested the time required to ensure that Elizabeth's

future. *Id.* at 1228-34.

141. *See* *Weast v. Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005) (noting that courts "do not automatically assign the burden of proof to the side with the bigger guns").

142. 2 MCCORMICK ON EVIDENCE, *supra* note 58, § 337.

143. *Id.*

waiver was knowing and voluntary.¹⁴⁴ This probability, coupled with the employer's superior access to legal information and greater resources, warrant assigning the burden to the employer.

C. Assigning the Burden of Proof

Allocating the burden of proof to the party seeking enforcement of the waiver strikes the appropriate balance between freedom of contract and the right to a jury trial.¹⁴⁵ First, employment agreements are uniquely susceptible to unfair terms. Second, the parties to those agreements differ greatly with respect to their bargaining power and legal sophistication. Third, it is more likely than not that a jury waiver will not be entered into knowingly and voluntarily. Fourth, pre-dispute jury waivers diminish the role of the jury and circumvent our public dispute resolution system. Thus, sound public policy, convenience and fairness concerns all establish that the burden of demonstrating that a jury waiver was voluntary and knowing is

144. But it is not unheard of. In *Gentry v. Superior Court*, 37 Cal. Rptr. 3d 790 (Cal. App., rev. granted and depublished, 2006 Cal. LEXIS 5122 (Cal. Apr. 26, 2006), the employer provided a dispute resolution packet to its workers pursuant to which employees were afforded various options, including arbitration, for resolving employment-related disputes and given thirty days to opt out of the arbitration agreement. *Id.* at 791-92. The employer also provided employees with a handbook that pointed out both the advantages and disadvantages of electing arbitration. *Id.* at 794. The *Gentry* court found that such an arbitration agreement was not adhesive and was not unconscionable. *Id.* at 793-94; see also *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199-1200 (9th Cir. 2002) (arbitration agreement was not unconscionable because employee was given thirty days to decide whether to participate in the program, the terms of the arbitration agreement were "clearly spelled out" in written materials and a video tape presentation, and employee was encouraged to contact employer's representatives or to consult an attorney prior to deciding whether to participate in the program). Since review has been granted in *Gentry*, its holding is questionable; however, materials and procedures similar to those implemented by the employer in *Gentry* could conceivably be used to increase the likelihood that an employee's waiver of her right to a jury trial is knowing and voluntary.

145. But see Joel Andersen, Note, *The Indulgence of Reasonable Presumptions: Federal Court Contractual Civil Jury Trial Waivers*, 102 MICH. L. REV. 104, 112 & n.50 (2003). Andersen advocates for the use of a permissive presumption in cases involving pre-dispute jury waivers. *Id.* at 111. Using the permissive presumption, if a party claims her waiver was not knowing and voluntary then the court may find that there was no waiver even if her claim is the only evidence. *Id.* at 116-17. However, the court may still find against the party resisting enforcement of the waiver if the evidence is "weak." *Id.* at 117. Andersen argues that this presumption protects the right to a jury trial and the contractual interests of the parties while leaving intact the "normal mechanisms found in an ordinary contract dispute." *Id.* According to Andersen, shifting the burden of production and persuasion to the party seeking to enforce the waiver does not adequately protect freedom of contract. *Id.* at 116 n.86. But, as argued in this Article, in the context of employment agreements, society's interest in freedom of contract is outweighed by the right to a jury trial. Furthermore, convenience and fairness concerns warrant assigning the burden of proof to the party with greater expertise and resources, and the party claiming the existence of an unlikely situation, which in most cases is an employer seeking enforcement of a pre-dispute jury waiver.

properly placed on the proponent of the waiver.¹⁴⁶

Applying this allocation to the *Brown* case¹⁴⁷ demonstrates how significantly it can affect the outcome. In *Brown*, plaintiff claimed that her waiver was not knowing and voluntary. Accordingly, her employer must persuade the court that plaintiff's waiver was knowing and voluntary in light of the following factors: (1) negotiability of the contract terms; (2) conspicuousness of the waiver provision; (3) the relative bargaining power of the parties; and (4) the business acumen of the party opposing the waiver. The employer presents evidence that the waiver was conspicuous and that plaintiff had an M.B.A. from Harvard and was formerly employed as an investment banker. No evidence is presented regarding the negotiability of the contract terms or the relative bargaining power of the parties. Plaintiff presents evidence that she did not even read the waiver before signing it. Because the burden of proof is on the employer, failure to present any evidence to suggest that the contract terms were negotiable and/or that the plaintiff had some modicum of bargaining power means that the employer has not satisfied its burden. In light of the evidence presented, the court would clearly find that the employer failed to meet its burden and would disregard the waiver.

V. CONCLUSION

Bench trials offer distinct advantages over arbitration and jury trials. But as parties attempt to leverage these advantages by using pre-dispute contractual jury waivers to manage litigation risk and

146. This is not the approach the courts take with mandatory employment arbitration, even though an agreement to arbitrate includes a waiver of jury trial rights. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); see also *Sternlight*, *supra* note 25, at 695-96. Courts have generally held that the opponent of an arbitration clause bears the burden of showing that the clause is inconsistent with federal law or invalid as a matter of contract law. *Id.* at 707-08. Courts have supported their more lenient treatment of mandatory arbitration by citing the federal policy favoring arbitration contained in the Federal Arbitration Act. See *Gilmer*, 500 U.S. at 25; see also *Sternlight*, *supra* note 25, at 696. But there is no comparable federal policy favoring bench trials over jury trials. This Article argues that the Constitution and the Federal Rules of Civil Procedure evidence a policy favoring jury trials over bench trials. See *supra* Part IV.A. Accordingly, in this respect, the judicial treatment of arbitration agreements is not relevant. Indeed, the California Supreme Court relied on a similar rationale to explain its decision to recognize arbitration agreements while striking down pre-dispute jury waivers. *Grafton Partners L.P. v. Super. Ct.*, 116 P.3d 479, 480 (Cal. 2005) (noting the strong state policy favoring arbitration, the absence of any state policy favoring court trials and a "long standing public policy in favor of trial by jury"). The *Grafton* court went on to state that it is rational to promote pre-dispute arbitration agreements "while not according the same advantage to jury trial waivers" because arbitration "conserves judicial resources far more than the selection of a court trial over a jury trial." *Id.*

147. See *supra* notes 73-78 and accompanying text.

cost, it is important to clarify judicial enforcement of such waivers to encourage their thoughtful and appropriate use. This Article argues that public policy considerations, coupled with convenience and fairness concerns, call for assigning the burden of proving the validity of a pre-dispute contractual jury waiver to the party seeking enforcement of the waiver. By assigning the burden of proof in this way, courts can ensure that such waivers are treated consistently. Consistent judicial treatment of pre-dispute contractual waivers will, in turn, allow such waivers to be used appropriately.