Nothing is Sacred: Why Georgia and California Cannot Bar Contractual Jury Waivers in Federal Court

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INTRODUCTION

Federal courts have long recognized that the right to a civil jury trial may be waived in advance by private agreement.[1] But contractual jury waivers are now unenforceable under Georgia and California law.[2] No one has explored whether the *Erie* doctrine requires federal courts exercising diversity jurisdiction in Georgia and California to bar these waivers under Georgia or California law. This Comment proposes that federal courts must continue to enforce these waivers under federal law.

Part I compares federal law on contractual jury waivers with the laws of the states. While federal statutes do not expressly allow these waivers, federal courts enforce them because the U.S. Supreme Court and the Federal Arbitration Act (FAA) have endosed similar pre-dispute agreements.[3] Georgia and California courts, unlike the courts of other states, bar these waivers because they are not expressly allowed by statute. But these states' legislatures do not necessarily prohibit these waivers.

Part II compares federal interests in enforcing contractual jury waivers with Georgia's and California's interests in barring them. Federal courts have an interest in upholding agreements that reduce the expense and delay of litigation for parties and courts. Georgia and California, however, have an interest in preventing parties from unfairly bargaining away the constitutional right to a jury trial.

Part III traces the U.S. Supreme Court's development of the constitutional doctrine from *Erie Railroad Co. v. Tompkins*,[4] which provides that federal courts sitting in diversity must apply the 'substantive'

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1 *See* Debra T. Landis, *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688, 691 (1989); Jay M. Zitter, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R.5TH 53, 53 (1996).

2 Bank S., N.A. v. Howard, 444 S.E.2d 799, 800 (Ga. 1994); Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 492 (Cal. 2005).

3 9 U.S.C. §§ 1–16 (2000).

4 304 U.S. 64 (1938).

law of the state. As for state 'procedural' rules, two alternative tests have evolved. The 'guided' *Erie* test generally requires the application of a federal statute or Federal Rule of Civil Procedure that covers the issue. If no federal statute or Rule applies, the 'unguided' *Erie* test requires the application of state law if applying federal law would substantially affect the outcome of litigation, unless there are countervailing federal interests.

Part IV proposes that the *Erie* doctrine requires federal courts to continue to enforce contractual jury waivers under federal law. The *Erie* doctrine applies because there is a conflict between federal and state law. In *Simler v. Conner*, the U.S. Supreme Court commanded that federal law govern the Seventh Amendment right to a jury trial. Alternatively, this part proposes that the FAA would control, because it satisfies both prongs of a 'guided' *Erie* test. First, the FAA is broad enough to cover the issue by making arbitration agreements enforceable, because contractual jury waivers are implicit parts of such agreements. Second, the FAA is a valid exercise of Congress' constitutional power to regulate procedure.

Alternatively, Part IV proposes that federal common law would control under an 'unguided' *Erie* test. Under the U.S. Supreme Court's *Erie* jurisprudence, the 'knowing and voluntary' standard satisfies the three prongs of this test. First, whether a judge or jury decides a dispute is a matter of procedure. Second, applying federal law would not substantially affect the outcome of litigation. Third, even if the application of federal law were outcome-determinative, federal interests in enforcing agreements that make litigation more efficient outweigh Georgia's and California's interests in protecting the right to a jury.

I. COMPARISON OF FEDERAL AND STATE LAW ON CONTRACTUAL JURY WAIVERS

A. The Federal Constitution and Statutes Allow Contractual Jury Waivers

The Seventh Amendment to the U.S. Constitution provides that, in civil cases in federal courts, "the right of trial by jury shall be preserved."[5] This provision says nothing about whether it may be waived. But the U.S. Supreme Court, in *Bank of Columbia v. Okely*, said that this provision requires federal courts to preserve the *right* to a jury, not the jury itself; and "the benefit of [this right] may, therefore, be relinquished."[6] Thus, the Seventh Amendment right to a jury may be waived.

Congress has expressly recognized that parties may also waive their rights to a jury during litigation. An 1865 act recognized waiver by written stipulation to the clerk of court.[7] The Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court pursuant to legislative authority,

5 *See* U.S. CONST. amend. VII.

6 17 U.S. (4 Wheat.) 235, 244 (1819).

incorporate the 1865 act by recognizing waiver by express stipulation.[8] The Rules also allow waiver by failure to file a timely request for a jury trial or by raising equitable issues that are not entitled to a jury trial.[9]

Parties may also waive their rights to a jury *prior to* litigation. In 1925, the FAA made arbitration agreements as enforceable as any other contract.[10] Parties that agree to submit their dispute to an arbitrator necessarily waive their rights in advance to submit that dispute to a jury.[11] One may argue that the right to a jury only attaches once the parties have submitted their dispute to a court of law. But the legislative history of the FAA suggests that an arbitration agreement implicates the right to a jury by stating that "[t]he constitutional right to a jury trial is adequately safeguarded" in such agreements.[12]

Congress has not expressly recognized pre-litigation jury waivers outside of arbitration agreements. But the U.S. Supreme Court commands federal courts to uphold parties' rights to enter into pre-dispute agreements that do not clearly violate law or public policy.[13] Thus, federal courts must enforce valid contractual jury waivers unless Congress has expressly stated or necessarily implied that they violate law or public policy.

Congress has never expressly stated or necessarily implied that contractual jury waivers are contrary to law. In *Kearney v. Case*, the U.S. Supreme Court interpreted the 1865 act that allowed jury trial waiver by written stipulation to the clerk of court.[14] The Court observed that the statute was ambiguous as to whether it excluded other methods of waiver.[15] The Court concluded that, "both by express agreement in open court, and by implied consent, the right to a jury trial could be waived."[16] Thus, the Court affirmed a decision in which it had allowed waiver by private agreement in advance of litigation.[17] The FAA, likewise, does not indicate that arbitration is the only method of waiving the jury prior to litigation.

Also, contractual jury waivers are not contrary to public policy. Rather, the FAA declares a strong public policy favoring them. A primary purpose of the FAA was to support agreements that reduce the expense and

7 Act of Mar. 3, 1865, ch. 86, § 4, 13 Stat. 501 (current version at FED. R. CIV. P. 39).

8 FED. R. CIV. P. 39(a) (2008).

9 *Id*. 38(d), 39(a).

10 United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2000)).

11 *E.g*., L & R Realty v. Conn. Nat'l Bank, 715 A.2d 748, 753 (Conn. 1998) ("[J]ury trial waivers entered into in advance of litigation are similar to arbitration agreements in that both involve the relinquishment of the right to have a jury decide the facts of the case.").

12 S. REP. NO. 68-536, at 3 (1924) (emphasis added).

13 *See infra* Part I.B.

14 79 U.S. (12 Wall.) 275, 282 (1871).

15 *Id*.

16 *Id*.

17 *Id*. at 281 (citing Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235 (1819)).

delay of litigation.[18] Contractual jury waivers are implicit parts of arbitration agreements and serve the same interests.[19] Also, an arbitration agreement "involves a greater compromise of procedural protections" than a contractual jury waiver.[20] Thus, "[p]ublic policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury."[21]

B. The U.S. Supreme Court Allows Contractual Jury Waivers

In 1819, the U.S. Supreme Court, in *Bank of Columbia v. Okely*, enforced a contractual jury waiver.[22] In *Okely*, the defendant made a note negotiable at a bank whose charter provided for collection of debts by a summary proceeding without a jury.[23] The trial court held that this waiver was void under the Seventh Amendment.[24] The U.S. Supreme Court reversed, holding that the waiver was valid and enforceable.[25] The Court reasoned that the defendant, "in consideration of the credit given him . . . voluntarily relinquished his claims to the ordinary administration of justice" by his "submission to the law of the contract."[26]

In 1871, the U.S. Supreme Court affirmed *Okely* in *Kearney v. Case*.[27] Thus, consistent with the Court's view that courts must enforce agreements that do not clearly violate law or public policy,[28] pre-dispute agreements are enforceable under federal law unless Congress has expressly stated or necessarily implied that they are prohibited.

In 1874, the U.S. Supreme Court retreated from this view. In *Home Insurance Co. v. Morse*, the Supreme Court of Wisconsin upheld, under

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18 *See infra* Part II.A.

19 *See id*.

20 *See* Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 838 (10th Cir. 1988).

21 *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 132 (Tex. 2004). The Texas Supreme Court explained why jury waivers are preferable to arbitration agreements:

> 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. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.

Id.

22 17 U.S. (4 Wheat.) 235 (1819), *construed in* Rodenbur v. Kaufman, 320 F.2d 679, 684 (D.C. Cir. 1963) ("[P]arties, at least in situations where summary procedure is clearly to be desired, may in advance contract to waive a trial by jury."), *and* Smith-Johnson Motor Corp. v. Hoffman Motors Corp., 411 F. Supp. 670, 676–77 (E.D. Va. 1975) ("It seems clear that contractual provisions waiving trial by jury in civil actions are neither illegal nor contrary to public policy.").

23 *Id*. at 241.

24 *Id*. at 237–38.

25 *Id*. at 246.

26 *Id*. at 243.

27 *See supra* note 17.

28 *See* Baltimore & Oh. Sw. Ry. Co. v. Voigt, 176 U.S. 498, 505 (1900).

Okely, an agreement adopted pursuant to a state statute that waived a foreign insurance company's rights to remove a lawsuit to federal court.[29] The U.S. Supreme Court reversed, holding that the agreement was "illegal and void."[30] The Court added, in dicta: "There is no sound principle upon which [arbitration agreements and contractual jury waivers] can be specifically enforced."[31] The Court explained:

> 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. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. 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.[32]

Under the reasoning of *Morse*, the rules of dispute resolution are fixed by Congress and federal courts have no power to allow parties to alter them by private agreement in advance of litigation.[33] Thus, pre-dispute agreements were considered illegal and against public policy unless expressly authorized by statute.

The Court upheld *Morse* into the early twentieth century.[34] The Court did not embrace arbitration agreements until Congress made them enforceable in 1925.[35] Congress intended the FAA to reverse courts' refusals to enforce such agreements.[36] Congress also intended that such agreements were to be as enforceable as any other contract.[37] Thus, the Court has since enforced them if valid under ordinary contract law.[38]

In the late twentieth century, however, the Court rejected *Morse* by enforcing pre-dispute agreements without legislative authority.[39] In *National Equipment Rental*, *Ltd*. *v*. *Szukhent*, the Court enforced an agreement to appoint an agent for service of process under ordinary

29 87 U.S. (20 Wall.) 445, 447, 457 (1874), *abrogated in* Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

30 *Id*. at 451, 458.

31 *Id*. at 450.

32 *Id*. at 451.

33 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, 1093 (2002).

34 *Id*. at 1094–95.

35 *Id*.

36 Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995).

37 *Id*. at 271; 9 U.S.C. § 2 (2000) ("A written provision . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

38 *See* Stephen J. Ware, *Arbitration Clauses*, *Jury-Waiver Clauses*, *and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 170–72 (2004).

39 Taylor & Cliffe, *supra* note 33, at 1095.

principles of agency.[40] In *Bremen v. Zapata Off-Shore Co.*, the Court held that a forum selection clause was presumptively enforceable if valid under contract law.[41] The Court in *Bremen* renounced a broad reading of *Morse* and explained that such clauses should be enforceable because they encourage freedom of contract and stimulate trade and commerce.[42]

The U.S. Supreme Court has not squarely held that contractual jury waivers are enforceable. But *Szukhent* and *Bremen* have abrogated the view in *Morse* that these waivers are contrary to law and public policy. These decisions also herald a modern era in which parties have virtually unlimited rights to control their disputes. G. Richard Shell argues that "the modern Court has shown more fidelity to an absolute principle of freedom to contract than the Courts that preceded it."[43]

C. Federal Courts Enforce Contractual Jury Waivers if they were 'Knowing and Voluntary'

In the late twentieth century, the lower federal courts began to enforce contractual jury waivers.[44] Federal courts recognize that "contractual provisions waiving trial by jury in civil actions are neither illegal nor contrary to public policy."[45] These courts analogize to the U.S. Supreme Court's liberal enforcement of contractual jury waivers and other pre-dispute agreements in *Okely*, *Szukhent* and *Bremen*.[46]

Federal courts enforce most pre-dispute agreements under state contract law.[47] But the U.S. Supreme Court commands that federal law apply to contractual jury waivers. In *Simler v. Conner*, the federal court of appeals in a diversity action denied the plaintiff's request for a jury trial because state law characterized his claims for relief as equitable.[48] The U.S. Supreme Court reversed, holding that federal law controlled the characterization of his claims.[49] The Court commanded that "the right to a jury trial in the federal courts is to be determined as a matter of federal law."[50] The Court explained that "[o]nly through a holding that the jury trial right is to be determined according to federal law can the uniformity in

40 375 U.S. 311, 316 (1964).

41 407 U.S. 1, 10 (1972), *superseded by statute*, 28 U.S.C. § 1404(a) (2008).

42 *Id*. at 9–10 & n.10.

43 G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 433 (1993). *See generally id*. at 452–62 (discussing the Court's presumptive enforcement of pre-dispute agreements under cases such as *Szukhent* and *Bremen*).

44 *See* Landis, *supra* note 1, at 691.

45 *E.g.*, Smith-Johnson Motor Corp. v. Hoffman Motors Corp., 411 F. Supp. 670, 677 (E.D. Va. 1975).

46 *See*, *e.g.*, *id*. at 675–77.

47 *See* Ware, *supra* note 38, at 181–97.

48 372 U.S. 221, 221 (1963).

49 *Id*. at 222.

50 *Id*.

its exercise which is demanded by the Seventh Amendment be achieved."[51]

In a criminal case, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[52] In *D.H. Overmyer Co. of Ohio v. Frick Co.*, the U.S. Supreme Court enforced a waiver of due process rights to notice and a hearing in a civil case because it was "voluntary, knowing, and intelligently made."[53] Thus, after *Overmyer*, federal courts "have overwhelmingly applied the knowing and voluntary standard" to determine whether the Seventh Amendment may be waived.[54] This standard is a constitutional one that is separate from, and higher than, contract law.[55]

To determine whether a waiver was 'knowing and voluntary,' a court examines (1) whether the waiver was conspicuous, (2) whether it was negotiable, (3) the relative sophistication of the parties, and (4) their relative bargaining power.[56] The circuits are split as to which party has the burden of proving whether a contractual jury waiver was knowing and voluntary.[57] Most circuits place the burden on the party seeking to *enforce* the waiver because, "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."[58] The Sixth Circuit places the burden on the party seeking to *avoid* the waiver, applying a "presumption in favor of validity in the interest of liberty of contract."[59]

D. The Courts of Most States Enforce Contractual Jury Waivers

States are not required to provide the right to a civil jury trial, because the Seventh Amendment has not been incorporated into the Fourteenth Amendment and applied to the states.[60] Nevertheless, every state provides for the right, either by constitution or statute.[61]

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51 *Id.*

52 Brady v. United States, 397 U.S. 742, 748 (1970).

53 *See* 405 U.S. 174, 185–86 (1972).

54 K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 756 (6th Cir. 1985). Scholars disagree as to the appropriate standard applicable to such waivers. *E.g.*, *compare* 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 (2000) (knowing and voluntary) *with* Ware, *supra* note 38 (contract law).

55 *See K.M.C.*, 757 F.2d at 755–56 (citing *Overmyer*, 405 U.S. at 183).

56 RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813–14 (N.D. Tex. 2002). *See generally* Sternlight, *supra* note 54, at 677–95 (2000) (discussing how courts apply the factors under the knowing and voluntary standard).

57 *Powell*, 191 F. Supp. 2d at 813. *See generally* Joel Andersen, *The Indulgence of Reasonable Presumptions: Federal Court Contractual Civil Jury Trial Waivers*, 102 MICH. L. REV. 104 (2003).

58 *E.g.*, Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).

59 *K.M.C.*, 757 F.2d at 758 (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 38.46, at 38-400 (2d ed. 1984)).

60 *See* Minn. & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916).

61 *Powell*, 191 F. Supp. 2d at 812 n.4.

In the nineteenth century, state courts, like the U.S. Supreme Court in *Morse*, did not enforce contractual jury waivers unless authorized by statute. For example, the Supreme Court of Massachusetts, in *Nute v. Hamilton Mutual Insurance Co.*, held that a forum selection clause in an insurance policy was unenforceable as a matter of law.[62] The court said, in dicta, that the right to a jury may not be waived by private agreement.[63] The court reasoned that the legislature cannot delegate to courts and parties the power to alter the rules of dispute resolution because they "affect the remedy, and are created and regulated by law."[64] The court also said that private agreements that alter these rules in advance were against public policy by interfering with the convenience of having uniform rules.[65]

In the twentieth century, however, state courts rejected the view in *Nute* and began to enforce contractual jury waivers without legislative authority.[66] As one court stated, these waivers serve the "public policy favoring freedom of contract and the efficient resolution of disputes."[67] The states apply different standards to these waivers. Some states enforce them under contract law, while others apply the knowing and voluntary standard.[68] Contractual jury waivers are unenforceable in Montana by statute and in Oklahoma by constitutional provision.[69] Georgia and California have barred them by judicial decision.[70]

E. The Georgia and California Supreme Courts Bar Contractual Jury Waivers

1. *Bank South, N.A. v. Howard*

In 1994, the Georgia Supreme Court barred contractual jury waivers. In *Bank South, N.A. v. Howard*, a bank lender suing a guarantor on a debt sought to enforce a jury waiver provision in the guaranty.[71] The trial court struck the guarantor's request for a jury trial.[72] The court of appeals

62 *See* 72 Mass. (6 Gray) 174, 176, 185 (1856), *abrogated by* W.R. Grace & Co. v. Hartford Accident & Indem. Co., 555 N.E.2d 214 (Mass. 1990).

63 *Id.* at 181.

64 *See id.* at 180.

65 *Id.* at 184.

66 *See* Zitter, *supra* note 1.

67 L & R Realty v. Conn. Nat'l Bank, 715 A.2d 748, 753 (Conn. 1998).

68 *E.g.*, *compare id.* at 755 (applying ordinary contract law) *with In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 134 (Tex. 2004) (applying the knowing and voluntary standard).

69 *See* MONT. CODE ANN. § 28-2-708 (2007) ("Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void."); OKLA. CONST. art. XXIII, § 8 ("Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.").

70 *See* Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 493 (Cal. 2005) (Chin, J., concurring).

71 Bank S., N.A. v. Howard, 444 S.E.2d 799, 799 (Ga. 1994).

72 *Id.*

reversed, holding that the waiver was unenforceable because it was not knowing and voluntary.[73] The Georgia Supreme Court, affirming, ruled that contractual jury waivers are unenforceable.[74]

Article I, section 1 of the Georgia Constitution provides: "The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party."[75] A Georgia statute allows waiver by oral or written stipulation to the court.[76] The *Bank South* court stated that, "[b]y their terms, both the statute and the Constitution plainly contemplate the pendency of litigation at the time of the waiver."[77] Thus, methods of waiver expressly authorized by the legislature are exclusive.[78] The court distinguished contractual jury waivers from arbitration agreements because the latter were expressly authorized by statute.[79] The court compared contractual jury waivers to confessions of judgment, noting that the latter are only allowed during pending litigation.[80] The court also observed "the magnitude of the rights involved and the probability of abuse that exists in both situations."[81]

Justice Sears-Collins, dissenting, argued that contractual jury waivers should be enforceable.[82] She noted that the constitutional and statutory provisions "do not provide that their methods by which the right to a jury trial can be waived are exclusive."[83] She argued that any ambiguity should be resolved in favor of enforceability, because parties may enter into agreements unless the legislature expresses or necessarily implies that the agreement violates law or public policy.[84] She pointed out that these waivers "economize litigation for the parties and for an already overburdened court system."[85] She also argued that the parties that use these clauses are sophisticated enough to understand their consequences.[86] She criticized the majority's analogy to a confession of judgment, because jury waivers forfeit only the right to a jury, but the latter "forfeits a panoply of constitutional and statutory rights, including the right to any trial whatsoever."[87] *Bank South* has generated much criticism.[88]

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73 *Id*.
74 *Id*. at 800.
75 GA. CONST. art. I, § 1, ¶ XI.
76 GA. STAT. § 9-11-39(a) (2008).
77 *Bank South*, 444 S.E.2d at 800.
78 *See id*.
79 *Id*. at n.5.
80 *Id*.
81 *Id*.
82 *Id*. at 801 (Sears-Collins, J., dissenting).
83 *Id*.
84 *Id*.
85 *Id*.
86 *Id*.
87 *Id*.
88 *See* RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 812 n.4 (N.D. Tex. 2002) (collecting

2. *Grafton Partners, L.P. v. Superior Court*

In 2005, the California Supreme Court followed the Georgia Supreme Court and barred contractual jury waivers. In *Grafton Partners, L.P. v. Superior Court*, a partnership sued the accounting firm, Price WaterhouseCoopers, L.L.P., for misrepresentation and other causes of action after the partnership hired the firm to audit its accounts.[89] The trial court enforced a jury waiver provision in the retainer agreement.[90] The California Supreme Court, however, affirmed the court of appeal's ruling that contractual jury waivers are unenforceable.[91]

Article I, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all . . . . In a civil cause a jury may be waived by the consent of the parties expressed *as prescribed by statute*."[92] The corresponding provision in the 1849 constitution read: "[A] jury trial may be waived by the parties in all civil cases in the manner to be *prescribed by law*."[93] In *Exline v. Smith*, the California Supreme Court found that, under this provision only the legislature could determine how a jury may be waived.[94] *Exline* invalidated an 1851 statute that allowed California courts to prescribe their own methods.[95] The *Exline* court pontificated that, "[t]he right of trial by jury is too sacred in its character to be frittered away or committed to the uncontrolled caprice of every judge or magistrate in the State."[96]

In *Grafton*, the California Supreme Court found that the present constitution supported *Exline*'s interpretation of the former one.[97] The constitutional convention of 1878-1879 considered proposals that deleted the "prescribed by law" language and simply allowed parties to waive a trial by jury.[98] These proposals were voted down without explanation.[99] The *Grafton* court reasoned that the convention, by reenacting this phrase in substantially similar language, incorporated *Exline*'s interpretation.[100] Thus, the court concluded, the California Constitution provides that only the legislature may determine how a jury may be waived.[101]

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sources).

89 Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 479 (Cal. 2005).

90 *Id*. at 481.

91 *Id*. at 492.

92 CAL. CONST. art. I, § 16 (emphasis added).

93 CAL. CONST. of 1849, art. I, § 3 (emphasis added).

94 5 Cal. 112, 112–13 (1855).

95 *Id*. at 112 (citing California Civil Practice Act, ch. 5, § 179, Stat. 1851, 78).

96 *Id*. at 113.

97 Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 483 (Cal. 2005).

98 1 E.B. WILLIS & P.K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, 1878–1879, 253, 255, 303–05 (1880–1881). The members lauded these proposals as "safe for the ends of justice and the preservation of private rights and the public interest" and a way of reducing expensive jury trials. *See id*.

99 *See id*.

100 *Grafton*, 116 P.3d at 479.

101 *Id*. at 482.

The court found that Code of Civil Procedure section 631 supported this conclusion.[102] The statute reads: "In civil cases, a jury may *only* be waived" in six specified ways, all of which occur during litigation.[103] The court conceded that the statute was "ambiguous concerning the validity of waivers entered into prior to the emergence of a legal dispute."[104] But the court interpreted the statute strictly to preserve the right to a jury trial.[105] The court opined that this provision "strongly suggests that waiver of the right to jury trial must occur subsequent to the initiation of a civil lawsuit."[106] Thus, the court concluded, "it is for the Legislature, not this court, to determine whether, and under what circumstances, a pre-dispute waiver of jury trial will be enforceable in this state."[107]

The court conceded that contractual jury waivers support public policies by conserving judicial resources and promoting freedom of contract.[108] The court also acknowledged that other states offer extraordinary protections for the right to a jury.[109] But the court was "reluctant" to substitute its own judgment for the legislature's as to whether and in what circumstances these waivers should be enforceable.[110] The court defended the legislature's decision to allow arbitration agreements but to bar express jury waivers.[111] The court explained that public policy supports preserving jury trials only once litigation has begun.[112] The court also suggested that arbitration agreements conserve more judicial resources.[113] The court blithely dismissed the idea that its decision would increase the number of arbitrations or jury trials.[114]

Justice Chin, concurring "reluctantly," urged the California Legislature to make contractual jury waivers enforceable.[115] He found "little sense" for the legislature to allow waiver by arbitration agreements but to bar contractual waivers.[116] The majority's decision "should not sound the death knell" for these waivers because, "[w]hile the public policy favoring jury trials subjects jury waiver agreements to strict construction, the application of that policy will not void every such agreement."[117] He observed that other states enforce these waivers because there is "no

102 *Id*. at 485.
103 CAL. CIV. PROC. CODE § 631(a) & (d) (West 2008) (emphasis added).
104 *Grafton*, 116 P.3d at 486.
105 *Id*. at 485.
106 *Id*.
107 *Id*. at 492.
108 *Id*. at 490–91.
109 *Id*. at 491.
110 *Id*. at 491–92.
111 *Id*. at 490.
112 *Id*.
113 *Id*.
114 *Id*.
115 *Id*. at 493 (Chin, J., concurring).
116 *Id*.
117 *Id*.

abstract public policy against [them]."[118] He noted that these waivers are an "attractive middle ground" between a jury trial and arbitration by minimizing excessive jury awards while better protecting the parties' rights.[119] *Grafton* has, like *Bank South*, generated much criticism.[120]

F. The Georgia and California Constitutions and Statutes do not Necessarily Prohibit Contractual Jury Waivers

The U.S. Supreme Court set forth the principle, which Justice Sears-Collins recognized in her dissent in *Bank South*, that pre-dispute agreements are enforceable unless they clearly violate law or public policy.[121] Thus, contractual jury waivers are enforceable in Georgia and California unless the relevant constitutional and statutory provisions clearly express or necessarily imply otherwise. Any ambiguity must be interpreted in favor of enforceability to uphold freedom of contract.

The Georgia constitutional and statutory provisions merely state methods to waive a jury. Thus, these provisions do not expressly state or necessarily imply that they prescribe the only methods.

The California constitutional provision states that a jury may be waived as provided by statute. This provision, however, does not mean that a jury may *only* be waived by statute. Similarly, a provision of the Texas Constitution reads: "The Legislature shall pass such laws as may be needed to regulate [the right to a jury]."[122] But the Texas Supreme Court, *In re Prudential Insurance Co. of America* held that a contractual jury trial waiver was enforceable because "[n]othing in the constitutional provisions themselves suggests that parties are powerless to waive trial by jury under any other circumstances, before or after suit is filed."[123]

California's constitutional history does not clearly indicate that the means of waiver are reserved to the legislature alone. The earlier constitutional provision did not expressly state or necessarily imply that a jury may *only* be waived as "prescribed by law." The debates shed no light on whether the framers rejected proposals to delete this language to reserve the methods of waiver to the legislature or whether they intended to incorporate the rule from *Exline*. At best, this history merely *suggests* that only the California Legislature may determine methods of waiver.

118 *Id*. at 493–94 (quoting Okura & Co. v. Careau Group, 783 F. Supp. 482, 488 (C.D. Cal. 1991)).

119 *Id*. at 493 (internal quotations omitted).

120 Julia B. Strickland & Stephen J. Newman, *Shock Waives*, 29 LOS ANGELES LAWYER, Mar. 2006, at 22 (arguing that Grafton is a "paternalistic" decision that will reduce certainty in the marketplace); Carl Grumer & *Thomas* McMorrow, *A Call for Contractual Jury Waivers in California*, 28 LOS ANGELES LAWYER, Dec. 2005, at 44 (arguing that Justice Chin's call "deserves strong and widespread support" because *Grafton* will harm the state's economy by increasing litigation costs).

121 *See supra* Part I.B.

122 TEX. CONST. art. I, § 15.

123 148 S.W.3d 124, 130 (Tex. 2004).

California Code of Civil Procedure section 631, while stating that a jury may be waived "only" as provided therein, is inapplicable to contractual jury waivers. In *Madden v. Kaiser Foundation Hospitals*, the California Supreme Court found arbitration agreements enforceable under this provision because it "presupposes a pending action" and thus does not apply to pre-dispute jury trial waivers.[124] In *Grafton*, the court clarified that Section 631 applies *only once parties have submitted their dispute to a court of law*.[125] Thus, because other statutes have not made arbitration the only method of pre-dispute waiver, contractual jury waivers are enforceable, despite this provision.

The Georgia and California supreme courts, unlike the U.S. Supreme Court, saw legislative ambiguity as a complete bar on contractual jury waivers. This drastic approach harks back to the outmoded views in *Morse* and *Nute* rather than a sensible, modern view of pre-dispute agreements. As the dissents in *Bank South* and *Grafton* pointed out, public policy that supports arbitration agreements surely supports contractual jury waivers. Further, as Justice Chin argued in *Grafton*, Georgia and California may protect the right to a jury by applying strict standards of waiver.

II. COMPARISON OF FEDERAL INTERESTS WITH GEORGIA'S AND CALIFORNIA'S INTERESTS

A. Federal Courts have an Interest in Enforcing Agreements that Reduce the Expense and Delay of Litigation

Federal courts have a paramount interest in enforcing private agreements. Congress has declared a strong public policy in favor of freedom of contract, reflected in the primary purpose of the FAA, "to enforce private agreements into which parties had entered, a concern which requires that [federal courts] rigorously enforce agreements to arbitrate."[126] The U.S. Supreme Court has stated that freedom of contract is a "sacred" liberty of the citizen and it is "paramount" that courts take care "not lightly to interfere with [it]."[127] The Court also said that the "usual and most important function of courts" is to protect the parties' legitimate expectations where the agreement does not violate law or public policy.[128]

Federal courts have an even stronger interest in promoting freedom to enter into agreements that resolve disputes efficiently. Federal procedure is designed "to secure the just, speedy, and inexpensive determination of

124 552 P.2d 1178, 1186–87 (Cal. 1976).

125 Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 486 (Cal. 2005).

126 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985) (internal quotations omitted).

127 Baltimore & Oh. Sw. Ry. Co. v. Voigt, 176 U.S. 498, 505 (1900) (internal quotations omitted).

128 *See id*. (internal quotations omitted).

every action."[129] Congress supported arbitration agreements because they save the time and expense of litigating in a judicial forum.[130] Jury trials cost much more for courts and litigants than bench trials. Eliminating the jury has been shown to reduce trial time by fifty percent.[131] Thus, contractual jury waivers, like arbitration agreements, serve one of the main purposes of the justice system by making litigation more efficient.[132]

By resolving disputes efficiently, contractual jury waivers also help the larger economy. Parties that have more control over their disputes have a deeper satisfaction with the judicial process.[133] Thus, they are more likely to enter into and rely on their agreements. Courts that enforce parties' legitimate expectations thus promote reliance and certainty in the marketplace.[134] Further, the waivers avoid the costs of grossly excessive verdicts granted by 'runaway juries.'[135] Lastly, businesses that avoid these costs can reduce the charges that they pass on to consumers.[136]

B. Georgia's and California's Interests in Barring Contractual Jury Waivers

Georgia and California have an interest in barring contractual jury waivers. Both of these states' constitutions require that the right to a jury be preserved "inviolate," and both *Bank South* and *Grafton* emphasized its importance.[137] The right to a jury is firmly rooted in American history and jurisprudence.[138] But, despite its importance, the Seventh Amendment has never been essential enough to the justice system to be incorporated into the Fourteenth Amendment and applied to the states.[139]

Georgia and California also have an interest in protecting the right to a jury.[140] But contractual jury waivers are most often used between

129 FED. R. CIV. P. 1.

130 S. REP. NO. 68-536, at 3 (1924); H.R. REP. NO. 68-96 (1924), at 1–2 ("Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement[,] . . . reducing technicality, delay and expense to a minimum and at the same time safeguarding the rights of the parties.").

131 *See* Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 57–58 (2001).

132 *See* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 481–85 (2007).

133 *See id*. at 479–81.

134 *Cf*. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13–14 (1972).

135 *See* Lilly, *supra* note 131, at 56–57 n.12.

136 *Cf*. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991).

137 *See supra* Part I.F.

138 Dimick v. Schiedt, 293 U.S. 474, 485–86 (1935). *See generally* Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 183–84 (discussing the importance and purposes of the civil jury in American history).

139 Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 21–22 (2003).

140 *See supra* Part I.E.

sophisticated parties, such as in equipment leases and commercial loans.[141] These waivers are sometimes used in franchise or employee agreements, where there may be an imbalance of bargaining power.[142] But courts have discretion to police agreements to prevent unfair bargaining, thus obviating the need for a complete bar on all contractual jury waivers. Further, the knowing and voluntary standard applicable to such waivers is so strict that there is a "far greater likelihood that the waiver was agreed to as part of a mutually beneficial contractual arrangement and far less danger of overreaching and duress by the party seeking to enforce the waiver."[143]

III. THE ERIE DOCTRINE: THE 'UNGUIDED' AND 'GUIDED' TESTS

A. The 'Unguided' *Erie* Test

The *Erie* doctrine comes from the seminal U.S. Supreme Court decision, *Erie Railroad Co. v. Tompkins*.[144] In *Erie*, the plaintiff sued a railroad in a federal diversity action for negligence after he was struck and injured by a train.[145] The railroad defended that it owed him no duty of care as a trespasser under Pennsylvania common law.[146] The court of appeals, however, affirmed the trial court's ruling that the railroad owed him a duty of care under *federal* common law.[147] The U.S. Supreme Court reversed and held that no duty existed because a federal court exercising its diversity jurisdiction must apply the substantive law of the state.[148]

The Court looked to the Rules of Decision Act (RDA), which states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[149] In *Swift v. Tyson*, the Court held that "the laws of the several States" referred only to legislation, and thus federal courts were free to develop their own common law.[150] *Erie* overruled this interpretation and made federal courts bound by state common law as well as legislation.[151] The Court said that the coexistence of federal and state common law after *Swift* caused litigants' substantive rights to be enforced

141 *See* Zitter, *supra* note 1, at 53.

142 *See* Smith-Johnson Motor Corp. v. Hoffman Motors Corp., 411 F. Supp. 670 (E.D. Va. 1975) (franchise agreement); Beach v. Burns Int'l Sec. Servs., 593 A.2d 1285, 1286 (Pa. Super. Ct. 1991) (employment agreement).

143 L & R Realty v. Conn. Nat'l Bank, 715 A.2d 748, 754–55 (Conn. 1998).

144 304 U.S. 64 (1938).

145 *Id*. at 69.

146 *Id*. at 69–70.

147 *Id*. at 70.

148 *Id*. at 72–73.

149 *Id*. at 71; 28 U.S.C. § 1652 (2000).

150 41 U.S. (16 Pet.) 1, 18–19 (1842).

151 *Erie*, 304 U.S. at 78–79.

differently in state and federal court.[152] This difference violated the Equal Protection Clause by encouraging non-citizens—who alone may remove a lawsuit to federal court—to 'forum-shop' for the most favorable law.[153]

Under *Erie*, federal courts sitting in diversity must apply the substantive law of the state.[154] But these courts are independent and sovereign, having "strong inherent power" over matters of procedure[155] and an "interest in the integrity of their own processes."[156] The distinction between substance and procedure is "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems."[157] But the line between the two shifts, depending on the context.[158] Federal courts must, therefore, carefully draw the line to avoid infringing on state sovereignty over substance or federal sovereignty over procedure.

The unguided *Erie* test has three prongs. First, a federal court is not required to follow state law that is 'procedural.'[159] 'Procedural' rights are defined as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[160] 'Substantive' rights, in contrast, are defined as those rights that, together with their corresponding duties, control citizens' "primary private activity" in everyday life.[161]

Second, even state law that is 'procedural' must be applied if it would substantially affect the result of litigation.[162] *In Guaranty Trust Co. of New York v. York*, the district court granted summary judgment for the defendant pursuant to the New York statute of limitations.[163] The court of appeals reversed pursuant to a federal equitable practice of ignoring the state statute.[164] The U.S. Supreme Court, reversing, held that the federal court must apply the state rule.[165] The Court conceded that a statute of limitations may be classified as 'procedural,' but opined that *Erie* still requires that the outcome of litigation be substantially the same in both

152 *Id*. at 74–75.
153 *See id*.
154 Hanna v. Plumer, 380 U.S. 460, 474–75 (1965) (Harlan, J., concurring).
155 *See id*. at 472–73 ("*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules."); *see also Erie*, 304 U.S. at 92 (Reed, J., concurring) ("[N]o one doubts federal power over procedure.").
156 Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001).
157 *See Hanna*, 380 U.S. at 474 (Harlan, J., concurring).
158 *See id*. at 471–72 (majority opinion).
159 *See* Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 108 (1945).
160 Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).
161 *See Hanna*, 380 U.S. at 474–75 (Harlan, J., concurring).
162 *York*, 326 U.S. at 109.
163 *Id*. at 100.
164 *Id*. at 100–01.
165 *Id*. at 110.

state and federal court.[166] A federal court that enforced a state statute of limitations would, by barring recovery, "vitally" affect the enforcement of the parties' substantive rights in violation of *Erie*.[167]

The Court gave unprecedented deference to state 'procedural' rules in the aftermath of *York*.[168] The Court in *Hanna v. Plumer*, conceding that its deference in this period was too liberal, noted that, because even the most minor procedural difference can ultimately affect the outcome of a case, the *York* standard is not meant to be used as a "talisman."[169] The other 'aim' of *Erie*, the Court explained, was to prevent forum-shopping.[170] Thus, a court must consider *both* whether a difference between federal and state law would be outcome-determinative and whether this difference would substantially influence a litigant's choice of forum.[171]

Third, state law, even if outcome-determinative, must not be applied if federal interests outweigh the state's interests. In *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, an injured electrical lineman sued his employer for negligence.[172] The employer raised the affirmative defense that the plaintiff's remedy was limited to the worker's compensation statute.[173] The South Carolina Supreme Court said that this statute required a judge to decide whether the plaintiff was a statutory 'employee.'[174] But the U.S. Supreme Court held that a jury must decide this factual issue.[175] The Court reasoned that the South Carolina court's rule was not "bound up with" the plaintiff's substantive right to recover under the statute, but was only a "form and mode" of enforcing that right.[176] The Court also said that, under the *York* standard, there was no "certainty" or "strong possibility" of a different outcome if a jury decided the defense.[177]

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166 *Id*. at 109.

167 *Id*. at 110.

168 *See* Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 534 (1949) (holding that state law controlled when an action is commenced for purposes of satisfying the statute of limitations); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 205 (1956) (holding that state law determined whether an arbitration agreement was enforceable).

169 380 U.S. 460, 466–67 (1965).

170 *Id*. at 467.

171 *Id*. at 468.

172 356 U.S. 525, 526 (1958).

173 *Id*. at 527.

174 Adams v. Davison-Paxon Co., 96 S.E.2d 566, 571 (S.C. 1957).

175 *Byrd*, 356 U.S. at 538.

176 *Id*. at 536.

177 *Id*. at 539–40. The Court said:

> We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury. But clearly there is not present here the certainty that a different result would follow . . . or even the strong possibility that this would be the case . . . . We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome.

Id.

But the Court, retracting its post-*York* deference to state law, said that it would not apply the state rule even if it were outcome-determinative.[178] The Court reasoned that the Seventh Amendment commanded—or at least influenced—the federal custom of having a jury decide disputed issues of fact.[179] The interest in preserving this practice, the Court said, was an "affirmative countervailing consideration" that outweighed the state's interest in ensuring substantial uniformity of outcome.[180]

B. The 'Guided' *Erie* Test

The alternative, 'guided' *Erie* test comes from *Hanna v. Plumer*.[181] In *Hanna*, the court of appeals affirmed the district court's dismissal of a personal injury suit on grounds that the manner of service of process was insufficient.[182] Massachusetts law required personal service of process, but service was instead made to an individual at the defendant's residence, pursuant to Federal Rule of Civil Procedure 4(d)(1).[183] The U.S. Supreme Court reversed and held that service was adequate.[184] The Court said, in dicta, that the *York* outcome-determinative test would probably not require application of the state rule governing service of process.[185]

The Court went on to say, however, that an 'unguided' *Erie* test is inappropriate for a Federal Rule.[186] The Court observed that the U.S. Constitution grants Congress the power to fashion rules of procedure for the federal courts.[187] Congress, by the Rules Enabling Act (REA), delegated authority to the Court to promulgate rules of "practice and procedure" for the federal courts that do not "abridge, enlarge, or modify any substantive right."[188] Thus, a Federal Rule controls if it satisfies the requirements of the REA and the U.S. Constitution.[189] A Federal Rule passes muster under the REA as long as it is "rationally capable of classification"[190] as procedural and does not "abridge, enlarge, or modify any substantive right."[191] The Court found that Rule 4(d)(1) satisfied these requirements and thus controlled the manner of service of process.[192]

178 *Id*. at 537–38.
179 *Id*. at 537.
180 *Id*. at 537–38.
181 *See* 380 U.S. 460, 471 (1965).
182 *Id*. at 462–63.
183 *Id*. at 461–62.
184 *Id*. at 474.
185 *Id*. at 466.
186 *Id*. at 471.
187 *Id*. at 472.
188 28 U.S.C. § 2072 (1958).
189 *See Hanna*, 380 U.S. at 471.
190 *Id*. at 472.
191 *Id*. at 464 (quoting Rules Enabling Act, 28 U.S.C. § 2072 (1958)).
192 *Id*. at 474.

IV. THE ERIE DOCTRINE REQUIRES FEDERAL COURTS TO APPLY FEDERAL LAW ON CONTRACTUAL JURY WAIVERS

A. The Erie Doctrine Applies because there is a Federal-State Conflict

As a preliminary matter, there is a conflict between Georgia and California law on contractual jury waivers and federal law. In *Stewart Organization*, *Inc*. *v*. *Ricoh Corp*., a copy machine dealer filed suit against a manufacturer under a dealership agreement.[193] The defendant moved to transfer the case under 28 U.S.C. section 1404, pursuant to a forum selection clause in the agreement.[194] The motion was denied because Alabama law barred such clauses.[195] The U.S. Supreme Court, reversing, found that there was a direct *Erie* conflict between federal and state law.[196] The Court reasoned that the statute allows a federal court to consider a forum selection clause as a factor in deciding whether to transfer the case, but the Alabama rule did not allow the court to consider the clause at all.[197]

Under the reasoning in *Ricoh*, federal law on contractual jury waivers is in direct conflict with Georgia and California law. As the venue statute at issue in *Ricoh* allows a court to consider various factors in determining whether to transfer the case, federal law on contractual jury waivers allows a federal court to consider various factors in determining whether the parties are entitled to a jury. In contrast, as the Alabama rule prohibited consideration of the forum selection clause in *Ricoh*, Georgia and California law prohibit any consideration of the contractual waiver.

B. The Supreme Court's *Erie* Decision, *Simler v*. *Conner*, Controls

In *Simler v*. *Conner*, the Supreme Court commanded that, in an *Erie* context, "the right to a jury trial in the federal courts is to be determined as a matter of federal law."[198] The command is clear that federal law governs *all* Seventh Amendment issues in federal courts. Therefore, *Simler* requires a federal court sitting in diversity to apply federal law to determine whether the Seventh Amendment right may be waived. Thus, federal courts routinely rely on the *Simler* rule in applying the knowing and voluntary standard rather than conflicting state law.[199]

One federal court in Texas refused to follow Georgia law under *Bank South* in determining whether a contractual jury waiver is enforceable. In

193 487 U.S. 22, 24 (1988).
194 *Id*.
195 *Id*.
196 *Id*. at 29–30.
197 *Id*.
198 372 U.S. 221, 222 (1963).
199 *E*.*g*., Med. Air Tech. Corp. v. Marwan Inv., Inc., 303 F.3d 11, 18 (1st Cir. 2002) ("In a diversity jurisdiction suit, the enforcement of a jury waiver is a question of federal, not state, law.").

RDO Financial Services v. Powell, the plaintiff sought to enforce a jury trial waiver in a guaranty agreement.[200] The defendant argued that, under the persuasive authority of *Bank South*, the waiver was unconstitutional.[201] But the court applied federal law in holding that the waiver was not knowing and voluntary.[202] The court reasoned that, although *Simler*'s precise holding concerned whether a claim is characterized as legal or equitable, federal courts have "routinely" applied the knowing and voluntary standard to contractual jury waivers.[203]

The same court later refused to follow California law under *Grafton* in determining whether a contractual jury waiver is enforceable. In *TransFirst Holdings, Inc. v. Phillips*, the defendant employees argued that, under *Grafton*, the plaintiff employer could not enforce a jury waiver provision in an employment agreement providing that California law governed.[204] The court disagreed and held that the waiver was knowing and voluntary under federal law.[205] The court reasoned that, under *Simler* and its earlier decision in *Powell*, "[t]he right to a jury trial in a federal court is clearly a question of federal law."[206]

Only one federal court has followed state law in determining whether a contractual jury waiver is enforceable. In *IFC Credit Corp. v. United Business and Industrial Federal Credit Union*, the Seventh Circuit held that Illinois law controlled the enforceability of a contractual jury waiver in an equipment lease.[207] The court reasoned:

> *Simler* holds that the classification of a dispute as "legal" or "equitable" must be made under federal norms . . . . It does not follow that national law also controls the validity of a contractual agreement to a bench trial. There is no general federal law of contracts after *Erie R.R. v. Tompkins*; if 'federal law' did control, the best it could do would be to use state law as the rule of decision.[208]

This reasoning is unsound for three reasons. First, the court's reading of *Simler* is too narrow. Federal law must also control the enforceability of contractual jury waivers because the exercise of the Seventh Amendment must, under *Simler*, be uniform. Second, while federal courts cannot make generally applicable contract law, they may fashion rules to determine whether rights under federal statutes may be waived.[209] Thus, the knowing and voluntary standard may determine whether the Seventh Amendment right to a jury trial may be waived. Third, "state law may be incorporated

200 RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 812 (N.D. Tex. 2002).
201 *Id*.
202 *Id*. at 812–14.
203 *Id*. at 813 n.5.
204 2007 U.S. Dist. LEXIS 20483, at *6 (N.D. Tex. Mar. 22, 2007).
205 *Id*. at *10.
206 *Id*. at *7 (internal quotations omitted).
207 512 F.3d 989, 991 (7th Cir. 2008).
208 *Id*. at 991–92 (internal citation omitted).
209 *See* Kendall v. City of Chesapeake, 174 F.3d 437, 441 n.1 (4th Cir. 1999).

as the federal rule of decision" only "when there is little need for a nationally uniform body of law."[210] The need to ensure uniformity in Seventh Amendment law, therefore, precludes incorporation of state law.

C. Even if *Simler* did not Control, the Federal Arbitration Act would Control under a 'Guided' *Erie* Test

Under a 'guided *Erie* test, federal courts must apply a federal statute that is broad enough to cover the issue and that is a valid exercise of Congress's power under the U.S. Constitution to regulate procedure for the federal courts.[211] The FAA satisfies both prongs of this test and thus requires federal courts to enforce contractual jury waivers.

First, the FAA is broad enough to cover the issue. A contractual jury waiver is an implicit part of an arbitration agreement.[212] State laws that bar contractual jury waivers would, therefore, bar arbitration agreements as well.[213] Thus, the U.S. Supreme Court has used the FAA to preempt state laws restricting contractual jury waivers. For example, in *Southland Corp. v. Keating*, the California Supreme Court held that an arbitration clause in a franchise agreement was unenforceable under the California Franchise Investment Law, which prohibited waiver of the rights therein.[214] The court reasoned that the arbitration agreement waived the statutory right to a jury.[215] The U.S. Supreme Court reversed, holding that the California law was void under the Supremacy Clause.[216] If the FAA preempts state laws that bar contractual jury waivers in state courts, it surely must control over state laws that bar these waivers in federal court.

Second, the FAA is a valid exercise of congressional power to regulate procedure. Although *Southland* and its progeny gave the FAA a substantive dimension, Congress enacted the FAA pursuant to its constitutional power to regulate federal procedure.[217] The FAA also does not abridge, enlarge or modify any substantive rights.[218]

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210 *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979).

211 Stewart Org. v. Ricoh Corp., 487 U.S. 22, 26–27 (1988).

212 *See supra* Part I.A.

213 *See* Long v. DeGeer, 753 P.2d 1327, 1330 (Okla. 1987) (Opala, J., concurring) (citing OKLA. CONST. art. XXIII, § 8, under which "express or implied *contractual* waivers of a *constitutional right* appear to be unenforceable[,]" and surmising that this provision would similarly bar an arbitration agreement "as an implicit waiver of [the] fundamental right to a trial by jury").

214 *See* 465 U.S. 1, 10 (1984); CAL. CORP. CODE § 31512 (West 2008) ("Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.").

215 *Southland*, 465 U.S. at 10.

216 *See id*. at 16. After *Southland*, the Court routinely used the FAA to preempt state laws that restricted arbitration agreements. *See* David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 546–54 (2004).

217 *See* H.R. REP. NO. 68-96 (1924), at 1 ("Whether an agreement for arbitration shall be enforced or not is a question of procedure . . . .").

218 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate . . . a party does not forgo the substantive rights . . . it only submits to their

D. Even if the Federal Arbitration Act did not Control, the 'Unguided' *Erie* Test would still Require Application of Federal Law

1. Federal Law on Contractual Jury Waivers is Procedural

The U.S. Supreme Court in *Byrd v. Blue Ridge Rural Electrical Cooperative* said that whether a judge or a jury decided factual issues relevant to an affirmative defense in a negligence case was not "bound up" with the parties' substantive rights but only a "form and mode" of enforcing them.[219] Thus, under *Byrd*, whether a judge or jury decides factual issues relevant to claims in a contract dispute is not "bound up" with the parties' substantive rights under the agreement but is only a "form and mode" of enforcing them.

The Court's definition of 'procedure' supports this conclusion. Substantive rights govern the parties' primary activity under a contract, including mutual promises, performances, and remedies for breach. Procedural rights, on the other hand, govern the judicial process by which those rights are enforced.[220] The right to a jury is procedural because it concerns who determines which party is entitled to a remedy. This right does not become substantive simply because it is part of the agreement—"a contract about procedure remains a matter of procedure."[221]

A 'procedural' rule is "bound up" with substantive rights only when a state declares an "integral" relationship between the two.[222] Georgia and California have not, by judicial decision or statute, suggested that the parties' rights under an agreement would be affected if a judge, rather than a jury, determined the factual issues under an agreement. Thus, there is no integral relationship between Georgia and California law on contractual jury waivers and the parties' rights under substantive law.

2. Federal Law on Contractual Jury Waivers is not Outcome-Determinative

The U.S. Supreme Court held in *Byrd v. Blue Ridge Rural Electrical Cooperative* that whether a judge or jury decides factual issues relevant to claims in a negligence case would not substantially affect the outcome of the litigation.[223] Whether a judge or jury decides factual issues relevant to the parties' claims in a contract dispute will also, therefore, not substantially affect the outcome of the litigation. The Court's *Erie* jurisprudence on arbitration agreements supports this conclusion.

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resolution in an arbitral, rather than a judicial, forum.").

219 356 U.S. 525, 535–36 (1958).

220 *See* Schwartz, *supra* note 216, at 615–20.

221 *Id*. at 618.

222 *See Byrd*, 356 U.S. at 536.

223 *Id*. at 539–40.

In *Wilko v. Swan*, a purchaser of securities brought suit for misrepresentation under the Securities Act of 1933.[224] The district court held that an arbitration agreement was unenforceable because the Securities Act provided a special right of recovery in a judicial forum.[225] The Court agreed, holding that the arbitration agreement would deprive the plaintiff of its remedy under the Act.[226] The Court reasoned that the choice of forum was a substantial right under the Act, because its protections applied much less in an arbitral forum.[227] The Court noted that arbitrators are not instructed in the law, and review of their decisions is limited.[228]

The Court maintained this view in its post-*York* period of deference to state law. In *Bernhardt v. Polygraphic Co. of America*, the district court denied the employer's motion to enforce an arbitration clause in the employment agreement because Vermont law made arbitration agreements revocable.[229] The court of appeals reversed, reasoning that "[a]rbitration is merely a form of trial," and thus enforcing the arbitration agreement would not infringe on the parties' substantive rights.[230] The U.S. Supreme Court reversed because New York law may have governed it instead.[231] But the Court also disagreed with the court of appeals' classification of an arbitration agreement as a mere procedural matter:

> If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where the suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.[232]

The Court explained that arbitration offers fewer procedural protections than trial.[233] For example, arbitration offers no right to trial by jury under the Seventh Amendment; arbitrators are not instructed in the law; the record of their proceedings is not as complete; and judicial review of their decisions is limited.[234]

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[235] the Court abrogated its previous view in *Wilko* and *Bernhardt*. *Mitsubishi*

224 346 U.S. 427, 428 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).
225 *Id.* at 430–31.
226 *See id.* at 435.
227 *Id.*
228 *Id.* at 436.
229 350 U.S. 198, 199–200 (1956).
230 *See id.* at 200, 202 (internal quotations omitted).
231 *Id.* at 205.
232 *Id.* at 203.
233 *Id.*
234 *Id.* (citing Wilko v. Swan, 346 U.S. 427, 435–38 (1953)).
235 473 U.S. 614 (1985).

involved an antitrust dispute over an international contract between an automobile manufacturer and distributor.[236] The Court affirmed the district court's grant of Mitsubishi's motion to enforce an arbitration agreement and ruled that claims under federal antitrust statutes are arbitrable.[237] The Court reasoned: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[238]

In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court squarely rejected its view in *Wilko* and *Bernhardt*.[239] In *Rodriguez*, securities investors brought suit against a brokerage firm for violations of the Securities Act of 1933 and the Exchange Act of 1934.[240] The district court held that, under *Wilko*, the investors' claims under the Securities Act were not arbitrable.[241] The court of appeals reversed.[242] The U.S. Supreme Court affirmed.[243] The Court admitted that its view that arbitration would substantially affect the outcome of litigation was outmoded and pervaded by "the old judicial hostility to arbitration."[244]

According to *Wilko* and *Bernhardt*, arbitration has many differences from a bench trial, including the right to trial by jury. But under *Mitsubishi* and *Rodriquez*, these differences do not substantially affect the outcome of litigation. A jury trial, on the other hand, has only one procedural difference from a bench trial, the right to a jury. Under these decisions, therefore, federal law on contractual jury waivers is even less outcome-determinative than federal law on arbitration agreements.

One may argue that federal law on contractual jury waivers, even if not outcome-determinative, will influence litigants to remove to federal court to enforce them. But a rule that does not substantially influence the outcome is unlikely to substantially influence the choice of forum.[245] And even a rule that causes forum-shopping does not violate *Erie* if it is not outcome-determinative. Justice Harlan, concurring in *Hanna v. Plumer*, explains why too much reliance on either 'aim' of *Erie* is wrong:

> The Court is quite right in stating that the "outcome-determinative" test of *Guaranty Trust Co. v. York*, if taken literally, proves too much, for any rule, no matter how clearly "procedural," can affect the outcome of litigation if it is not obeyed. In turning from the "outcome" test of York back to the unadorned forum-shopping rationale of *Erie*, however, the Court falls prey to like

236 *Id.* at 616–20.
237 *Id.* at 618–20, 629.
238 *Id.* at 628.
239 490 U.S. 477 (1989).
240 *Id.* at 478–79.
241 *Id.* at 479.
242 *Id.*
243 *Id.* at 481.
244 *Id.* at 480 (internal quotations omitted).
245 Hanna v. Plumer, 380 U.S. 460, 468 (1965).

> oversimplification, for a simple-forum shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge.[246]

Mitsubishi and *Rodriquez* show that federal law on contractual jury waivers is not outcome-determinative. Thus, any risk of forum-shopping caused by such waivers is chimerical. But, even if federal law did cause forum-shopping, it still would not violate *Erie*, under Justice Harlan's reasoning, without creating substantial differences in outcome.

3. Even if Federal Law on Contractual Jury Waivers was Outcome-Determinative, Federal Interests would Control.

The U.S. Supreme Court has consistently said that the federal interest in uniformity of the exercise of the Seventh Amendment is paramount. For example, in *Simler v. Conner*, the Court commanded that federal law govern the right to a jury to ensure its uniform exercise as "demanded by the Seventh Amendment."[247] Also, in *Byrd v. Blue Ridge Rural Electrical Cooperative*, the Court said that the federal interest in whether a judge or jury determined factual issues was "countervailing" because of "the influence—if not the command—of the Seventh Amendment."[248] Thus, federal law governs whether the Seventh Amendment may be waived to ensure uniformity in its exercise.

Federal courts follow this reasoning in enforcing contractual jury waivers. For example, in *Phoenix Leasing v. Sure Broadcasting, Inc.*, the plaintiff lender moved to enforce a jury waiver in a loan agreement against the borrower.[249] The defendant argued that the waiver was unconscionable under California law, while the plaintiff argued that the knowing and voluntary standard controlled the waiver's validity.[250] The court avoided the *Erie* question by finding no direct conflict between federal and state law.[251] But the court said, in dicta, that, if there were a conflict, "the validity of contractual waivers of . . . [t]he right to a jury trial in federal court is governed by federal law" under *Simler*[252] because of "[t]he need to ensure the uniformity of exercise of the Seventh Amendment right."[253]

Federal interests in enforcing agreements that allow parties to resolve their disputes efficiently are also paramount. In *Stewart Organization v. Ricoh Corp.*, the U.S. Supreme Court held that federal law determined

246 *Id.* at 475 (Harlan, J., concurring) (internal citation omitted).
247 372 U.S. 221, 222 (1963).
248 356 U.S. 525, 537 (1958).
249 843 F. Supp. 1379, 1382 (D. Nev. 1994).
250 *Id.* at 1383.
251 *See id.* at 1386.
252 *Id.* at 1384.
253 *Id.* at 1386.

whether a forum selection clause was enforceable in federal court.[254] Justice Kennedy, concurring, stated:

> The federal judicial system has a strong interest . . . not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses. Though state policies should be weighed in the balance, the authority and prerogative of the federal courts to determine the issue . . . should be exercised so that a valid forum-selection clause is given controlling weight in all but the most exceptional cases.[255]

Contractual jury waivers support the same interests as forum selection clauses because both agreements reduce the expense and delay of litigation. Thus, under Justice Kennedy's reasoning, federal interests in enforcing contractual jury waivers control over Georgia's and California's interests in barring them, unless the most exceptional case applies.

This is not an exceptional case, for three reasons. First, federal law provides extraordinary protection for the right to a jury. The knowing and voluntary standard is so much stricter than the contract law applied to other pre-dispute agreements that a criminal defendant may waive his or her most basic constitutional rights under it.[256] Even the *Grafton* court admired the extraordinary protection that this standard provides and seemed to suggest that the California Legislature adopt it.[257] This standard's extraordinary strictness virtually guarantees that a waiver is fairly bargained for.[258]

Second, the protection that federal law provides for the right to a jury is more than adequate. As Congress stated in the legislative history to the FAA, "The constitutional right to a jury trial is adequately safeguarded" by arbitration agreements.[259] If ordinary contract law applicable to such agreements provides adequate protection when the parties may not even realize that they are waiving the right to a jury, the knowing and voluntary standard must provide *more than* adequate protection when the waiver is conspicuous and freely bargained for.

Third, federal law provides *better* protection for the right to a jury than Georgia and California law. Georgia and California law encourage parties that wish to waive the right to a jury to turn to arbitration agreements instead. The contract law applicable to such agreements provides minimal protection for this right. The knowing and voluntary standard, on the other hand, stems the tide to arbitration and more than adequately protects this right. Thus, federal courts can best protect the right to a jury by continuing to enforce contractual jury waivers under federal law.

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254 487 U.S. 22, 28 (1988).
255 *Id*. at 33 (Kennedy, J., concurring).
256 *See supra* note 52.
257 *See* Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 491 (Cal. 2005).
258 *See supra* note 143.
259 S. REP. NO. 68-536, at 3 (1924).

CONCLUSION

This Comment proposes that the *Erie* doctrine requires federal courts sitting in diversity in Georgia and California to continue to enforce contractual jury waivers under federal law. The *Erie* doctrine applies because federal courts enforce these waivers, while the supreme courts of Georgia and California have barred them. In *Simler v. Conner*, the U.S. Supreme Court commanded that federal law governs the Seventh Amendment right to a jury trial. Thus, federal courts must continue to enforce contractual jury waivers if they were knowing and voluntary.

Alternatively, this Comment proposes that the FAA also requires federal courts to enforce these waivers, because it satisfies both prongs of the 'guided' *Erie* test. First, the FAA is broad enough to cover the issue by making arbitration agreements enforceable, because contractual jury waivers are implicit parts of such agreements. The FAA must conflict with state laws restricting contractual jury waivers in federal court because it preempts such laws in state courts. Second, the FAA is a valid exercise of congressional power to regulate procedure in the federal courts.

This Comment further proposes that federal common law controls because, under the Court's *Erie* jurisprudence, it satisfies the three prongs of the 'unguided' *Erie* test. First, whether a judge or jury determines a dispute is a matter of procedure. Second, federal law would not substantially affect the outcome of the litigation, especially if arbitration agreements do not. Third, even if federal law were outcome-determinative, federal interests in enforcing agreements that resolve disputes efficiently outweigh state interests, absent the most exceptional case. This is not an exceptional case where Georgia's and California's interests in protecting the right to a jury control, because the 'knowing and voluntary' standard more than adequately protects those interests.

Two legal developments must occur as a result of this thesis. First, the Ninth Circuit has granted review to a California district court's ruling that contractual jury waivers are enforceable under federal law, despite *Grafton*.[260] If the Ninth Circuit reverses, the U.S. Supreme Court should grant certiorari and reverse the Ninth Circuit decision. Second, the Georgia and California legislatures should overturn *Bank South* and *Grafton* by making these enforceable with appropriate safeguards. Georgia and California must not curtail the freedom to enter into agreements that serve important public interests. In an era of customized litigation, the view that some rights are too sacred to be bargained for is a thing of the past.

260 Applied Elastomerics, Inc. v. Z-Man Fishing Prods., Inc., 521 F. Supp. 2d 1031, 1044 (N.D. Cal. 2007) ("The right to a jury trial in federal court is governed by federal law and, under federal law, parties may contractually waive their right to a jury trial."), *appeal docketed*, No. 07-17170 (9th Cir. Nov. 29, 2007).