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Jean R. Sternlight

University of Nevada, Las Vegas – William S. Boyd School of Law

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Articles

The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial

By JEAN R. STERNLIGHT*

THE CIVIL JURY trial is fast disappearing from our legal landscape,¹ and one important reason for its disappearance is the rapid growth of mandatory arbitration.² However, with few exceptions, lawyers, courts, and commentators have failed to adequately consider constitutional rights to a jury trial in determining the validity of arbitration clauses.

* Saltman Professor of Law, University of Nevada, Boyd School of Law; and Director, Saltman Center for Conflict Resolution. The author commenced this project while still a professor at the University of Missouri-Columbia, and expresses her gratitude for the support of that institution, as well as for the support of her current employer, UNLV. The author also thanks the Roscoe Pound Institute. She presented an earlier version of this paper to a conference of state court judges with the support of that organization. Finally, the author thanks her research assistants at both schools: Ann Casey, Mark Lyons, and Patti Ross.

1. Federal court statistics for 2000 show just 1.21% of cases terminating in a jury verdict. See Theodore Eisenberg & Kevin M. Clermont, Judicial Statistical Inquiry Form, at <http://teddy.law.cornell.edu:8090/questata.htm> (last accessed Nov. 5, 2003) (search variables on file with author). Apparently the same phenomenon is occurring at the state level, but with more variation. A chart provided by the Court Statistics Project for the National Center for State Courts shows that among 25 states, the percentage of cases ending in jury trial ranged from Washington's low .35% to Rhode Island's high of 5.5%. The average in the jurisdictions studied, including 25 states, Puerto Rico, and the District of Columbia, was that .7% of litigated cases ended in a jury trial. COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE TRIAL & NON-TRIAL DISPOSITIONS (in progress 2003) (on file with author). See also Chris Guthrie, *Procedural Justice Research and the Paucity of Trials*, 2002 J. DISP. RESOL. 127, 129 n.22 (discussing sample of 1992 data showing that approximately 2% of state court cases ended in jury verdict).

2. See *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 933 (Ala. 1997) (Cook, J., concurring) ("The reality is that contracts containing [arbitration] provisions appear with increasing frequency in today's marketplace. As a result, consumers find it increasingly difficult to acquire basic goods and services without forfeiting their rights to try before a jury the common-law claims that may accrue to them.").

This article will show that if an appropriate analysis were used, a significant number of mandatory arbitration clauses would be held invalid.

Companies providing a broad range of products and services are now using small print contracts of adhesion to require their customers, employees, business partners, and others to resolve any future disputes through binding arbitration, rather than through litigation. Buy a house or car, open a bank account, obtain insurance, order a computer, schedule termite extermination services, or secure a credit card, and the odds are high that you will be “agreeing” to resolve all related future disputes through arbitration.³ Arbitration is increasingly being required by medical providers,⁴ schools,⁵ and was even mandated for a Cheerios box mail-in.⁶ One study showed that the “average Joe” in Los Angeles is now required to arbitrate disputes that arise with respect to one-third of the major transactions in his life.⁷

The rapid proliferation of mandatory arbitration has been quite controversial. Numerous articles in the popular press have criticized the practice as unfair,⁸ and most legal academics who have written on the subject express negativity toward the mandatory imposition of arbitration.⁹ Many state and federal court judges have also voiced dis-

3. Many articles have collected examples of these kinds of cases. *See, e.g.*, David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 7–10 (1997); Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. (forthcoming Winter 2003), available in draft at <http://www.roscoepound.org/new/thornburg.pdf> (last accessed Nov. 5, 2003).

4. *See, e.g.*, Michelle Andrews, *For Patients, Unpleasant Surprises in Arbitration*, N.Y. TIMES, Mar. 16, 2003, § 3, at 8.

5. *See, e.g.*, Elizabeth F. Farrell, *Signer Beware: For-Profit Colleges Increasingly Use Arbitration Agreements to Prevent Lawsuits*, 49 CHRON. HIGHER EDUC., Apr. 18, 2003, at A33.

6. Ellie Winninghoff, *A Fair Fight? Arbitration May Not Always be in Your Best Interest*, CHI. TRIB., Nov. 24, 1994, at A1.

7. Linda Demaine & Deborah Hensler, *Only Another Forum: Substituting Arbitration for the Courthouse in Consumer Disputes*, 67 LAW & CONTEMP. PROBS. (forthcoming Winter 2003), available in draft at <http://www.roscoepound.org/new/demaine.pdf> (last accessed Oct. 22, 2003).

8. *See, e.g.*, Reynolds Holding, *Private Justice; Millions are Losing Their Legal Rights; Supreme Court Forces Disputes from Court to Arbitration—A System with No Laws*, S.F. CHRON., Oct. 7, 2001, at A1; Margaret Mannix, *No Suits For You—Mad at a Firm? Arbitration Could be your Only Recourse*, U.S. NEWS & WORLD REP., June 7, 1999, at 58; Caroline E. Mayer, *Hidden in Fine Print: “You Can’t Sue Us”; Arbitration Clauses Block Consumers from Taking Companies to Court*, WASH. POST, May 22, 1999, at A1; Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, N.Y. TIMES, Mar. 10, 1997, at A1.

9. *See, e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997); Schwartz, *supra* note 3; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 660–74

gust with the process of mandatory arbitration.¹⁰ The critics attack mandatory arbitration on a variety of grounds, including not only its elimination of access to courts and juries,¹¹ but also its actual or potential lack of neutrality,¹² high cost,¹³ diminution of claimants' remedies,¹⁴ elimination of class actions,¹⁵ and curtailment of discovery.¹⁶

Yet, mandatory arbitration persists because, at least thus far, the Supreme Court has received it quite enthusiastically. Since the mid-1980s the Supreme Court has issued numerous decisions stating that arbitration should be looked upon with favor and that, with few exceptions, arbitration clauses should be enforced.¹⁷ While recognizing that some contracts imposing arbitration might be unconscionable or impermissible under particular federal laws, the Court has explained that those seeking to attack arbitration on such grounds must present evidence rather than merely speculate about future problems.¹⁸ Thus, while federal and state courts have voided some of the most egregious

(1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

10. Often judges use quite colorful language to condemn the process. See, e.g., *In re Knepp*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999) (asserting that the stench of mandatory arbitration "rises as a putrid odor which is overwhelming to the body politic"); *Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643, 658 n.8 (Pa. 2002) (observing that particular arbitration clause at issue "reveals yet another vignette in the timeless and constant effort by the *haves* to squeeze from the *have nots* even the last drop," and quoting a populist song to illustrate the point).

11. See, e.g., *Sternlight*, *supra* note 3; see also Carrington & Haagen, *supra* note 9, at 402 (urging that the Supreme Court has trammled democratic institutions).

12. See, e.g., *Sternlight*, *supra* note 9, at 684.

13. See, e.g., *id.* at 682-83; Lisa B. Bingham, *Self Determination in Dispute System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. (forthcoming Winter 2003), available in draft at <http://www.roscoepound.org/new/bingham.pdf> (last accessed Nov. 5, 2003).

14. See, e.g., *Sternlight*, *supra* note 9, at 685-86; Bingham, *supra* note 13.

15. See, e.g., Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2002).

16. See, e.g., *Sternlight*, *supra* note 3, at 61.

17. I recount this history in *Sternlight*, *supra* note 9.

18. See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (rejecting claim that arbitration was unduly expensive on ground that plaintiff had failed to present sufficient evidence of cost); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-33 (1991) (rejecting brokerage employee's claim that arbitration would be biased or unfair on ground that employee failed to present sufficient evidence of problems with arbitration). An example of a case in which plaintiffs successfully presented sufficient evidence to void an arbitration clause on grounds of unconscionability is *Ting v. AT&T*, 182 F. Supp. 2d 902, 929-34 (N.D. Cal. 2002) (holding the arbitration provision illegal and unconscionable given its limitation of remedies, elimination of class actions, and other problems), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003).

arbitration clauses on statutory or common law grounds,¹⁹ most arbitration clauses are upheld.

Nor has legislation significantly reined in mandatory arbitration. At the federal level, although numerous bills have been introduced to proscribe arbitration of particular claims, the only one that has been enacted protects automobile franchisees from arbitration imposed by automobile franchisors.²⁰ With respect to state law, the Supreme Court has interpreted the Federal Arbitration Act in such a way as to preempt most legislation that states might think to pass prohibiting the use of mandatory arbitration with respect to certain kinds of claims.²¹

Although one of the most significant aspects of mandatory arbitration is that it denies claimants access to court or to a jury trial, lawyers, courts, and policy makers have typically failed to pay sufficient attention to jury trial guarantees.²² This diminution of the right to a jury trial is especially surprising in light of the reverence traditionally accorded the jury right. The Supreme Court has repeatedly praised the civil jury trial, stating, for example, that “[t]he trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.”²³ As the Montana Supreme Court put it, “the importance of the right of trial by jury derives from it having ‘developed in harmony with our basic concepts of a democratic soci-

19. See, e.g., *Alexander v. Anthony Crane Int'l*, 341 F.3d 256 (3d Cir. 2003) (voiding, as unconscionable, clause that shortened employees' statute of limitations to thirty days and limited their parenthetical claims for relief); *Paladino v. Avnet Computer Techs. Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (refusing to compel arbitration of Title VII claims when arbitrator was precluded from awarding compensation damages); *State ex rel Dunlap v. Berger*, 567 S.E.2d 265, 280 (W.Va. 2002) (voiding, as unconscionable, arbitration clause imposed on jewelry customer where clause prohibited punitive damages or proceeding by way of class action).

20. The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001 was signed into law as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028, 116 Stat. 1758, 1835-36 (2002).

21. See *infra* Part II.C for further discussion of the preemption issue.

22. Insufficient attention has also been afforded to “access to court” provisions contained in many states’ constitutions. However, consideration of these arguments is outside the scope of this article. For an example of a decision rejecting the “access to court” argument, see *Rollings v. Thermodyne Industries Inc.*, 910 P.2d 1030 (Okla. 1996) (holding, with respect to private commercial contract, that agreement to arbitrate did not violate Oklahoma constitutional provisions guaranteeing access to court).

23. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 581 (1990) (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.)).

ety and a representative government.’”²⁴ To quote William Blackstone, trial by jury is “a privilege of the highest and most beneficial nature.”²⁵ As Blackstone also observed, in remarks very apt for our situation today:

[Our liberties] cannot but subsist, so long as this palladium remains sacred and inviolate, not only from all open attacks, which none will be so hardy as to make, but also from all secret machinations which may sap and undermine it.²⁶

Thus, we have traditionally valued the jury trial for providing a fair hearing by one’s peers, for fostering the use of common sense, for limiting the power of judges, and for providing jurors themselves with an important civic educational experience. Yet, the imposition of mandatory arbitration eliminates the civil jury, and often this elimination is not made through a knowing, voluntary, or intelligent waiver. The remainder of this paper will discuss the implication of jury trial rights for mandatory arbitration under both the federal and state constitutions, but will focus primarily on state constitutional rights as I have previously examined the federal right in some detail.²⁷

I. The Seventh Amendment Right to a Jury Trial

The Constitutional right to a jury trial has long been deemed one of the fundamental elements of our federal system of justice. Ratified in 1791, the Seventh Amendment provides that “in Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved.”²⁸ Of course, the Seventh Amendment only applies to certain kinds of claims. First, it only applies to those cases brought “at common law” for more than twenty dollars.²⁹ Second, at least to date, the Seventh Amendment has been held by the Supreme Court to apply only in federal and not state courts. While the Court has not, in any recent cases, held that the Seventh Amend-

24. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 12 (Mont. 2002) (quoting *State v. LaMere*, 2 P.3d 204, 211–12 (Mont. 2000)) (Nelson and majority of court specially concurring).

25. 3 WILLIAM BLACKSTONE, COMMENTARIES *350.

26. 4 WILLIAM BLACKSTONE, COMMENTARIES *343.

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

28. U.S. CONST. amend. VII.

29. To determine if a particular claim is brought “at common law,” courts first perform a historical analysis to decide whether the claim would have entitled parties to a jury in eighteenth-century England. Then, if that test is inconclusive, courts look at whether the remedy that is sought is legal as opposed to equitable. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 581 (1990) (finding plaintiff entitled to a jury trial in duty of fair representation action brought against union).

ment does not apply in state court, the Court's most recent decision on this point reveals that, to date, the Seventh Amendment is one of the very few provisions of the Bill of Rights that has not been "incorporated" into the Fourteenth Amendment Due Process clause and applied to the states.³⁰

The fact that the Seventh Amendment has not been deemed sufficiently fundamental to our system of justice to be incorporated into the Fourteenth Amendment is troubling. Indeed, the refusal to incorporate, if maintained, creates tension with the Court's statements regarding the fundamental nature of the jury trial. Nonetheless, for purposes of this article I do not argue for incorporation, but rather assume that the Seventh Amendment governs only proceedings in federal court and that state constitutions will govern actions brought in state court.³¹

When the Seventh Amendment does apply, the right to jury trial may be waived, but federal courts typically hold that such waivers must be knowing, voluntary, and intelligent, or words to the same effect.³² To determine whether a knowing, voluntary, intelligent waiver has been made, federal courts look at such factors as the negotiability of the waiver, the conspicuousness of the waiver, the disparity of bargaining power between the parties, and the degree of professional or business sophistication on the part of the party opposing waiver.³³ Courts often place the burden of proof on those parties asserting that the jury trial right has been waived.³⁴

Given this analysis, one might assume that the existence of a Seventh Amendment jury trial right would provide a significant shield against the imposition of mandatory arbitration, but one would be wrong. At least to date, the jury trial right has provided scant protection from mandatory arbitration. How can this be? First, for the most part, federal courts have not even considered jury trial rights when examining the viability of arbitration clauses.³⁵ Instead, ignoring any special jury trial waiver standards, courts have typically done an ordi-

30. *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916). See generally Richard C. Reuben, ADR and the Troubling Seventh Amendment: A Modern Case for Incorporation (2000) (unpublished manuscript, on file with author).

31. A strong argument for incorporation is presented in Reuben, *supra* note 30.

32. For a detailed discussion of this body of case law, see *Sternlight*, *supra* note 27, at 678-90. For a recent federal case setting out this standard, see *Medical Air Technology Corp. v. Marwan Investment Inc.*, 303 F.3d 11, 18-19 (1st Cir. 2002).

33. *Med. Air Tech.*, 303 F.3d at 18-19.

34. *Sternlight*, *supra* note 27, at 690.

35. Federal court judges are not solely responsible for this failure. Plaintiffs' counsel have likely failed to make strong jury trial arguments in many cases.

nary contractual analysis and simply considered whether there was an agreement to arbitrate, whether it covered the dispute in question, and whether it was void for contractual reasons such as unconscionability or fraud.³⁶ Second, to the extent federal courts have considered jury trial waiver arguments in evaluating arbitration clauses, they have usually found they are not relevant to arbitration. For example, a few courts have recognized that a contract to arbitrate waives the jury trial right, but have not then explained their failure to apply the traditional jury trial waiver criteria.³⁷ Some have relied on the principle that arbitration is “favored,” to reject jury trial arguments, without considering that any favoritism entailed in a federal statute might be trumped by the Seventh Amendment.³⁸

One line of federal cases does purport to address the jury trial waiver argument more seriously, ultimately concluding that because persons who accept arbitration obviously choose a forum in which no jury trial is available, no jury trial waiver analysis need be performed.³⁹ Yet, this analysis is clearly circular. If the acceptance of an alternative forum waives jury trial rights, then courts should use appropriate jury trial waiver standards to determine whether in fact an alternative forum has been selected.⁴⁰

The only intellectually honest way to defend many federal courts’ refusal to apply a heightened jury trial waiver standard to arbitration is to argue that reliance on civil jury trial waiver standards should be abandoned not only in reviewing arbitration clauses but in all other contexts as well. Professor Stephen Ware has taken precisely this approach.⁴¹ Indeed, some lawyers have now urged companies to use a

36. Many such cases are discussed in *Sternlight*, *supra* note 27, at 696–710.

37. *E.g.*, *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) (stating that “the Seventh Amendment does not preclude ‘waiver’ of the right to jury trial through the signing of a valid arbitration agreement,” but failing to apply standard waiver criteria); *United States v. Am. Soc’y of Composers, Authors & Publishers*, 708 F. Supp. 95, 97 (S.D.N.Y. 1989) (rejecting jury trial claim but failing to consider whether choice of arbitration was voluntary, knowing, or intelligent).

38. *Burlington N. R.R. v. Soo Line R.R.*, 162 B.R. 207, 214 (D. Minn. 1993) (stating that “if the Seventh Amendment presented a serious limitation on the duty to arbitrate, arbitration provisions would have to be narrowly construed,” and rejecting this possibility in light of Supreme Court precedent).

39. The leading case making this point is *Geldermann, Inc. v. Commodity Futures Trading Commission*, 836 F.2d 310, 316–21 (7th Cir. 1987). Others include *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001), *aff’d*, 2002 WL 663804 (5th Cir. 2002), *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909 (N.D. Tex. 2000), and *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1461 (N.D. Ill. 1997).

40. For a discussion and critique of these cases, see *Sternlight*, *supra* note 27, at 719–26.

41. Stephen J. Ware, *Arbitration Clause, Jury Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. (forthcoming Winter 2003), available

plain jury trial waiver, rather than an arbitration clause, to gain the advantages of the waiver without what some companies may perceive as the disadvantages of arbitration (for example, limited appeal or the possibility of facing an arbitral class action).⁴² Fortunately, it does not seem likely that most courts are ready to allow persons to waive their jury trial rights involuntarily, non-intelligently, or non-knowingly in all contexts.⁴³

As I have argued elsewhere in greater detail,⁴⁴ unless federal courts are generally willing to abandon the Seventh Amendment “knowing/voluntary/intelligent” civil jury trial waiver standard, they need to significantly revise their approach to mandatory arbitration clauses. While applying the appropriate standard in arbitration cases will not result in the invalidation of all mandatory arbitration clauses, it should cause the invalidation of those clauses that are imposed in the most egregious fashion, to the extent that the claimants would have otherwise possessed a Seventh Amendment jury trial right.⁴⁵

II. Jury Trial Arguments in State Court

Most state constitutions protect the right to jury trial for certain civil claims.⁴⁶ Such clauses typically protect the rights to a civil jury that existed at the time the state constitution was adopted.⁴⁷

in draft at <http://www.roscoepound.org/new/ware.pdf> (last accessed Oct. 22, 2003). Ware asserts that there is no valid reason to protect persons against unknowing, unintelligent, involuntary waivers of civil jury trial rights, and that standard contractual analyses should be used that would permit waiver of the jury trial by way of a contract of adhesion. *Id.*

42. See Stephen F. Fink, *Insist on Bench Trials*, NAT'L. L.J., Jan. 13, 2003, at A17; Barry M. Appell, *Bench Trials May Prove Better for Employers than Arbitration*, S.F. DAILY J., Apr. 24, 2003, at 5.

43. While a few courts appear ready to allow commercial entities to waive their jury trial rights involuntarily, unknowingly, or non-intelligently, I have not found any courts willing to apply this standard to most consumers or employees outside the arbitration context.

44. See *Sternlight*, *supra* note 27, at 727–29.

45. *Id.* One federal district court recently applied the Seventh Amendment in the manner I am advocating. See *Walker v. Ryan's Family Steak Houses, Inc.*, No. 3:02-1078, 2003 WL 22533457 (M.D. Tenn. Oct. 2, 2003) at *14-15 (finding arbitration clause imposed on restaurant chain employees invalid in part because there is “strong evidence that plaintiffs cannot be compelled to arbitrate their claims because they did not knowingly and voluntarily waive their constitutional right to a jury trial”).

46. See Jay M. Zitter, Annotation, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R. 5th 53 (1996); see also Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1040 n.11 (1999) (stating that all fifty states provide for preservation of the jury trial right, in certain kinds of cases, either by constitution or by statute).

47. See, e.g., *Lisanti v. Alamo Title Ins. of Tex.*, 55 P.3d 962 (N.M. 2002).

State courts, like federal courts, have typically held that the civil jury trial right is waivable. While the specific waiver standards differ from state to state, most state courts follow the federal formulation that the waiver must be knowing, voluntary, and intelligent.⁴⁸ Like the federal courts, state courts usually consider the clarity and conspicuousness of the waiver, the degree to which it was negotiable, and the relative bargaining power and sophistication of the parties.⁴⁹ Thus, while civil jury trial waivers are often enforced in commercial contracts,⁵⁰ they are often rejected if imposed on a weaker consumer by a stronger party.⁵¹

48. For a general discussion of waiver standards in the fifty states, see Zitter, *supra* note 46. Examples of state court cases setting out this standard include *L & R Realty v. Connecticut National Bank*, 715 A.2d 748, 751–52 (Conn. 1998) (recognizing that jury trial waiver must be knowing, voluntary, and intelligent but also stating that, in commercial as opposed to consumer context, the written waiver provision is prima facie evidence of knowing, voluntary, intelligent waiver); *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 627 (Mo. 1997) (per curiam) (“[The] fundamental nature of the due process right to jury trial demands that it be protected from an unknowing and involuntary waiver”); *Gaylord Department Stores of Alabama, Inc. v. Stephens*, 404 So. 2d 586, 588 (Ala. 1981) (rejecting jury trial waiver imposed on employee on grounds that it was not knowing and intelligent, and also emphasizing bargaining inequity); *Fairfield Leasing Corp. v. Techni-Graphics, Inc.*, 607 A.2d 703, 704–05 (N.J. Super. Ct. 1992) (finding no proper waiver, in commercial context, because no knowing, voluntary, intelligent waiver was shown); *Trizec Properties, Inc. v. Superior Court*, 280 Cal. Rptr. 885, 887 (Ct. App. 1991) (“We do not mean to imply that contractual waivers of trial by jury will be upheld in all instances, or that such rights will be taken away from a party who unknowingly signs a document purporting to exact a waiver. The right to trial by jury in a civil case is a substantial one not lightly to be deemed waived.”). *But see* *Chase Commercial Corp. v. Owen*, 588 N.E.2d 705, 708–09 (Mass. App. Ct. 1992) (failing to use knowing, voluntary test, and contrasting federal courts’ treatment of jury trial waivers, but nonetheless recognizing importance of bargaining inequities).

49. *See, e.g., Gaylord Dept. Stores*, 404 So. 2d at 588 (concluding that a jury trial waiver contained in the employment agreement between a pharmacist and a department store was not valid because it was buried in paragraph thirty-four of the agreement and also due to the disparity in bargaining power); *Fairfield Leasing Corp.*, 607 A.2d at 704 (refusing to find proper waiver, in contract between two commercial entities). To the extent that a state imposed tougher waiver standards than those imposed by the Seventh Amendment, the state rule would apply.

50. *See, e.g., Trizec*, 280 Cal. Rptr. at 887 (enforcing jury trial waiver contained in commercial lease given clear unambiguous language and given commercial as opposed to consumer context); *L & R Realty*, 715 A.2d at 751–52 (upholding waiver by commercial borrower and noting that in commercial context, intent can be inferred from the language of the waiver).

51. At the extreme, the Georgia Supreme Court has held that all pre-dispute agreements to waive a jury trial are unenforceable under the Georgia Constitution and statutes. *Bank S., N.A. v. Howard*, 444 S.E.2d 799, 800 (Ga. 1994). Interestingly and inexplicably, however, this prohibition has not been applied to arbitration clauses. *Id.* at 800 n.5 (citing statute governing enforcement of arbitration provisions).

A. How Have Jury Trial Arguments Affected State Courts' Examination of Arbitration Clauses?

As in federal arbitration cases, the right to a jury trial is mentioned in a fair number of state court arbitration appeals as well. Unfortunately, like the federal courts, state courts rarely examine the jury trial right argument in a full fashion. Jury trial arguments have arisen in state court cases in two different contexts: (1) state statutes mandating use of arbitration for certain kinds of claims; and (2) private contracts requiring the use of arbitration.

1. Cases That Rely on Jury Trial Concerns to Reject Mandatory Arbitration

The most extensive consideration of whether a contractually imposed arbitration clause violated a state constitutional right to jury trial was given by the Montana Supreme Court in *Kloss v. Edward D. Jones & Co.*⁵² The case involved a claim brought by an elderly investor against a securities brokerage firm. Justice Nelson's special concurrence, joined by three other Justices from the seven member court, found that the right to jury trial afforded by the Montana Constitution⁵³ was "fundamental,"⁵⁴ and therefore could only be waived "voluntarily, knowingly and intelligently."⁵⁵ Listing a host of factors to be considered in determining whether this test was met, such as the conspicuousness of the waiver and the extent to which the waiver was negotiable,⁵⁶ the concurrence went on to conclude that "there is no evidence to support a conclusion that Kloss knowingly and intelligently waived her right[] to trial by jury . . . when she executed . . .

52. 54 P.3d 1 (Mont. 2002) (Nelson, J., specially concurring). An older California appellate level case also rejected an arbitration clause, imposed by an attorney on his client, on the ground that the client was not sufficiently apprised of the fact that she was waiving her jury trial right. *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6, 9-10 (Cal. App. 1989). Cf. *Powers v. Dickson, Carlson & Campillo*, 63 Cal. Rptr. 2d 261, 265, 269 (Cal. App. 1997) (refusing to use jury trial grounds to void arbitration clause imposed on client by attorney).

53. Article II, section 26 of Montana's constitution provides that "[t]he right of trial by jury is secured to all and shall remain inviolate." MONT. CONST. art. II, § 26.

54. *Kloss*, 54 P.3d at 12. The opinion also asserted that the right of access to court is fundamental, while recognizing that not all prior Montana courts had so held. *Id.* at 12-14.

55. *Id.* at 15. The court further stated that "[f]or a fundamental right to be effectively waived, the individual must be informed of the consequences before personally consenting to the waiver," and that "the waiver will be narrowly construed." *Id.*

56. *Id.*

standard-form contracts containing the arbitration clauses.”⁵⁷ As will be discussed in more detail later, the Montana opinion also rejected an argument that the Federal Arbitration Act preempted the state constitutional jury trial guarantee.⁵⁸

In two other cases, state supreme courts struck down arbitration that was imposed by statute because of jury trial infringements. In *Lisanti v. Alamo Title Insurance of Texas*,⁵⁹ the New Mexico Supreme Court relied on the state constitutional right to jury trial to invalidate mandatory arbitration of certain insurance claims imposed by statute and state regulation.⁶⁰ The insureds argued that the New Mexico constitution entitled them to a jury trial for their non-statutory claims, and the supreme court agreed. It found that the claims were essentially breach of contract allegations, to which a jury trial should attach.⁶¹ The court then went on to consider whether the insureds waived their jury trial right when they chose to purchase title insurance, and concluded they did not because the arbitration was not voluntary, but rather mandated by regulation.⁶² While the Court did not spell out the standards by which waiver should be determined, it clearly had no problem concluding that arbitration imposed by regulation did not amount to a voluntary relinquishment of the jury trial.⁶³

57. *Id.* The opinion emphasized that there was no evidence plaintiff actually negotiated the clause, that she had the assistance of counsel, or that she had the same level of knowledge and sophistication as the representative of the brokerage. *Id.*

58. *Id.* at 15–16. See *infra* text accompanying notes 113–16.

59. 55 P.3d 962 (N.M. 2002).

60. *Id.* at 964. The court found that N.M. STAT. ANN. § 59A-30-4(A) (Michie 1985) provided the superintendent of insurance with authority to promulgate rules and regulations, and that the superintendent had used this authority to require arbitration of title insurance claims for under \$1,000,000. *Id.*

61. *Lisanti*, 55 P.3d at 964–65. In so ruling, the court rejected the insurance company’s argument that “because the specific right to sue under a title insurance policy did not exist in the territorial period, it is not a right for which a jury trial is guaranteed.” *Id.* at 965. The court explained that what is relevant is the type of cause of action, breach of contract, rather than the specific subject matter of the claim. “It is unreasonable . . . to say that no jury trial right attaches to a breach of contract claim concerning the purchase of a computer simply because computers did not exist when the New Mexico Constitution was adopted.” *Id.*

62. *Id.* at 966. “Because the decision to arbitrate the disputes could not be voluntarily accepted or rejected, we think the Court of Appeals was correct to reject Alamo’s argument that the Lisantis waived the right to trial by jury.” *Id.*

63. *Id.* *Lisanti* also rejected the defendant’s argument that the state was entitled to eliminate the jury trial because plaintiffs were pursuing a “public right” as to which the legislature could determine the appropriate remedy. *Id.* at 966–68 (discussing *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442, 450 (1977) and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), but concluding that Lisantis’ claim was private in nature).

Similarly, in *Williams v. Williams*,⁶⁴ the Nevada Supreme Court held that a statute requiring arbitration of certain motor vehicle claims infringed on the jury trial right because the arbitration was imposed involuntarily.⁶⁵

Also, in *Badie v. Bank of America*,⁶⁶ a California appellate court did not perform a full jury trial analysis. Specifically, that court explained that because an agreement to arbitration amounts to a waiver of the state constitution's right to a jury trial,⁶⁷ an arbitration clause is invalid where the ambiguity of the clause makes it unclear that the party agreed to arbitration.⁶⁸ The court explained:

In order to be enforceable, a contractual waiver of the right to a jury trial must be clearly apparent in the contract and its language must be unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties. . . . Although an effective waiver, particularly in a non-adhesive contract, need not expressly state, "I waive my right to a jury trial" or words to that effect, it must clearly and unambiguously show that the party has agreed to resolve disputes in a forum *other than* the judicial one.⁶⁹

The *Badie* court found that a provision that merely authorized the bank to make future changes in the agreement was not sufficient to allow the bank to impose arbitration on its customers.⁷⁰

Several other state courts have cited to jury trial rights in refusing to enforce arbitration clauses, but have referred to the jury right largely in dictum or rhetoric rather than including it as support for the actual holding. For example, in *Broemmer v. Abortion Services of Phoenix, Ltd.*,⁷¹ the Arizona Supreme Court rejected an arbitration clause contained in an adhesion contract on the ground that it fell outside

64. 877 P.2d 1081 (Nev. 1994).

65. *Id.* at 1083 (finding violation of jury trial right afforded by NEV. CONST. art. I, § 3); see also *Obstetrics & Gynecologists v. Pepper*, 693 P.2d 1259, 1261 (Nev. 1985) (holding unenforceable arbitration imposed on patient by doctor, where there was no "knowing consent," but failing to explicitly mention jury trial rights).

66. 79 Cal. Rptr. 2d 273 (Ct. App. 1998).

67. *Id.* at 289.

68. *Id.*

69. *Id.*

70. *Id.*; see also *Buckner v. Tamerin*, 119 Cal. Rptr. 2d 489, 492 (Ct. App. 2002) (concluding father lacked power to waive adult child's right to jury trial by agreeing to arbitration); *Howell v. NHC Healthcare-Fort Sanders, Inc.*, No. E2002-01321-COA-RV-CV, 2003 WL 465775, at *4 (Tenn. Ct. App. Feb. 25, 2003) (refusing to enforce clause imposed on nursing home resident where clause was contained on page ten of eleven-page agreement, where font size did not stand out, where arbitration was not fully explained, where agreement was presented on take-it-or-leave-it basis, and where husband who signed clause had obvious educational limits and no real bargaining power).

71. 840 P.2d 1013 (Ariz. 1992).

the plaintiff's reasonable expectations. However, in reaching that conclusion, the court emphasized that agreeing to arbitrate would waive a jury trial: "Clearly, there was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived. The only evidence presented compels a finding that waiver of such fundamental rights was beyond the reasonable expectations of plaintiff."⁷²

Similarly, in *Seifert v. U.S. Home Corp.*,⁷³ the Florida Supreme Court interpreted an arbitration clause narrowly to mean that it did not cover a wrongful death claim, and stated that the public policy supporting jury trials was part of the reason for interpreting the clause narrowly.⁷⁴

2. Cases Upholding Arbitration After Considering Constitutional Jury Trial Rights

The mere fact that a court upheld the imposition of arbitration does not mean that it found a jury trial waiver analysis irrelevant. Rather, some state courts have recognized that arbitration potentially results in the loss of jury trial rights but found no reason to reject arbitration in a particular case because the claimant never had a jury trial right, or because the claimant in fact waived the jury trial right.

For example, in one line of cases courts have upheld statutorily mandated arbitration on the ground that a claimant was seeking to vindicate a public rather than a private right, and therefore could not legitimately complain if the legislature replaced the jury trial with an alternative remedy such as arbitration. One such case is *Board of Education v. Harrell*,⁷⁵ in which the New Mexico Supreme Court found that the state employee was asserting a "public right" that could be required by the state to be resolved through arbitration.⁷⁶

72. *Id.* at 1017.

73. 750 So. 2d 633 (Fla. 1999).

74. *See id.* at 642 (stating that to deprive petitioners of jury trial and other constitutional rights simply because they signed a contract containing an arbitration provision "would clearly be unjust"). It should also be noted that a few decisions have considered jury trial waivers under particular statutes. *See, e.g.,* Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 773 A.2d 665 (N.J. 2001) (rejecting arbitration clause imposed on employee on ground that employee did not knowingly waive jury trial right under New Jersey Law Against Discrimination).

75. 882 P.2d 511 (N.M. 1994).

76. *Id.* at 523. The New Mexico court cited two Supreme Court cases that laid out this doctrine: *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977), and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). These cases and their progeny permit Congress to send disputes involving public as opposed to private rights to be

Although *Bethany v. Public Employees Relations Board*⁷⁷ does not use this exact analysis, it relies on similar logic in holding that the Oklahoma constitution's jury trial provisions did not void a statutory provision requiring public employees to resolve disputes through binding arbitration.⁷⁸

Courts have also rejected jury trial arguments where the claimant enjoyed no jury trial right in the first place, or to the extent the state allows civil jury trial rights to be waived without requiring special conditions. For example, the Colorado Supreme Court held that a statute requiring arbitration of certain insurance disputes did not violate a state constitutional right to jury trial because there is no constitutional right to a civil jury trial in Colorado.⁷⁹

Similarly, in *Madden v. Kaiser Foundation Hospitals*,⁸⁰ the California Supreme Court considered whether an employee's jury trial rights were waived when the group medical plan to which he subscribed mandated that malpractice claims brought against it be arbitrated.⁸¹ The court found no jury trial problem, explaining "it has always been understood without question that parties could eschew jury trial . . . by agreeing to a method of resolving that controversy, such as arbitration, which does not invoke a judicial forum."⁸² The Court further explained that the agreement to arbitration need not include an express jury trial waiver to be valid.⁸³ To justify this conclusion, the court

resolved by administrative tribunals or other non-Article III judges. For a discussion of this doctrine and its limits, see *Sternlight*, *supra* note 3, at 72-76.

77. 904 P.2d 604 (Okla. 1995).

78. See *id.* at 616. Analogizing to acts covering administrative procedures, government tort claims, and workers' compensation, the court found that specialized adjudicative and quasi-adjudicative regimes may be needed in particular situations. *Id.* at 614. This "logic," if it is such, would not seem to extend to the private requirement that traditional private claims such as breach of contract be resolved through arbitration rather than a jury trial. Although *Bethany* mentioned that jury trial rights are waivable, and to some extent relied on this proposition, *id.* at 615, it did not use a standard jury trial waiver analysis as this article suggests it should have done.

79. *State Farm Mut. Auto. Ins. Co. v. Broadnax*, 827 P.2d 531 (Colo. 1992).

80. 552 P.2d 1178 (Cal. 1976). Note that *Madden* was subsequently distinguished on another ground in *Blanton v. Womancare, Inc.*, 696 P.2d 645, 653 (Cal. 1985) (holding that attorney did not have authority to bind client to arbitration).

81. *Madden*, 552 P.2d at 1187.

82. *Id.*

83. *Id.* at 1187-88 ("But to predicate the legality of a consensual arbitration agreement upon the parties' express waiver of jury trial would be as artificial as it would be disastrous. . . . [T]here are literally thousands of commercial and labor contracts that provide for arbitration but do not contain express waivers of jury trial. Courts have regularly enforced such agreements Before today no one has so much as imagined that such agreements are consequently invalid; to destroy their viability upon an extreme hypothesis that they fail expressly to negative jury trials would be to frustrate the parties' interests and

asserted that the standards for waiving a jury trial in the criminal context do not generally apply to civil proceedings.⁸⁴

Sometimes it is unclear whether the court is employing a jury waiver analysis. For instance, in *Buraczynski v. Eyring*,⁸⁵ although the Tennessee Supreme Court did not state it was using a standard jury trial waiver analysis, it effectively did so. While recognizing that the arbitration clause imposed by a doctor on his patient would result in the loss of a jury trial right,⁸⁶ the court nonetheless upheld the clause because it was contained in a separate one-page document rather than buried with other forms; because the patient was encouraged to discuss any questions about arbitration with the doctor; because the retroactive aspect of the clause was separately initialed; and because the clause could be revoked for any reason within thirty days.⁸⁷ These are many of the factors that a court would have considered in doing a full jury trial waiver analysis.

3. Cases Failing to Adequately Consider Jury Trial Concerns in Upholding Mandatory Arbitration Provisions

By way of contrast to the cases discussed above, which give at least some consideration to constitutional jury trial rights in considering whether arbitration clauses are valid, many courts have failed to thoroughly consider jury trial arguments. In some cases, although state legislation mandated the use of arbitration to resolve particular disputes, courts rejected jury trial challenges brought under the state constitution. Typically, such cases have summarily stated that it was appropriate for states to mandate the substitution of arbitration for litigation as a condition of doing business.⁸⁸ If a proper constitutional

destroy the sanctity of their mutual promises.”); see also *Powers v. Dickson, Carlson & Campillo*, 63 Cal. Rptr. 2d 261, 265 (Ct. App. 1997) (citing *Madden* to uphold validity of arbitration mandated by attorney’s retainer agreement with client, and stating that agreement could be valid though it was not knowing).

84. *Madden*, 552 P.2d at 1187 n.12. Cf. *Trizec Props., Inc. v. Super. Ct.*, 280 Cal. Rptr. 885, 887 (Ct. App. 1991) (upholding jury trial waiver contained in commercial lease but stating that “[w]e do not mean to imply that contractual waivers of trial by jury will be upheld in all instances, or that such rights will be taken away from a party who unknowingly signs a document purporting to exact a waiver” and noting that “the waiver provision must be clearly apparent in the contract and its language must be unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties”).

85. 919 S.W.2d 314 (Tenn. 1996).

86. See *id.* at 320–21.

87. See *id.* at 321.

88. See, e.g., *Reicks v. Farmers Commodities Corp.*, 474 N.W.2d 809, 811 (Iowa 1991) (holding that constitutional jury trial is not compromised where commodities broker is compelled, by federal regulation, to resolve claim through arbitration, where submission to

analysis were applied, at least some of these cases would probably be reversed, depending on whether a jury trial right would have otherwise existed and whether the elimination of the right could be justified by special facts and circumstances.⁸⁹

Other cases have failed to adequately consider jury trial arguments in a contractual setting.⁹⁰ In many of these cases, specifically those in which the party challenging arbitration was a business that entered a contract calling for arbitration, the court would likely have upheld the constitutional validity of the arbitration provision even had it applied a waiver test. That is, in those cases the court likely would have found “knowing, voluntary, intelligent” waivers had it employed such a test because businesses are presumed to possess sufficient bargaining power and business savvy such that an agreement to arbitrate was consciously chosen.⁹¹

The most troubling cases that fail to properly consider jury trial arguments are those that likely would have come out differently had a proper waiver analysis been used. These are typically the cases that involve less sophisticated parties such as consumers or lower level em-

arbitration is a condition of doing business as a commodities broker); *Anderson v. Elliott*, 555 A.2d 1042, 1047–49 (Me. 1989) (holding attorney’s rights to jury trial are not violated where state law requires him to submit to arbitration with respect to his fee); *Lumbermen Mut. Cas. Corp. v. Bay St. Truck Lease, Inc.*, 322 N.E.2d 737, 739 (Mass. 1975) (holding statutory imposition of arbitration as remedy for inter-insurer subrogation claims does not violate jury trial rights, but failing to explain why not).

89. See *Williams v. Williams*, 877 P.2d 1081 (Nev. 1994). As noted earlier, *supra* note 63, a body of Supreme Court law distinguishes between claims of public right, which can be sent to administrative or other processes, and claims of private right, which cannot.

90. See, e.g., *Bank S., N.A. v. Howard*, 444 S.E.2d 799, 800 n.5 (Ga. 1994) (holding that pre-litigation jury trial waivers are invalid but stating, in dictum, that pre-litigation agreements to arbitrate may nonetheless be enforced); *Graham v. State Farm. Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989) (upholding validity of arbitration clause contained in insurance policy, even though insureds were never specifically informed of arbitration clause and received a copy of the arbitration policy only after they had paid the premium and the policy coverage had begun); *Nordenstrom v. Swedberg*, 143 N.W.2d 848, 857 (N.D. 1966) (concluding jury trial had been waived, in agreement to arbitration between two businesses, without setting out specific waiver standards); *Miller v. Two State Constr. Co.*, 455 S.E.2d 678, 680 (N.C. Ct. App. 1995) (finding that because arbitration is favored, contract calling for arbitration between contractor and subcontractor does not violate constitutional jury trial provision); *DePalmo v. Schumacher Homes, Inc.*, No. 2001CA272, 2002 WL 253845, at *1 (Ohio Ct. App. Feb. 19, 2002) (finding contractual waiver of jury trial right in home purchaser’s agreement to arbitrate, but without considering whether jury waiver standard was met).

91. Examples of these less troubling cases include *Nordenstrom*, 143 N.W.2d at 857 (concluding jury trial had been waived, in agreement to arbitration between two businesses, without setting out specific waiver standards) and *Miller*, 455 S.E.2d at 680 (finding that because arbitration is favored, contract calling for arbitration between contractor and subcontractor does not violate constitutional jury trial provision).

ployees who, significantly, were not represented by counsel at the time they purportedly waived their jury trial rights. For example, in *Graham v. State Farm Mutual Auto Insurance Co.*,⁹² the Delaware Supreme Court found that the insureds, George and Mary Jane Graham, could be compelled to arbitrate their uninsured motorist claim against State Farm, despite the jury trial guarantee of the Delaware constitution.⁹³ The court permitted this waiver even though defendant admitted that the Grahams “were never informed of the arbitration clause and received a copy of the policy only after premiums had been paid and coverage had begun,”⁹⁴ and even though the court recognized that any attempt to actually bargain over the clause would have been futile.⁹⁵ Had a knowing, voluntary, intelligent waiver standard been applied in this case, it might well have been decided differently. Given the rapid proliferation of mandatory arbitration in the consumer and employment realms, it is clear that many such cases will result in the voiding of arbitration clauses once courts begin to use an appropriate jury trial waiver analysis as discussed below.

B. How Should Jury Trial Arguments Affect State Courts’ Examination of Arbitration Clauses?

State courts should recognize, though many have not, that those arbitration clauses that eliminate a pre-existing constitutional right to jury trial should be treated like civil jury trial waivers interpreted outside the arbitration context. Thus, to the extent that the state enforces civil jury trial waivers only if they are knowing, voluntary, and intelligent, that same standard should be applied to arbitration clauses. What does this mean, in practice, and what does it not mean? I offer a simple three-part analysis.

First, a full jury trial waiver analysis is not required for all arbitration clauses. Instead, the state court must consider whether, absent arbitration, a jury trial would have been required. If the claim is equitable in nature, or based on a new statutory right, a jury trial may not have been appropriate in court, and thus a jury waiver analysis is inappropriate in such disputes over arbitration. To the extent that a particular jurisdiction does not provide a constitutional right to civil jury at all, then obviously no jury trial waiver analysis should be performed.

92. 565 A.2d 908 (Del. 1989).

93. *Id.* at 911. The court recognized that Article I, section 4 of the Delaware Constitution “preserves the right to trial by jury as it existed at common law.” *Id.*

94. *Id.* at 912.

95. *Id.* at 913.

Second, assuming a jury trial right is at stake, the court must determine what kind of waiver analysis is employed in the particular jurisdiction. If a given state allows the civil jury trial right to be waived through a contract of adhesion, even if the waiver is not knowing, voluntary, or intelligent, then that same standard should be applied to arbitration clauses.⁹⁶ At the other extreme, if a given state provides civil jury trial rights are not waivable at all in pre-dispute contracts, then that same prohibition should be applied to arbitration clauses. To the extent that the particular jurisdiction applies some version of the “knowing, voluntary, intelligent” test to determine whether the jury trial right has been waived, then that precise test should be applied to the arbitration clause.

Third, it is not appropriate for the court to “water down” the normal jury trial waiver analysis simply because it is examining an arbitration clause, rather than an ordinary jury trial waiver. This is where a number of courts have gone astray. Noting that arbitration is “favored,” some courts have hesitated or failed to apply the normal jury trial waiver analysis to arbitration clauses.⁹⁷ In *Bank South, N.A. v. Howard*⁹⁸ the Georgia Supreme Court held that both the Georgia constitution and state statute prohibited pre-litigation jury trial waivers altogether, and yet stated that pre-dispute arbitration clauses should be allowed.⁹⁹ There is no logical defense for this lapse. The mere fact that many courts look upon arbitration clauses favorably and enforce them where appropriate does not mean that courts should go to the extreme of enforcing an arbitration clause that trammels constitutional rights. As will be discussed in the subsequent section, the preemptive scope of the Federal Arbitration Act does not justify ignoring ordinary state constitutional waiver provisions.

What would it mean, in practice, if state courts examined arbitration provisions under a traditional jury trial waiver standard? Notwithstanding the apparent fears of some courts,¹⁰⁰ it would not mean the total demise of arbitration. Where two experienced companies know-

96. While I personally believe states should protect the jury trial against involuntary or unknowing waiver in the litigation context, that is the subject for another article. My only point here is that there is no valid reason for applying a different standard to arbitration clauses than to other jury trial waivers.

97. *Miller v. Two State Constr. Co.*, 455 S.E.2d 678, 680 (N.C. Ct. App. 1995).

98. 444 S.E.2d 799 (Ga. 1994).

99. *Id.* at 800 n.5 (relying on difference in legislative approach taken to arbitration as compared to other jury trial waivers, but failing to explain why Georgia constitution would not protect jury trial access from legislative infringement).

100. *See, e.g., Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1187 (Cal. 1976) (stating it would be “disastrous” to apply a jury trial waiver standard to arbitration clauses).

ingly and voluntarily agree to substitute arbitration for litigation, presumably any court in the country would accept that jury trial waiver, and validly so under a jury waiver analysis. Similarly, where a sophisticated employee or borrower knowledgeably agrees to resolve future disputes through arbitration, again the clause would pass muster.¹⁰¹ But, where a company imposes arbitration on unsophisticated consumers or employees and mandates the use of arbitration without giving them adequate notice or perhaps a chance to opt out of the clause, some states' jury trial waiver standards should void such a provision. The fate of such a clause would depend upon both the specific law of the jurisdiction and also the precise way in which the clause was imposed. Was it clear and conspicuous? Was the individual knowledgeable, sophisticated, or represented by counsel? Was the individual absolutely required to accept the arbitration? Was the individual given a chance to negotiate the clause or to opt out of it altogether? In at least some states, those companies that are interested in introducing arbitration to their consumers or employees will still be able to do so, but the companies may have to change their procedures to make them more fair. They may have to draft clearer clauses and perhaps even give people a chance to decide whether or not they want arbitration. To my mind, at least, such reform would not be a bad thing.

C. The Preemption Question

It is well established that the Federal Arbitration Act ("FAA") preempts certain state laws that are hostile to arbitration. Thus, it is likely that as opponents of mandatory arbitration increasingly attempt to use state constitutional jury trial rights to defeat some of those clauses, defenders of mandatory arbitration will argue that the FAA preempts reliance on state constitutional jury trial provisions. While few court decisions have addressed this question thus far, I argue it would be inappropriate to hold that the FAA preempts general jury trial waiver provisions.¹⁰²

Unfortunately, the scope of FAA preemption is not entirely clear, although the Supreme Court has addressed it in several deci-

101. For an example of a case finding a sophisticated employee waived her right to a jury trial knowingly, voluntarily, and intentionally, even though she did not read the jury waiver, see *Brown v. Cushman & Wakefield*, No. 2002 WL 1751269 (S.D.N.Y. July 29, 2002).

102. For further discussion of preemption concerns raised by the FAA, see David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law* (2003) (unpublished, on file with author).

sions.¹⁰³ In these cases, the Court has made clear that while the FAA does not occupy the entire field of arbitration, it does preempt those state laws that would undermine the goals of the FAA.¹⁰⁴ In particular, two different kinds of state legislation are preempted.

First, the Court has held that states may not legislate that particular categories of claims are exempt from arbitration.¹⁰⁵ Second, in the most recent Supreme Court preemption decision, *Doctor's Associates, Inc. v. Casarotto*,¹⁰⁶ the Court held that the FAA preempted a Montana statute requiring that arbitration clauses in franchise agreements be "typed in underlined capital letters on the first page of the contract."¹⁰⁷ The Justices explained that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."¹⁰⁸

Thus, the Court has consistently contrasted general state laws regarding unconscionability or fraud, which clearly can be used to invalidate arbitration clauses,¹⁰⁹ and those state laws that substantively or procedurally single out arbitration contracts for invalidation. To the extent courts hold that only those state statutes or constitutions that target arbitration are preempted, no problem is posed for the use of jury trial waiver standards. Clearly those waiver standards are designed to govern contracts in general, and not specifically to undermine arbitration clauses.

However, some will likely seek to attack the use of the state constitutional jury trial waiver standard by arguing that the preemptive

103. Most recently, in *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), defendants argued for an extension of these preemption doctrines, suggesting that the FAA should preempt South Carolina's willingness to allow an arbitration to proceed as a class action. However, the Court failed to reach the preemption issue, instead simply concluding that the question of whether or not the contract allowed for an arbitral class action should be decided by the arbitrator. *Id.* at 2408.

104. See *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477-78 (1989).

105. See generally *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (invalidating Alabama statute prohibiting enforcement of pre-dispute arbitration agreements); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (holding that FAA preempted provision of California labor law that had been interpreted to prohibit arbitration of wage collection actions); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that the California Franchise Investment Law was preempted to the extent it prohibited arbitration of claims brought under that Act).

106. 517 U.S. 681 (1996).

107. *Id.* at 683. The preempted provision was MONT. CODE ANN. § 27-5-114(4) (1995).

108. *Doctor's Assocs.*, 517 U.S. at 687.

109. As the Court has repeatedly observed, section 2 of the FAA explicitly allows states to invalidate arbitration clauses "upon such grounds as exist at law or in equity for revocation of any contract." See, e.g., *Doctor's Assocs.*, 517 U.S. at 683; *Allied-Bruce*, 513 U.S. at 281; *Perry*, 482 U.S. at 491; *Southland Corp.*, 465 U.S. at 16.

scope of the FAA should be interpreted more broadly.¹¹⁰ In particular, such defenders of mandatory arbitration may argue that jury trial waiver provisions are not saved from preemption because they do not apply generally to all kinds of contracts in a given state. These defenders will cite a series of cases that arise in the franchise area, such as *Bradley v. Harris Research, Inc.*¹¹¹ In *Bradley*, the Ninth Circuit held that a franchise law prohibiting the use of out-of-state venues was void to the extent it applied to arbitration clauses, because the venue prohibition applied only to franchise agreements and not to contracts in general.¹¹²

In my view, however, it would be erroneous to interpret FAA preemption so broadly as to exempt arbitration clauses from the standard jury trial waiver analysis. The FAA does not preempt state jury trial provisions because jury trial guarantees do not single out or target arbitration clauses for elimination.¹¹³ This is precisely the interpretation that was given by a majority of justices of the Montana Supreme Court in *Kloss v. Edward D. Jones & Co.*¹¹⁴ That court explained that because Montana's law on contractual waiver of constitutional rights applies in a variety of contexts, and not merely to arbitration clauses, it is a general provision of Montana law and not preempted by the FAA.¹¹⁵ In applying its general constitutional waiver rules to an arbitration contract, the court was simply keeping arbitration on the same footing as other contracts, rather than relegating it to an inferior position. This interpretation makes sense as a matter of policy, in that states are not seeking to invalidate arbitration clauses in general but merely ensuring that waivers of constitutional rights are handled similarly for arbitration clauses as they are for other contractual clauses.

Cases such as *Bradley* are wrongly decided in that they would preempt any state statute or state constitutional provision that partially or

110. For a discussion of alternative preemption analyses, see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. (forthcoming Spring 2004).

111. 275 F.3d 884 (9th Cir. 2001).

112. *Id.* at 892. Several other courts issued similar decisions. See also *OPE Int'l L.P. v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001) (holding preempted, in arbitration context, Louisiana statute invalidating contract provisions requiring litigation or arbitration of any disputes outside of state); *KKW Enters. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999) (holding preempted, as to arbitration, a Rhode Island statute which renders unenforceable a provision in a franchise agreement restricting jurisdiction or venue to a forum outside Rhode Island).

113. *Schwartz, supra* note 102, at 10, spells out this argument in greater detail, criticizing such decisions as *Bradley* as "incoherent."

114. 54 P.3d 1 (Mont. 2002).

115. *Id.* at 15-16 (majority of justices in concurring opinion).

wholly invalidates an arbitration clause if the state provision does not apply to all contracts in the state. As Professor Schwartz argues, the *Bradley* approach is highly problematic because it voids virtually all state laws that might invalidate arbitration clauses, since almost no state law literally applies to all contracts.¹¹⁶ Although it is true that jury trial waiver provisions do not literally apply to all contracts, in that some contracts may not, for example, be worth enough money to create a jury trial right,¹¹⁷ certainly the jury trial waiver standard covers a broad range of contracts and is not targeted to the elimination of arbitration.¹¹⁸ From a practical standpoint, the vast majority of state statutes and state constitutional provisions do not apply to all contracts in a given state, but rather apply only to a particular category of situations. It makes no sense to preempt all provisions that are not so general as to apply to every contract in the state when this is a virtually impossible task for any provision to accomplish.¹¹⁹

Conclusion

The civil jury trial has been part of our legal culture at both the federal and state levels for many years. We have long held that while the jury trial may be waived, the waiver must be knowing, voluntary, and intelligent. Companies' imposition of mandatory arbitration against consumers, employees, and others now threatens the jury trial right to the extent that courts fail to apply the traditional jury trial waiver to mandatory arbitration provisions. If our society is to eliminate the civil jury trial right we should do so in the open, following a full public discussion. It is wrong to allow companies to use mandatory arbitration clauses to surreptitiously eliminate this precious right. Federal and state court judges have a critical role to play in preventing companies from using mandatory arbitration clauses to erode the precious right to jury trial.

116. *Schwartz, supra* note 102, at 8–10. As Schwartz explains, such an overextension of the preemption doctrine is highly troubling not only because of its impact on arbitration, but more generally because of its undercutting of the appropriate role of state legislatures and state courts.

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

118. For an example of a decision rejecting the *Bradley* analysis, see *Mitchell v. American Fair Credit Association*, 122 Cal. Rptr. 2d 193, 201–02 (Ct. App. 2002) (upholding, against preemption attack, signature requirement contained in California Services Act).

119. *See Schwartz, supra* note 102, at 8–10; Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1031 n.210 (1996) (state statute is not preempted merely because it only applies to particular categories of contracts, rather than to every contract in the state).