

THE ENFORCEMENT OF CONTRACTUAL JURY WAIVER CLAUSES IN
TEXAS

David F. Johnson*

I.	Introduction.....	649
II.	Why Use a Contractual Jury Waiver?.....	650
III.	The Texas Supreme Court Affirms the Use of Jury Waivers.	652
IV.	Texas Intermediate Appellate Courts Disagree on the Standards for Enforcing Contractual Jury Waivers.	656
V.	The Texas Supreme Court Addresses Which Party Has the Burden to Establish Knowing-and-Voluntary Waiver.....	665
VI.	Post- <i>In Re Bank of America</i> Cases.....	669
VII.	Should the Enforcement of a Jury-Waiver Clause Differ From an Arbitration Clause and a Forum-Selection Clause?.....	674
	A. Texas Courts Liberally Enforce Arbitration Clauses Using Contractual, Mutual Assent Standard.	674
	B. Texas Courts Liberally Enforce Forum-Selection Clauses and There Is No Knowing-and-Voluntary Defense.....	675
	C. Why Do Parties Fighting Contractual Jury Waivers Have a Knowing-and-Voluntary Defense?	676
VIII.	Conclusion	679

I. INTRODUCTION

A contractual jury waiver is a contractual provision that expressly states that the parties to the contract waive their right to a jury if a dispute should

*David F. Johnson is one of only fifteen practicing attorneys in Texas board certified in civil appellate law, civil trial law, and personal injury trial law by the Texas Board of Legal Specialization. Mr. Johnson is a shareholder in the Fort Worth office of Winstead PC. Mr. Johnson dedicates this article to his daughter Anna.

arise between them.¹ An example of such a provision is:

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

If a dispute arises, one party could sue the other in court, but neither party would have the option to request a jury to determine the outcome. The judge sits as the finder of fact.² Of course, this would seem to conflict with a party's constitutional right to a jury trial.³ Yet, Texas courts, and almost all other jurisdictions, have held that contractual jury waivers are permissible and enforceable under certain circumstances.⁴

II. WHY USE A CONTRACTUAL JURY WAIVER?

A natural question is: why would a party choose to use a contractual jury waiver as compared to an arbitration clause? Generally, arbitration clauses are a good idea for consumer contracts such as depositor agreements.⁵ The initial filing fees for arbitration are normally prohibitive for consumers, and the inclusion of such a clause will ward off some claims.⁶ However, for multiple reasons, arbitration clauses may not be such

¹ See, e.g., *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 127–28 (Tex. 2004) (orig. proceeding) (examining text of jury waiver between landlord and tenant).

² See *id.* at 132.

³ See TEX. CONST. art. I, § 15 (“The right of trial by jury shall remain inviolate.”); TEX. CONST. art. V, § 10 (granting right to jury trial in district courts).

⁴ See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 132–33; see also *In re Wells Fargo Bank Minn.*, 115 S.W.3d 600, 606 n.8 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

⁵ See *Banks Offer ADR in Disputes with Customers*, 10 ALTERNATIVES TO HIGH COST LITIG. 134, 138 (1992) (discussing the cost-saving and time-saving benefits of binding arbitration).

⁶ See, e.g., *Universal Underwriters Life Ins. Co. v. Dutton*, 736 So. 2d 564, 569 (Ala. 1999)

a good idea for other contracts. Arbitrations are not as inexpensive as advertised.⁷ The parties have to pay the arbitrator(s), and this can be very expensive depending on the expertise required.⁸ The parties still conduct discovery, and it is normally about as expensive as regular litigation.⁹

Moreover, arbitrators have an incentive to keep the arbitration going, and therefore, do not generally grant pre-hearing dispositive motions.¹⁰ Judges do not have that incentive, and at least in Texas, grant partial or complete summary judgments on a regular basis.¹¹ So, if a party is in an arbitration proceeding, an evidentiary hearing will most likely be required, which will be expensive and uncertain in outcome. In a court of law, that may not be the case. Also, and importantly, in arbitration there is basically no appellate review.¹² An arbitrator's decision is almost impossible to overturn, no matter the facts or the law.¹³ In a court of law, there is an appellate remedy to correct the insufficiency of evidence and/or the incorrect application of law.¹⁴

As a result, some parties are turning to the alternative of the contractual jury waiver. These clauses are recognized in federal courts and most state courts.¹⁵ They eliminate the uncertainty of a runaway jury finding, but

(holding that trial court could not require defendant to initiate arbitration and bear cost of filing).

⁷ See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 132 (stating an advantage of waiving only a right to jury trial, as opposed to agreeing to arbitration which includes a waiver of both a right to jury trial and a right to appeal, is that it avoids the expense of arbitration).

⁸ See Michael H. Leroy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 143 (2002) (discussing arbitration agreements where employees cannot afford arbitration because they are required to pay large sums for arbitrator fees).

⁹ See Henry S. Noyes, *If You (Re)build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 586–88 (2007) (determining the costs of arbitration to be similarly expensive as litigation in reference to the parties alone).

¹⁰ See *id.* at 588.

¹¹ See Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1914–15 (1998) (discussing the increased prevalence in Texas for using summary judgment to weed out claims).

¹² See *In Re Prudential Ins. Co. of Am.*, 148 S.W.3d at 132 (stating that parties waive their right to appeal when they agree to arbitration).

¹³ See Stuart H. Bompey et. al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 36 (1997) (since the arbitrator does not have to disclose the reasoning, it is impossible to tell what facts and law the arbitrator considered for a future appeal).

¹⁴ See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 132 (stating that by not agreeing to arbitrate, parties retain their right to appeal).

¹⁵ See *id.* at 132–33 (explaining the advantages of a contractual jury waiver and the acceptance of these waivers across multiple jurisdictions).

preserve other rights that exist in a court of law.¹⁶ When a jury waiver is coupled with a forum-selection and venue provision, a party may be able to eliminate the risk of being in an unfavorable jurisdiction or area of a jurisdiction.¹⁷

III. THE TEXAS SUPREME COURT AFFIRMS THE USE OF JURY WAIVERS.

Prior to 2004, there was uncertainty in Texas as to whether a contractual jury waiver would be enforced. In *Rivercenter Associates v. Rivera*, the Texas Supreme Court expressly refused to address whether pre-litigation contractual jury waivers would be enforceable in Texas because the party seeking to enforce the jury waiver waited too long to enforce it and waived it.¹⁸ The court stated it would not decide the jury waiver issue: “We do not reach the parties’ arguments concerning the constitutionality of jury waiver provisions generally or those concerning the enforceability of the provisions at issue in this cause.”¹⁹

In *In re Prudential*, the Texas Supreme Court reached the issue and held that contractual jury waivers were enforceable.²⁰ The case involved a dispute over a restaurant lease where the lessees sued the lessor claiming a bad smell disrupted their business.²¹ The plaintiffs demanded a jury and paid the fee.²² The defendant filed a motion to quash the jury demand relying on a jury waiver clause in the lease.²³ The trial court denied the motion, and the defendant sought mandamus relief.²⁴

The Texas Supreme Court first stated that nothing in the constitutional provisions or Texas Rules of Civil Procedure provided that the right to a jury trial could not be waived by a party.²⁵ The court then addressed the defendant’s main contention: that jury waivers were void as against public

¹⁶See *id.*; see also Shira Yoshor & Cheri Thomas, *Jury Waivers: A Saving Grace for the Development of Precedent in Texas*, 39 THE ADVOC. (TEX.) 8 (2007) (discussing the causes of a proliferation of contractual jury waiver clauses in Texas).

¹⁷See Yoshor & Thomas, *supra* note 16, at 14.

¹⁸858 S.W.2d 366, 367–68 (Tex. 1993).

¹⁹*Id.* at 368 n.2.

²⁰148 S.W.3d at 132–33.

²¹*Id.* at 128.

²²*Id.*

²³*Id.*

²⁴*Id.* at 129.

²⁵*Id.* at 130.

2010]

CONTRACTUAL JURY WAIVER

653

policy because they grant parties the private power to fundamentally alter the civil justice system.²⁶ The court found otherwise:

[P]arties already have power to agree to important aspects of how prospective disputes will be resolved. They can, with some restrictions, agree that the law of a certain jurisdiction will apply, designate the forum in which future litigation will be conducted, and waive in personam jurisdiction, a requirement of due process. Furthermore, parties can agree to opt out of the civil justice system altogether and submit future disputes to arbitration. State and federal law not only permit but favor arbitration agreements. ICP argues that while it does not offend public policy for parties to agree to a private dispute resolution method like arbitration, an agreement to waive trial by jury is different because it purports to manipulate the prescribed public justice system. We are not persuaded. Public policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury.²⁷

Thus, the court analogized contractual jury waivers to arbitration agreements and forum-selection clauses.²⁸

The plaintiffs argued that permitting contractual jury waivers could cause a party to take unfair advantage of another party.²⁹ The court held that such an agreement would be unenforceable:

[A] waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences. We echo the United States Supreme Court's admonition that "[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." Under those conditions, however, a party's right to trial by jury is

²⁶ *Id.* at 130–31.

²⁷ *Id.* at 131 (citations omitted).

²⁸ *See id.*

²⁹ *See id.* at 132.

afforded the same protections as other constitutional rights.³⁰

Therefore, the court found that a contractual jury waiver had to be entered into knowingly and voluntarily.³¹

However, the court then found that a contractual jury waiver was less of a deprivation of constitutional rights than an arbitration clause:

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.³²

The plaintiffs argued that the waiver was not entered into knowingly and voluntarily.³³ The court disagreed and cited factors such as: both sides had counsel, there were a number of changes to the lease, and the waiver was clear and unambiguous.³⁴ The court expressly commented that it was not ruling on whether a contractual jury waiver had to be conspicuous.³⁵ Therefore, even though the court found that a contractual jury waiver was less intrusive than an arbitration agreement, it found that it had to be entered into voluntarily and knowingly.³⁶

The Texas Supreme Court once again addressed contractual jury waivers in *In re GE Capital*, where the court granted mandamus relief to enforce a contractual jury waiver.³⁷ The court first addressed the plaintiff's

³⁰ *Id.* (citations omitted).

³¹ *See id.*

³² *Id.*

³³ *Id.* at 133–34.

³⁴ *Id.* at 134.

³⁵ *Id.*

³⁶ *See id.* at 132.

³⁷ 203 S.W.3d 314, 316–17 (Tex. 2006) (per curiam) (orig. proceeding).

2010]

CONTRACTUAL JURY WAIVER

655

argument that the defendant had waived the contractual jury waiver and found that the defendant did not waive its right to enforce the contractual jury waiver.³⁸ The initial bench trial setting was passed, and following the plaintiff's jury demand, the case was moved to the jury docket.³⁹ However, the defendant asserted that it did not receive the jury demand and did not notice that the court had moved the case to the jury docket.⁴⁰ The court found that the defendant did not waive its contractual jury waiver by immediately filing a motion to quash the demand:

Waiver requires intent, either the "intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." In *Jernigan v. Langley*, we explained that:

Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances. There can be no waiver of a right if the person sought to be charged with waiver says or does nothing inconsistent with an intent to rely upon such right. Waiver is ordinarily a question of fact, but when the surrounding facts and circumstances are undisputed, as in this case, the question becomes one of law.

As in *Jernigan*, we have no evidence here of General Electric's specific intention to waive its contractual right nor can we imply intent from the surrounding facts and circumstances. The circumstances here may indicate inattention or a certain lack of care on the part of General Electric, but they do not imply that General Electric intended to waive its previously asserted contractual right by not complaining sooner.⁴¹

The court then addressed whether the contractual jury waiver was enforceable.⁴² The plaintiff contended that the trial court correctly refused

³⁸ *Id.* at 314–15.

³⁹ *Id.* at 315.

⁴⁰ *Id.* at 316.

⁴¹ *Id.* (citations omitted).

⁴² *Id.*

to enforce the contractual jury waiver because the defendant did not present evidence that the waiver was entered into knowingly and voluntarily as required to enforce such a waiver.⁴³ The waiver provision was written in capital letters and bold print.⁴⁴ The court disagreed with the plaintiff's argument:

Such a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it. [The plaintiff] did not challenge the jury waiver provision in the trial court and only summarily contends here that the provision is invalid. . . .

Finding no evidence that the provision was invalid or that [the defendant] knowingly waived its contractual right to a non-jury trial, we conclude that the trial court abused its discretion in failing to enforce the provision.⁴⁵

Accordingly, the court found that a knowing-and-voluntary waiver was still a requirement, but placed the burden on the plaintiff to prove that it was not a voluntary or knowing waiver where the provision was conspicuous.⁴⁶

IV. TEXAS INTERMEDIATE APPELLATE COURTS DISAGREE ON THE STANDARDS FOR ENFORCING CONTRACTUAL JURY WAIVERS.

Several courts of appeals have addressed contractual jury waivers. The first case in Texas to substantively discuss the enforceability of contractual jury waivers was in 2003—before *In re Prudential*.⁴⁷ In *In re Wells Fargo*, the plaintiff filed suit based on a note and guaranty where both agreements had jury waivers.⁴⁸ Notwithstanding, the trial court denied plaintiff's motion to compel the jury waiver.⁴⁹

The Houston Court of Appeals for the Fourteenth District considered the defendant's argument that the jury waiver was not enforceable.⁵⁰ The

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (citations omitted).

⁴⁶ *Id.*

⁴⁷ See *In re Wells Fargo Bank Minn.*, 115 S.W.3d 600, 603 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

⁴⁸ *Id.*

⁴⁹ *Id.* at 604.

⁵⁰ *Id.* at 606.

court first noted that contractual jury waivers were enforced in the majority of states and in the federal system.⁵¹ It then noted that constitutional rights are not absolute; parties frequently waive their constitutional right to a jury by procedural errors.⁵² Interestingly, the court expressly compared contractual jury waivers to arbitration agreements:

Although no Texas court has directly addressed the enforceability of contractual jury waivers, Texas allows parties to contractually waive the right to a jury trial by enforcing arbitration agreements. “It is clear that when a party agrees to have a dispute resolved through arbitration rather than judicial proceeding, that party has waived its right to a jury trial.” Although parties agreeing to arbitrate waive considerably more than just the right to a jury trial, arbitration is strongly favored under Texas law.⁵³

The court then considered the defendant’s claim that the waiver was not entered into knowingly and voluntarily.⁵⁴ Without expressly holding that a knowing-and-voluntary assent was a requirement for enforcement, the court held that because the waiver stated on its face that it was given knowingly and voluntarily, the burden shifted to the defendant to show that it was not.⁵⁵ Even though the agreement was a standardized form, the court found no evidence to support the claim that the parties did not enter the clause on a knowing-and-voluntary basis.⁵⁶ The court conditionally granted the writ of mandamus and enforced the contractual jury waiver.⁵⁷ In doing so, the court repeatedly looked to arbitration precedent and analogy for support.⁵⁸

In *In re C-Span Entertainment*, the Dallas Court of Appeals found that a jury waiver was enforceable and was not waived.⁵⁹ The plaintiff requested a jury, and the defendant entered into several agreed scheduling orders that set the trial on the jury docket.⁶⁰ Eventually, the defendant requested that

⁵¹ *Id.* at 606 n.8.

⁵² *Id.* at 606–07.

⁵³ *Id.* at 607 (citations omitted).

⁵⁴ *Id.* at 609.

⁵⁵ *Id.*

⁵⁶ *See id.* at 610.

⁵⁷ *Id.* at 611–12.

⁵⁸ *See id.* at 607.

⁵⁹ 162 S.W.3d 422, 426 (Tex. App.—Dallas 2005, orig. proceeding).

⁶⁰ *Id.* at 425.

the case be placed on the non-jury docket arguing that a contractual jury waiver required such a result.⁶¹ The trial court agreed with the defendant, quashed the jury demand, and the plaintiff filed a petition for writ of mandamus.⁶² The court of appeals denied the plaintiff's petition, finding that the evidence did not prove as a matter of law that the defendant waived its contractual jury trial waiver agreement.⁶³ The court of appeals found that the evidence, and the fact that the Texas Supreme Court had recently handed down the *In re Prudential* opinion, supported the trial court's finding of no waiver.⁶⁴

Other courts have not been as friendly to the enforcement of contractual jury waivers. In *Mikey's Houses LLC v. Bank of America*, the Fort Worth Court of Appeals found that a trial court erred in enforcing a contractual jury waiver because the defendant did not prove that it was entered into voluntarily and knowingly.⁶⁵ The court found that contractual jury waivers were very different from arbitration agreements.⁶⁶ It found that "public policy favors arbitration, while the same cannot be said of the waiver of constitutional rights," although "courts are required by statutory directives . . . to compel arbitration if an agreement to arbitrate exists, . . . [n]o comparable statutory mandate exists directing courts to compel enforcement of contractual jury trial waivers," "the enforceability of arbitration clauses are inapplicable because they conflict with the *Brady* knowing-and-voluntary standard adopted by the supreme court in *In re Prudential*," and "[a] distinction exists between an agreement to resolve disputes out of court and an agreement to resolve disputes in court but to waive constitutional aspects of that in-court resolution."⁶⁷

The court found that contractual jury waivers are only enforceable if the waiver "is made knowingly, voluntarily, and intelligently 'with sufficient awareness of the relevant circumstances and likely consequences.'"⁶⁸ The court first found that the burden was on the party attempting to enforce the clause and that there was a rebuttable presumption against enforcing the

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 426.

⁶⁴ *Id.*

⁶⁵ 232 S.W.3d 145, 147 (Tex. App.—Fort Worth 2007), *mand. granted*, *In re Bank of Am.* 278 S.W.3d 342, 346 (Tex. 2009) (orig. proceeding).

⁶⁶ *Id.* at 151–52.

⁶⁷ *Id.*

⁶⁸ *Id.* at 149 (citing *In re Prudential*, 148 S.W.3d 124, 132 (Tex. 2004) (orig. proceeding)).

2010]

CONTRACTUAL JURY WAIVER

659

waiver.⁶⁹ The court then set out seven factors that a court may look to in determining whether a party has rebutted the presumption against waiver:

(1) the parties' experience in negotiating the particular type of contract signed, (2) whether the parties were represented by counsel, (3) whether the waiving party's counsel had an opportunity to examine the agreement, (4) the parties' negotiations concerning the entire agreement, (5) the parties' negotiations concerning the waiver provision, if any, (6) the conspicuousness of the provision, and (7) the relative bargaining power of the parties.⁷⁰

The court cited the facts of knowing waiver as follows:

The waiver here was not included in the Texas Real Estate Commission standard one-to-four family residential contract. Nor was it presented to Martin and Powell concurrently with the sales contract. Instead, after the sales contract had been executed, Bank of America presented a two-page addendum to the contract to Martin and Powell for their signatures. No evidence exists in the record that the sales contract or the addendum were negotiated.

Paragraph thirteen, in the middle of the second page of the addendum, provides as follows: "Waiver of Trial by Jury. Seller and Buyer knowingly and conclusively waive all rights to trial by jury, in any action or proceeding relating to this Contract." This paragraph is not set forth any differently than the other paragraphs in the addendum; that is, the entire paragraph is not printed in larger font, not printed in a different color, not bracketed or starred, does not have blanks beside it for the Seller and Buyer to place their initials, nor does it possess any unique features to distinguish it or make it stand out from the other twenty paragraphs in the addendum, as seen in Appendix A. Martin testified that Mikey's Houses was not represented by counsel. She did not recall reading the jury waiver paragraph and testified that it was not discussed or

⁶⁹ *Id.* at 152.

⁷⁰ *Id.* at 153.

explained. She said that she did not understand that by signing the addendum she was waiving her constitutional right to trial by a jury. She said that she did not understand the consequences of the provision.⁷¹

Based on this evidence and the factors set forth above, the court determined that on the record before it, there was no evidence showing that the plaintiffs had knowingly and voluntarily waived their right to a jury trial.⁷² The court reversed the trial court's ruling granting the defendant's motion to enforce the jury trial waiver.⁷³

In *In re Credit Suisse First Boston Mortgage Capital*, the Houston Court of Appeals for the Fourteenth District similarly refused to enforce a contractual jury waiver.⁷⁴ This case involved a dispute over a loan agreement where a non-signatory defendant attempted to enforce a contractual jury waiver against a signatory plaintiff.⁷⁵ The defendant alleged that the plaintiff relied on the loan agreement as the basis of its claims and was therefore equitably estopped from denying the application of the jury waiver clause.⁷⁶ The defendant cited to precedent that would

⁷¹ *Id.* at 154 (footnote omitted).

⁷² *Id.* at 156.

⁷³ *Id.* at 157. *Mikey's Houses* has an unusual subsequent history. See, e.g., *In re Columbia Med. Ctr. of Lewisville Subsidiary, L.P.*, 273 S.W.3d 923, 926 n.1 (Tex.App.—Fort Worth 2009, orig. proceeding) (describing history of *Mikey's Houses* case). One appeals-court justice dissented in the initial *Mikey's Houses* decision, *Mikey's Houses LLC v. Bank of Am.*, 232 S.W.3d 145, 159 (Tex. App.—Fort Worth 2007) (Livingston, J., dissenting), thus giving Bank of America the option of pursuing a further appeal to the Texas Supreme Court. See TEX. GOV'T CODE ANN. § 22.225(c) (West 2004 & Supp. 2008) (granting Texas Supreme Court appellate jurisdiction over interlocutory appeal when appellate-court justice issues a dissenting opinion). Though Bank of America could have pursued a direct appeal to the Texas Supreme Court, Bank of America instead filed a petition for a writ of mandamus with the Texas Supreme Court naming the court of appeals as the respondent. *In re Bank of Am.*, 278 S.W.3d 342, 343 (Tex. 2009) (per curiam) (orig. proceeding). Bank of America asked the Supreme Court to issue a writ of mandamus directing the court of appeals to vacate and withdraw the opinion and judgment entered by the court of appeals. *Id.* The Texas Supreme Court issued the writ of mandamus, and that opinion is discussed later in this article. *Id.* at 346. One justice dissented from the judgment of the court of appeals following mandamus. *Mikey's Houses LLC v. Bank of Am.*, 278 S.W.3d 927 (Tex. App.—Fort Worth 2009, no pet.) (Walker, J., dissenting). He argued that the court of appeals did not have jurisdiction to alter its judgment, as it was ordered to do by the Texas Supreme Court, after the court of appeals issued its mandate and its plenary period ended. *Id.*

⁷⁴ 257 S.W.3d 486, 488 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).

⁷⁵ *Id.*

⁷⁶ *Id.* at 491.

support such an argument in the arbitration context.⁷⁷ The trial court denied the request to apply the jury waiver by the non-signatory defendant.⁷⁸

On mandamus review, the court of appeals first directly contrasted arbitration and jury waiver clauses:

Unlike arbitration agreements, which are strongly favored under Texas law, the right to a jury trial is so strongly favored that contractual jury waivers are strictly construed and will not be lightly inferred or extended. Before a jury waiver will be enforced, such waiver must be found to be a voluntary, knowing, and intelligent act that was done with sufficient awareness of the relevant circumstances and likely consequences.⁷⁹

The court then analyzed the provision that expressly stated that the lender and borrower agreed to it.⁸⁰ The court stated that because the clause expressly only applied to the signatories, the non-signatory defendant could not enforce the provision.⁸¹ The court then held that it would not apply equitable estoppel in the context of contractual jury waivers:

We decline to recognize direct-benefits estoppel as a vehicle by which a jury waiver clause may be applied to claims against a party that did not sign the contract containing the clause. We are unaware of any court, in Texas or elsewhere, that has applied direct-benefits estoppel to a jury waiver provision.⁸²

The court then stated that arbitration clauses are different from and implicate different policy issues than jury waivers:

We recognize that Texas courts have occasionally referenced arbitration principles in deciding jury-waiver issues. However, these occasional references do not signal a departure from the longstanding principle that jury waivers are disfavored in Texas. Nor can *Prudential* or

⁷⁷ *Id.*

⁷⁸ *Id.* at 488.

⁷⁹ *Id.* at 490 (citations omitted).

⁸⁰ *See id.*

⁸¹ *Id.* at 491.

⁸² *Id.* at 492.

Wells Fargo be read as placing jury-waiver provisions on the same footing as arbitration clauses. These mechanisms cannot be treated interchangeably merely because they both lead to decisions by factfinders other than jurors. Jury waiver provisions and arbitration clauses implicate significantly different policies and principles.

In upholding parties' freedom to contract, the Texas Supreme Court noted that arbitration agreements—which are strongly favored—allow parties to contractually opt out of the civil justice system altogether. The use of arbitration *as an example* of contractual waiver should not be read as a statement that, henceforth, jury waivers are to be analyzed interchangeably with arbitration agreements.⁸³

The court concluded that it would “not use equitable estoppel as a vehicle to circumvent the required ‘knowing and voluntary’ waiver standard.”⁸⁴

In *In re Credit Suisse First Boston Mortgage Capital*, the Houston court once again denied a petition for writ of mandamus on a trial court's denial of a motion to enforce a contractual jury waiver.⁸⁵ This was a subsequent proceeding from the case discussed above.⁸⁶ In the first opinion, the court declined to consider the movant's agency argument.⁸⁷ The movant then filed a motion for reconsideration with the trial court based on agency and argued that because the defendant was an agent of a signatory, it should be allowed to enforce the contractual jury waiver.⁸⁸ The trial court denied the motion for reconsideration.⁸⁹ The movant then filed another petition for writ of mandamus with the court of appeals.⁹⁰

The court held that “when a valid contractual jury waiver applies to a signatory corporation, the waiver also extends to nonsignatories that seek to invoke the waiver as agents of the corporation.”⁹¹ The court acknowledged that the plaintiff had alleged that the defendant was an agent of the

⁸³ *Id.* (footnote omitted) (citations omitted).

⁸⁴ *Id.* at 493.

⁸⁵ 273 S.W.3d 843, 845 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).

⁸⁶ See *supra* text accompanying note 74.

⁸⁷ *Id.* at 846.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 848.

2010]

CONTRACTUAL JURY WAIVER

663

signatory.⁹² However, the court determined that allegations alone were not sufficient: “We further hold that a nonsignatory may not invoke a jury waiver merely because it is *alleged* to be an agent of the signatory.”⁹³ The court then held that because the defendant did not provide proof that it was an agent, the trial court did not abuse its discretion in denying the motion for reconsideration:

Because Texas law does not presume that an agency relationship exists, the party alleging agency has the burden to prove it. An enforceable contract requires a “meeting of the minds” between both parties. Absent proof of CSFB’s agency relationship with Mortgage Capital, we cannot assume that the parties intended to include CSFB in their contractual jury waiver.

Therefore, we hold that the trial court did not abuse its discretion by declining to extend the jury waiver on the basis of allegations alone. Because the right to a jury trial implicates constitutional guarantees, we will not lightly infer or extend a contractual jury waiver absent proof that the parties intended it to include claims against nonsignatories.⁹⁴

The Fort Worth Court of Appeals has subsequently written on the topic of contractual jury waivers.⁹⁵ In *In re Columbia Medical Center of Lewisville Subsidiary*, the court granted mandamus relief to a tenant where a trial court had denied a motion to quash a jury demand in a lease dispute because the tenant successfully rebutted the presumption against a prelitigation contractual waiver of a jury trial, and the landlord offered no evidence to show that its waiver was not knowingly and voluntarily made.⁹⁶ The court once again found that there was a presumption against a knowing-and-voluntary waiver, and stated the factors as follows:

Evidence of the following nonexclusive factors may be considered in determining whether the party seeking to

⁹² *Id.*

⁹³ *Id.* at 850.

⁹⁴ *Id.* at 851 (citations omitted).

⁹⁵ See *In re Columbia Med. Ctr. of Lewisville Subsidiary, L.P.*, 273 S.W.3d 923 (Tex. App.—Fort Worth 2009, orig. proceeding).

⁹⁶ *Id.* at 928.

enforce a contractual waiver of the right to a jury trial has rebutted the presumption against the waiver by prima facie evidence that the waiver was knowingly and voluntarily made: (1) the parties' experience in negotiating the particular type of contract signed; (2) whether the parties were represented by counsel; (3) whether the waiving party's counsel had an opportunity to examine the agreement; (4) the parties' negotiations concerning the entire agreement; (5) the parties' negotiations concerning the waiver provision, if any; (6) the conspicuousness of the provision; and (7) the relative bargaining power of the parties.⁹⁷

The movant presented evidence of a knowing-and-voluntary waiver:

The evidence presented by Medical Center shows that CenterPlace was experienced in negotiating leases. CenterPlace was a landlord involved in leasing space in large commercial buildings. Section 30 of the lease executed by the parties indicates that when CenterPlace executed the lease containing the contractual jury waiver provision, it had already entered into leases with at least eleven other tenants in the same building. Although the record is silent as to whether CenterPlace was represented by counsel when the original lease was executed, the evidence conclusively establishes that CenterPlace was represented by counsel when the "First Amendment to Lease Agreement" was negotiated and executed. Numerous provisions of the original lease were modified by the amended lease, but the jury waiver provision was not. And the First Amendment to Lease Agreement ratified the unmodified portions of the original lease. Consequently, before CenterPlace entered into the lease amendment, counsel for CenterPlace did have the opportunity to review the jury waiver provision and did have the opportunity to make it part of the negotiations that occurred with respect to the amended lease. The parties' negotiations concerning both the original lease and the

⁹⁷ *Id.* at 926.

lease amendment were extensive. The original lease contains numerous handwritten interlineations made by Dr. Harpavat on behalf of CenterPlace. The lease amendment was negotiated by CenterPlace's counsel over a period of approximately four months. The record contains no indication that the jury waiver provision was specifically negotiated. The jury waiver provision set forth in section 24 of the original lease is not conspicuous. It is set forth in the exact same manner as each of the other thirty-eight sections of the lease. The relative bargaining power of the parties was fairly equal. Both were Texas limited partnerships. They were entering into a landlord-tenant relationship through a lease agreement.⁹⁸

The court held that the movant produced prima facie evidence on five of the seven nonexclusive factors rebutting the presumption against waiver of the constitutional right to trial by jury.⁹⁹ "Weighing each of these factors, and viewing the totality of the circumstances surrounding the transaction as reflected in the record before us, Medical Center's evidence rebuts the presumption against the waiver."¹⁰⁰ Because the presumption was rebutted, the burden shifted to the non-movant to show that it was not knowing or voluntary.¹⁰¹ The court then reviewed the record and determined that the non-movant "did not meet the burden that shifted to it to establish that the waiver was not made knowingly and voluntarily."¹⁰² Therefore, the court found that the trial court abused its discretion by failing to enforce the contractual jury waiver provision and conditionally granted the petition for writ of mandamus.¹⁰³

V. THE TEXAS SUPREME COURT ADDRESSES WHICH PARTY HAS THE BURDEN TO ESTABLISH KNOWING-AND-VOLUNTARY WAIVER.

In *In re Bank of America.*, the Texas Supreme Court granted mandamus relief against the Fort Worth Court of Appeals, and ordered it to enforce the

⁹⁸ *Id.* at 926–27.

⁹⁹ *Id.* at 927.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 928.

¹⁰³ *Id.*

trial court's order enforcing the contractual jury waiver.¹⁰⁴ This case involved Bank of America's challenge to the Fort Worth Court of Appeals's decision in *Mikey's Houses*.¹⁰⁵ The Texas Supreme Court disagreed with the court of appeals' inference that a contractual jury waiver was not enforceable.¹⁰⁶ The court first held that a presumption against waiver would violate the parties' freedom to contract.¹⁰⁷ The court held that "a presumption against contractual jury waivers wholly ignores the burden-shifting rule" previously found by the court that "a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it."¹⁰⁸ Courts presume that "a party who signs a contract knows its contents."¹⁰⁹ Therefore, the court concluded that "as long as there is a conspicuous waiver provision, *Mikey's Houses* is presumed to know what it is signing."¹¹⁰

The court then addressed what the test was for determining whether there was a conspicuous contractual jury waiver:

Section 1.201(b)(10) of the Texas Business and Commerce Code provides that "[c]onspicuous . . . means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." In *Prudential*, we noted that the waiver provision was "crystal clear" because "it was not printed in small type or hidden in lengthy text" and "[t]he paragraph was captioned in bold type."¹¹¹

The court reviewed the contract at issue and found that the contractual jury waiver was conspicuous:

In this case, the addendum is only two pages long, and each of the twenty provisions are set apart by one line and numbered individually. Five of the twenty provisions

¹⁰⁴278 S.W.3d 342, 346 (Tex. 2009) (per curiam) (orig. proceeding).

¹⁰⁵*See id.* at 343.

¹⁰⁶*See id.* at 344.

¹⁰⁷*Id.*

¹⁰⁸*Id.* (quoting *In re Gen. Electric*, 203 S.W.3d 314, 316 (Tex. 2006) (per curiam) (orig. proceeding)).

¹⁰⁹*Id.* at 344.

¹¹⁰*Id.*

¹¹¹*Id.*

included bolded introductory captions similar to the waiver provision in *Prudential*, and the “Waiver of Trial By Jury” caption is one of the five. Furthermore, the introductory caption is hand-underlined, as is the word “waiver” and the words “trial by jury” within the provision. This bolded, underlined, and captioned waiver provision is no less conspicuous than those contractual waivers that we upheld in both *Prudential* and *General Electric*, and therefore serves as prima facie evidence that the representatives of Mikey’s Houses knowingly and voluntarily waived their constitutional right to trial by jury.¹¹²

Because the contractual jury waiver was conspicuous, the court found that the bank did not have the burden to establish a knowing-and-voluntary waiver.¹¹³ However, the court did not state what would happen if the clause was not conspicuous.

Interestingly, the court noted that if the party opposing the jury waiver had alleged fraud with regard to the jury waiver provision, that it would have shifted the burden to the party seeking to enforce the jury waiver to establish a knowing-and-voluntary waiver: “As for the extent of the allegation that would be necessary to shift the burden to Bank of America to prove knowledge and voluntariness, an allegation could be sufficient to shift the burden if there is fraud alleged in the execution of the waiver provision itself.”¹¹⁴

Finally, the court noted that the court of appeals’ presumption was contrary to the fact that contractual jury waivers were similar to arbitration agreements:

We also note the similarity between arbitration clauses and jury-waiver provisions to clarify that a presumption against contractual jury waivers is antithetical to *Prudential*’s jurisprudence with regard to private dispute resolution agreements. In *Prudential*, we agreed with the United States Supreme Court that “arbitration and forum-selection clauses should be enforced, even if they are part of an agreement alleged to have been fraudulently induced,

¹¹² *Id.* at 345.

¹¹³ *See id.* at 346.

¹¹⁴ *Id.* at 345.

as long as the specific clauses were not themselves the product of fraud or coercion.” Since *Prudential* indicates that the same dispute resolution rule expressed by the United States Supreme Court in *Scherk* should apply to contractual jury-waiver provisions, the court of appeals’ analysis errs by distinguishing jury waivers from arbitration clauses, thereby imposing a stringent initial presumption against jury waivers. Statutes compel arbitration if an arbitration agreement exists, and more importantly, “Texas law has historically favored agreements to resolve such disputes by arbitration.” We see no reason why there should be a different rule for contractual jury waivers.¹¹⁵

The court then conditionally granted the petition for writ of mandamus, holding that the trial court’s enforcement of the contractual jury waiver provision was correct.¹¹⁶

There is no question that contractual jury waivers are enforceable in Texas under the right circumstances.¹¹⁷ The issue facing Texas courts is whether the clause is something different from an arbitration clause or a forum-selection clause and thus should be judged by different standards.¹¹⁸ Does Texas law require a conspicuous jury waiver clause? Does the clause have to be entered into by both parties on a knowing-and-voluntary basis? If so, whose burden is it to prove a knowing-and-voluntary waiver? Are there any presumptions in favor of or against jury waivers? What factors will Texas courts look to in determining a knowing-and-voluntary waiver?

The opinion in *In re Bank of America* could be read narrowly. Just as the court determined in *In re General Electric*, the jury waiver clause was conspicuous, and therefore, the burden was on the party opposing the waiver to prove that it was not entered into knowingly and voluntarily.¹¹⁹ The court did not deal with a non-conspicuous clause and did not expressly hold that the party opposing a non-conspicuous clause would have that initial burden of proving a knowing-and-voluntary waiver. Therefore, there is still a question as to whether the burden of proving a knowing-and-

¹¹⁵ *Id.* at 346.

¹¹⁶ *Id.* at 346.

¹¹⁷ *See supra* Part III.

¹¹⁸ *See, e.g., In re Bank of Am.*, 278 S.W. 3d at 346 (stating the lower court erred in distinguishing jury waiver from arbitration clause).

¹¹⁹ 203 S.W.3d 314, 316 (Tex. 2006) (per curiam) (orig. proceeding).

voluntary waiver is on the party attempting to enforce a non-conspicuous jury waiver clause.

VI. POST-*IN RE BANK OF AMERICA* CASES

There are a few Texas intermediate appellate courts that have reviewed contractual jury waivers since the Texas Supreme Court issued *In re Bank of America*.¹²⁰ Those courts have reviewed the clauses the same as arbitration clauses.¹²¹

In *In re Wild Oats Markets*, the court of appeals held that contractual jury waiver provisions are enforced like any other contractual clause, including an arbitration clause.¹²² The court stated: “In its response, Kuykendahl suggests arbitration cases are treated more favorably than other contractual jury waiver cases. We disagree.”¹²³ Ultimately, the court denied the petition for writ of mandamus because the plaintiff was not a signatory to the agreement, and though potentially available, direct-benefits estoppel did not apply due to the facts of the case.¹²⁴

In *In re J.W. Resources Exploration and Development*, even though plaintiffs signed an arbitration agreement that also contained an express contractual jury waiver, they filed suit against the signing party for fraud.¹²⁵ After the trial court granted a motion to compel arbitration and stayed the proceedings, the plaintiffs filed a petition for writ of mandamus arguing in part that the express “embedded” jury waiver mandated that the court disregard the general case law favoring arbitration agreements.¹²⁶ The court of appeals disagreed:

Texas allows parties to contractually waive the right to a jury trial by enforcing arbitration agreements.

Additionally, the Supreme Court recently rejected

¹²⁰ See generally *In re Wild Oats Mkts*, 286 S.W.3d 499, 500 n.1 (Tex. App.—Beaumont 2009, orig. proceeding) (per curiam); *In re J.W. Res. Exploration & Dev.*, No. 107-09-0189-CV, 2009 Tex. App. LEXIS 6676, at *6–10 (Tex. App.—Amarillo Aug. 25, 2009, orig. proceeding) (mem. op.).

¹²¹ See *In re Wild Oats Markets*, 286 S.W.3d at 500 n.1; *In re J.W. Res. Exploration & Dev.*, 2009 Tex. App. LEXIS 6676, at *6–10.

¹²² 286 S.W.3d at 500 n.1.

¹²³ *Id.*

¹²⁴ See *id.* at 500–01.

¹²⁵ 2009 Tex. App. LEXIS 6676, at *2–3.

¹²⁶ See *id.* at *3, *8.

treating a waiver of a jury trial differently than arbitration clauses. The Court clarified *In re Prudential Ins. Co. of America*, and held that it does not impose a presumption against jury waivers that places the burden on the party seeking enforcement to prove that the waiver was executed knowingly and voluntarily.

A conspicuous jury waiver provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it. The Court has always presumed that a party who signs a contract knows its contents. As long as there is a conspicuous waiver provision, Relators are presumed to know what they were signing. “[P]arties strike the deal they choose to strike and, thus, voluntarily bind themselves in the manner they choose. And, that is why parties are bound by their agreement as written.” The jury waiver provision included in the arbitration clause is in all capital letters and stands out from the language pertaining to arbitration. It is sufficiently conspicuous to serve as prima facie evidence that Relators, Watkins and Blankenship, who both executed the Agreement, knowingly and voluntarily waived their right to a jury trial.¹²⁷

The parties also argued that the arbitration agreement containing the jury waiver was not enforceable because they were defrauded into executing the entire agreement.¹²⁸ The court of appeals held that this defense was for the arbitrator to determine:

Such a general allegation is insufficient to shift the burden to McKenney to produce a knowing and voluntary waiver. If a party could simply allege fraud on the entire transaction in order to nullify a jury waiver provision, there would hardly ever be a circumstance when waiver provisions could be enforceable.¹²⁹

¹²⁷ *Id.* at *9–10 (citations omitted).

¹²⁸ *Id.* at *10.

¹²⁹ *Id.* at *10–11.

Therefore, the court of appeals denied the petition for writ of mandamus finding that the trial court did not abuse its discretion in compelling arbitration:

Statutes compel arbitration if an arbitration agreement exists. More importantly, Texas law favors arbitration. The Court has determined, “[w]e see no reason why there should be a different rule for contractual jury waivers.” Relators have failed to rebut prima facie evidence that they knowingly and voluntarily agreed to waive a jury trial. We disagree with their contention that the waiver provision of the right to a jury trial “embedded” in the arbitration clause is unenforceable.¹³⁰

These cases hold similarly to the Texas Supreme Court’s *In re Bank of America* case and imply that a contractual jury waiver is the same as an arbitration agreement.¹³¹ Yet, in *J.W. Resources*, the court still allowed a knowing-and-voluntary defense to the party seeking to escape the clauses’ effect, a result that would not have occurred in the arbitration context.¹³²

In *Chambers v. O’Quinn*, the plaintiffs argued that an arbitration clause impermissibly waived their right to a jury trial.¹³³ The Houston Court of Appeals for the First District rejected this argument holding that there was a difference between a contractual jury waiver and an arbitration agreement.¹³⁴ The court noted that:

Arbitration is an agreement to resolve disputes out of court in the first instance, not an agreement to waive a particular constitutional right available within the judicial process. When a party contractually agrees to arbitrate a dispute, it waives its rights to recourse in the courts. Because

¹³⁰ *Id.* at *11 (citations omitted).

¹³¹ See *In re Wild Oats Mkts.*, 286 S.W.3d 499, 500 n.1 (Tex. App.—Beaumont 2009, orig. proceeding) (per curiam); *In re J.W. Res. Exploration & Dev.*, 2009 Tex. App. LEXIS 6676, at *6–10.

¹³² Compare *In re Bank of Am.*, 278 S.W.3d 342, 346 (Tex. 2009) (per curiam) (orig. proceeding) (holding the court of appeals erred by distinguishing jury waivers from arbitration clauses) with *In re J.W. Res. Exploration & Dev.*, 2009 Tex. App. LEXIS 6676, at *9–11 (holding arbitration agreements are compelled by statute, but allowing a knowing-and-voluntary defense for jury waiver provision).

¹³³ 305 S.W.3d 141, 149 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

¹³⁴ *Id.*

arbitration does not deny parties their right to a jury trial as a matter of law, we reject appellants' argument.¹³⁵

In *In re Frost National Bank*, the Dallas Court of Appeals reversed a trial court's refusal to enforce a contractual waiver.¹³⁶ In an arbitration agreement, there was a second provision dealing with a contractual jury waiver that applied to any action "to enforce this agreement, or which . . . [is] related to this agreement or the subject matter of this agreement."¹³⁷ Because the claims related to the subject matter of the underlying agreement, the court concluded that the plaintiff's claims did fall within the scope of the contractual jury waiver and that they should therefore be submitted to the court and not a jury.¹³⁸

In *In re Go Colorado 2007 Revocable Trust*, the Fort Worth Court of Appeals granted mandamus relief and held that a jury waiver did not apply against a trust.¹³⁹ A plaintiff sued a trust over a guarantee agreement signed by the trustee before the trust was created.¹⁴⁰ This agreement contained a jury waiver in it.¹⁴¹ After the trial court enforced the jury waiver the plaintiff filed a petition for writ of mandamus.¹⁴² The court of appeals held that a trust cannot knowingly and voluntarily enter into a contractual jury waiver before it was even created.¹⁴³ The plaintiff made several arguments concerning a non-party to an arbitration agreement being held to such an agreement.¹⁴⁴ The court refused to consider these arguments:

CCC argues that arbitration principles—which allow an arbitration agreement in certain narrow circumstances to be enforceable against nonsignatories—apply to contractual jury waivers We need not address these arguments, however, because we hold that the fact that the Trust was

¹³⁵ *Id.*

¹³⁶ No. 05-10-01097-CV, 2010 Tex. App. LEXIS 7749 at *3 (Tex. App.—Dallas Sept. 22, 2010, orig. proceeding).

¹³⁷ *Id.* at *3.

¹³⁸ *Id.*

¹³⁹ No. 02-10-182-CV, 2010 Tex. App. LEXIS 5626 at *8 (Tex. App.—Fort Worth July 15, 2010, orig. proceeding).

¹⁴⁰ *Id.* at *2.

¹⁴¹ *Id.*

¹⁴² *Id.* at *2–3.

¹⁴³ *Id.* at *8.

¹⁴⁴ *Id.* at *6–7.

2010]

CONTRACTUAL JURY WAIVER

673

not in existence when Gregory Obert and the other defendants executed the guaranties containing the jury waiver provisions conclusively establishes as a matter of law that the Trust (which was not in existence) did not knowingly and voluntarily waive its constitutional right to a jury trial. If the Trust had existed prior to Gregory Obert's execution of the guaranty containing the jury waiver or if evidence established that the Trust had become an assignee of a Guarantor, CCC's three arguments may or may not have merit.¹⁴⁵

But the court did not explain why the nonexistence of the trust would impact any of the equitable grounds for enforcing such an agreement against a nonsignatory.¹⁴⁶ In fact, that is not a factor in the arbitration context.

Most recently, in *In re Professional Pharmacy II*, the Fort Worth Court of Appeals granted mandamus relief and held that jury waiver language in an arbitration agreement was not enforceable.¹⁴⁷ The trial court granted the defendant bank's motion to strike a jury demand based on a clause that stated as follows:

Most disputes arising under this Agreement related to accounts or services hereunder are subject to mandatory binding arbitration. Rights to trial by judge or jury are waived hereby. Bank must be notified by depositor of claims and proceedings to enforce any such claims must be brought, within the time requirements established in the Account Disclosures and Regulations.¹⁴⁸

The plaintiff filed a petition for writ of mandamus seeking to reverse the trial court's waiver.¹⁴⁹

The Fort Worth Court of Appeals held that the jury waiver language was imbedded in an arbitration clause and was not a contractual jury waiver:

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ No. 2-10-163-CV, 2010 Tex. App. LEXIS 7798 at *10-12 (Tex. App.—Fort Worth September 23, 2010, orig. proceeding) (mem. op.).

¹⁴⁸ *Id.* at *6-7.

¹⁴⁹ *Id.* at *2.

The first sentence in the provision at issue clearly relates to arbitration as the method that has been selected for resolving disputes. The sentence waiving trial by judge or jury also clearly contemplates arbitration as it attempts to take the dispute resolution out of the court system altogether. “Judge” and “jury” are mentioned in the same sentence, and there is nothing to indicate the waiver of jury standing alone. Accordingly, JP Morgan’s contention that the provision is a valid jury waiver fails.¹⁵⁰

Interestingly, the court also noted that even if it was meant to be a contractual jury waiver, it was not enforceable because it was not conspicuous.¹⁵¹ However, the court did not discuss whether there was any evidence of a knowing-and-voluntary waiver and whose burden it was to make such a showing. Presumably, the court held that a jury waiver imbedded in an arbitration clause was not conspicuous, that the party trying to enforce the waiver had the burden to establish that it was entered into knowingly and voluntarily, and that there was no such evidence in the record. Accordingly, parties should have two separate paragraphs and provisions dealing with arbitration and contractual jury waivers for those matters not sent to arbitration.

VII. SHOULD THE ENFORCEMENT OF A JURY-WAIVER CLAUSE DIFFER FROM AN ARBITRATION CLAUSE AND A FORUM-SELECTION CLAUSE?

Arbitration, forum-selection, and jury-waiver clauses all fundamentally alter a party’s right to dispute resolution.¹⁵² They can all waive a party’s right to a jury trial.¹⁵³ However, those clauses seemingly have different tests for their enforcement.¹⁵⁴

A. *Texas Courts Liberally Enforce Arbitration Clauses Using Contractual, Mutual Assent Standard.*

Texas courts liberally enforce arbitration clauses notwithstanding the

¹⁵⁰ *Id.* at *10.

¹⁵¹ *Id.* at *10–11.

¹⁵² *See In re Bank of Am.*, 278 S.W.3d at 346 (discussing arbitration, jury-waiver, and forum-selection clauses).

¹⁵³ *See id.*

¹⁵⁴ *Id.*

fact that a party waives its constitutional right to a jury trial and has a very limited right to appeal an arbitrator's decision.¹⁵⁵ In Texas, arbitration agreements are interpreted under general contract principles.¹⁵⁶ To enforce an arbitration clause, a party must merely prove the existence of an arbitration agreement and that the claims asserted fall within the scope of the agreement.¹⁵⁷ Further, there are instances where Texas courts have enforced arbitration agreements against nonparties under the theory of estoppel.¹⁵⁸

Moreover, in Texas, there is a presumption that parties who sign contracts have read and understood the contracts' provisions.¹⁵⁹ Therefore, absent narrow exceptions,¹⁶⁰ there is no requirement that the party relying on the arbitration agreement prove that it is conspicuous or that all parties entered into the agreement voluntarily or knowingly. For example, an arbitration clause can be incorporated by reference into another contract.¹⁶¹ In *Bank One*, the court enforced an arbitration agreement that was contained in a lengthy depository agreement that had been incorporated by reference into an account signature card.¹⁶² Certainly, a clause that is not expressly set out in an agreement is not conspicuous. In addition to a strong presumption in favor of an arbitration clause, the enforcement of an arbitration clause is a mere contract-based analysis with normal contract-based defenses.¹⁶³

B. Texas Courts Liberally Enforce Forum-Selection Clauses and There Is No Knowing-and-Voluntary Defense.

Enforcement of forum-selection clauses is mandatory unless the party opposing enforcement clearly shows that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as

¹⁵⁵ See *supra* Part V.

¹⁵⁶ See *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

¹⁵⁷ See *In re Dallas Peterbilt*, 196 S.W.3d 161, 163 (Tex. 2006) (per curiam).

¹⁵⁸ See, e.g., *In re Weekley Homes*, 180 S.W.3d 127, 133–35 (Tex. 2005); *In re Kellogg, Brown & Root*, 166 S.W.3d 732, 738–40 (Tex. 2005).

¹⁵⁹ See *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996) (per curiam).

¹⁶⁰ For example, the Texas Business and Commerce Code requires that an arbitration clause be conspicuous when included in certain contracts requiring arbitration in another jurisdiction. See TEX. BUS. & COM. CODE ANN. § 273.002 (West 2007).

¹⁶¹ See *In re Bank One*, 216 S.W.3d 825, 826 (Tex. 2007).

¹⁶² See *id.*

¹⁶³ See *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 230 n.2 (Tex. 2003).

fraud or overreaching.¹⁶⁴ Though there is ostensibly an “unreasonable and unjust” exception to enforcing a forum-selection clause that does not exist for arbitration agreements, the Texas Supreme Court has seemingly enforced forum-selection clauses the same as arbitration agreements.¹⁶⁵

Courts have not held that there has to be any showing of a knowing or voluntary agreement to enforce a forum-selection clause. Moreover, courts have applied estoppel so that non-signatories can enforce forum-selection clauses.¹⁶⁶ Moreover, Texas courts apply arbitration precedent to forum-selection clauses.¹⁶⁷ The United States Supreme Court’s forum-selection clause cases liberally cite to and refer to arbitration precedent.¹⁶⁸

C. Why Do Parties Fighting Contractual Jury Waivers Have a Knowing-and-Voluntary Defense?

Contractual jury waivers are clauses in contracts stating that the parties waive the right to a jury and will submit their disputes to the court.¹⁶⁹ However, a plaintiff still gets to have its choice of Texas as the jurisdiction for dispute resolution, is still entitled to full discovery, cross examination, and importantly, appellate review of the trial court’s decision.¹⁷⁰ The same cannot be said of arbitration, and may not be able to be said for forum-selection clauses depending on the forum.¹⁷¹ Because contractual jury waivers are less intrusive than arbitration or forum-selection clauses, common sense would lead to the conclusion that they should be enforced with the same contractual analysis and are at least as easily enforced as arbitration agreements.

¹⁶⁴ *In re AIU Ins. Co.*, 148 S.W.3d 109, 112 (Tex. 2004).

¹⁶⁵ *See id.*

¹⁶⁶ *See Phoenix Network Techs. (Eur.) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 622–24 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

¹⁶⁷ *See, e.g., In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 885–86 (Tex. 2010) (per curiam) (applying arbitration clause principles to a forum selection clause).

¹⁶⁸ *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 507 (1974) (stating that an arbitration clause is essentially a specialized forum selection clause).

¹⁶⁹ *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 127–28 (Tex. 2004) (orig. proceeding).

¹⁷⁰ *See id.* at 132 (stating that by agreeing to only waive the right to a trial by jury, parties take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal).

¹⁷¹ *See id.* (stating that by agreeing to arbitration, parties waive not only their right to trial by jury but also their right to appeal).

However, contractual jury waivers are not enforced under the same standards as arbitration or forum-selection clauses; and parties have a more difficult burden to enforce jury waivers.¹⁷² In *In re Prudential*, the Texas Supreme Court for the first time held that contractual jury waivers were enforceable.¹⁷³ The court held that such an agreement may be unenforceable where it was not entered into voluntarily, knowingly, and intelligently.¹⁷⁴ Oddly, despite creating a “voluntary, knowing, and intelligent” requirement, the court acknowledged that a contractual jury waiver was less of a deprivation of constitutional rights than an arbitration clause.¹⁷⁵

Texas intermediate courts of appeals have been understandably conflicted on the meaning and use of the “voluntary, knowing, and intelligent” requirement.¹⁷⁶ The Texas Supreme Court has not discussed why there are different standards for contractual jury waivers than for arbitration agreements or forum-selection clauses.¹⁷⁷ However, in *In re Prudential* the court clearly stated that contractual jury waivers were less intrusive than arbitration agreements and forum-selection clauses.¹⁷⁸ One reason that arbitration clauses are favorably viewed is that there are federal and state statutes extolling arbitration’s virtues while there are no such statutes for jury waivers.¹⁷⁹ Of course, a statute should not be able to trump a constitutional right.¹⁸⁰

But that begs the main question – why does a party fighting a contractual jury waiver have a knowing-and-voluntary defense when similar parties fighting arbitration and forum-selection clauses do not? If the

¹⁷² See *id.* at 134 (applying knowing-and-voluntary standard).

¹⁷³ See *id.* at 132.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., *In re Wild Oats Mkts.*, 286 S.W.3d 499, 500 n.1 (Tex. App.—Beaumont 2009, orig. proceeding) (per curiam) (contractual jury waiver treated the same as arbitration clause); *Mikey’s Houses, LLC v. Bank of Am.*, 232 S.W.3d 145, 150–51 (Tex. App.—Fort Worth 2007) (presumption against enforcement of contractual jury waiver), *mand. granted*, *In re Bank of Am.*, 278 S.W.3d 342, 346 (Tex. 2009) (orig. proceeding); *In re Wells Fargo Bank Minn.*, 115 S.W. 3d 600, 607, 609–10 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (contractual jury waiver is presumptively valid).

¹⁷⁷ See *In re Prudential*, 148 S.W.3d at 134 (using a different standard for jury waivers).

¹⁷⁸ *Id.* at 132.

¹⁷⁹ *Id.* at 142 (Phillips, J. dissenting) (citing *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992) (orig. proceeding)).

¹⁸⁰ See U.S. CONST. art. VI, cl. 2.

knowing-and-voluntary requirement is constitutional, it should apply to arbitration agreements notwithstanding statutory enactments.¹⁸¹ Yet, most courts have held that the knowing-and-voluntary requirement does not apply to arbitration clauses.¹⁸²

For example, in *Chambers v. O'Quinn*, the court of appeals refused to apply contractual jury waiver standards to a motion to compel arbitration:

[A] difference exists between a jury trial waiver and an agreement to arbitrate disputes. Arbitration is an agreement to resolve disputes out of court in the first instance, not an agreement to waive a particular constitutional right available within the judicial process. When a party contractually agrees to arbitrate a dispute, it waives its rights to recourse in the courts. Because arbitration does not deny parties their right to a jury trial as a matter of law, we reject appellants' argument.¹⁸³

¹⁸¹ See, e.g., *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005) (holding arbitration agreement waiver of jury right to knowing-and-voluntary standard); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304–05 (9th Cir. 1994) (concluding that “a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration”); see also, e.g., Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 102–08 (1992) (same); Richard Reuban, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1019–34 (2000) (same); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1352 n.63 (1996) (same); 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, 675–76 (2001) (arguing for harmonization under the knowing-and-voluntary standard of waiver). But see Andrew M. Kepper, *Contractual Waiver of Seventh Amendment Rights: Using the Public Rights Doctrine To Justify a Higher Standard of Waiver for Jury-Waiver Clauses than for Arbitration Clauses*, 91 IOWA L. REV. 1345, 1365 (2006) (arguing that harmonization of differing standards for enforceability between arbitration and jury waivers is not necessary); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 167–97 (2004) (arguing for harmonization under the contract-law standard of waiver).

¹⁸² See, e.g., *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 223–24 (3rd Cir. 2008) (holding the knowing-and-voluntary requirement does not apply to arbitration agreements); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1371 (11th Cir. 2005) (same); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) (same); *Sydnor v. Consecro Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (same).

¹⁸³ 305 S.W.3d 141, 149 (Tex. App.—Houston [1st dist.] 2009, pet. denied.) (citations omitted).

Of course, this case is incorrect because an arbitration clause does waive a party's right to a jury trial.¹⁸⁴

Is there any reason to apply arbitration precedent and presumptions to forum-selection clauses and not to contractual jury waivers? Certainly, litigating in other countries of the world has a huge impact on parties' constitutional rights. Few countries provide a right to a jury.¹⁸⁵ Moreover, there are other rights that may be limited such as the examination of witnesses, presentation of evidence, and right to appellate relief.¹⁸⁶ Why is there a lesser standard for enforcing these provisions than for jury waivers? There is no good reason. For example, in *In re Palm Harbor Homes*, the Texas Supreme Court held that when a contractual-jury-waiver provision is subsumed within an arbitration agreement, the procedural and substantive rules concerning arbitration apply.¹⁸⁷ Why should a different, more strenuous, standard apply when jury-waiver clauses are not included in arbitration agreements?

Arbitration, forum-selection, and jury waiver clauses should all be judged by the same standard.¹⁸⁸ They all deprive a party of constitutional rights; however, as courts acknowledge, a party can waive those rights.¹⁸⁹ They should all be judged either under the contract/mutual assent standard of arbitration agreements or by some higher knowing-and-voluntary standard. Further, equitable estoppel should apply to all of these clauses or to none of them. There is no logical difference between them.

VIII. CONCLUSION

There is no question that contractual jury waivers are enforceable in Texas under the right circumstances. The issue facing Texas courts is

¹⁸⁴ See *In re Gulf Exploration LLC*, 289 S.W.3d 836, 843 (Tex. 2009) (stating that an arbitration clause denied a party's constitutional right to a jury trial).

¹⁸⁵ See, Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U.L. REV. 553, 593 n.230 (2007).

¹⁸⁶ *Id.*

¹⁸⁷ 195 S.W.3d 672, 678–79 (Tex. 2006).

¹⁸⁸ See *supra* text accompanying notes 43–46 (using knowing-and-voluntary standard for jury waiver).

¹⁸⁹ See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132–33 (Tex. 2004) (orig. proceeding); see also 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, 49 (1997) (noting that the Supreme Court has long held that many constitutional rights, including the rights to a civil jury trial, are largely waivable).

whether the clause is something different from an arbitration clause or a forum-selection clause and should be judged more strictly. Does Texas law require a conspicuous jury waiver clause? Does the clause have to be entered into by both parties on a knowing-and-voluntary basis? If so, whose burden is it to prove a knowing-and-voluntary waiver? Are there any presumptions in favor of or against jury waivers? What factors will Texas Courts look to in determining a knowing-and-voluntary waiver? Is the scope of the jury waiver viewed broadly or narrowly?

The Texas Supreme Court held that there is a requirement that there be a knowing-and-voluntary waiver. However, where the clause is conspicuous, the court placed the burden on the party challenging the clause to establish that there was not a voluntary and knowing waiver. Moreover, the court has not held that there is a requirement that the clause be conspicuous. A fair reading of the Texas Supreme Court's opinions leads to the conclusion that the Court favors their use and enforceability. The same is not true in at least the Fort Worth Court of Appeals and the Houston Fourteenth District Court of Appeals. Those courts seem hostile to the enforceability of jury waiver clauses. Moreover, the Houston Fourteenth District Court of Appeals applied a rather narrow interpretation of the scope of the jury waiver clause, something that rarely occurs in the context of arbitration or forum-selection clauses.

Until the Texas Supreme Court weighs in on more contractual jury waiver cases, there will be some uncertainty and there will likely be conflicts among the Texas intermediate courts of appeal on the questions set forth above. However, parties should still use the jury waiver clause as its benefits certainly outweigh the detriment of the uncertainty as to when they will be enforced. Further, parties can buttress the enforceability of a jury waiver clause by making it conspicuous and expressly stating in the agreement that the parties entered into the waiver knowingly and voluntarily after the opportunity to retain counsel. If this is done, the Texas Supreme Court holds that the burden of proving otherwise will be on the party seeking a jury trial. Further, parties should draft the scope of the clause broadly to include all disputes between the parties if that is the intent.