

# The Enforceability of Pre-Dispute Jury Waiver Agreements in Employment Discrimination Cases

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## I. INTRODUCTION

Employers are always attempting to find new ways to limit their exposure to employment discrimination claims. Many employers have implemented multi-level alternative dispute resolution procedures which attempt to prevent claims of discrimination from occurring, settle the dispute before it reaches the appropriate judicial system and/or avoid the uncertainty of a jury trial if a claim is ultimately litigated. Throughout the 1990's mandatory arbitration agreements in employment contracts were the alternative dispute resolution program of choice. There are several drawbacks to mandatory arbitration agreements, however, and as a result employers have continued their quest to find a better method of limiting their financial exposure in jury trials.

The newest method utilized by employers to attempt to reduce the risk of excessive jury awards is the jury trial waiver. Jury trial waivers are generally included in a provision of an employment agreement and provide that the right to a jury trial is waived for any claim or cause of action arising under the agreement or out of the employment relationship. Jury trial waivers give employers the benefits of a judicial forum without the expense and uncertainty of a jury trial.

This development is recent enough that case law on the subject is limited. This article reviews the current federal and Pennsylvania case law and concludes that pre-dispute jury waiver agreements under current federal and Pennsylvania Constitutional and statutory law are enforceable in employment discrimination cases. This article also sets forth the legal framework used by courts to determine the validity of pre-dispute jury trial waivers. Finally, it will identify the factors that should be considered by employers when implementing pre-dispute jury waivers.

## II. ENFORCEABILITY OF PRE-DISPUTE JURY WAIVER AGREEMENTS

In determining the validity of a pre-dispute jury trial waiver agreement, the court is sometimes asked to consider whether the jury trial waiver is valid under state contract law standards. If so, the court then must consider whether the right to a jury trial can be waived under the applicable state and/or federal constitutional or statutory law. This section will review the current legal framework for resolution of these two issues.

### A. *Contract Law Considerations*

A party seeking to avoid enforcement of a pre-dispute jury waiver agreement can be expected to assert the contract law defense of unconscionability.<sup>1</sup> Although the unconscionability defense is almost always unsuccessful in cases challenging the enforceability of mandatory arbitration agreements, a stricter standard of scrutiny applies to pre-dispute jury waiver agreements. Comparison of the different standards is a useful starting point for addressing the enforceability of pre-dispute jury waivers under state law.

#### *Mandatory Arbitration Agreements*

The body of law governing arbitration often presents the following propositions: (1) arbitration is favored; (2) arbitration clauses may be upheld absent a showing of voluntary, knowing, or intentional consent; (3) the party opposing arbitration bears the burden of proof; (4) arbitration can sometimes be imposed using unsigned envelope "stuffers," handbooks, and warranties; and (5) ambiguous contracts should be construed broadly to support arbitration.<sup>2</sup>

These distinct principles have developed because of the Supreme Court's jurisprudence holding that the Federal Arbitration Act ("FAA") manifests a liberal federal policy favoring arbitration.<sup>3</sup> For example, the Supreme Court in *Gilmer v. Interstate/Johnson*

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1. Unconscionability is a defensive contractual remedy which serves to relieve a party from an unfair contract or from an unfair portion of a contract. In order for a contract to be found unconscionable, a court generally requires that the disputed contractual terms be unreasonably favorable to one party and that there was an absence of meaningful choice on the part of one of parties. See *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) and *Witmer v. Exxon Corp.*, 434 A.2d 1222, 1228 (Pa. 1981).

2. 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, 673-74.

3. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-26, (1991).

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*Lane Corp.* addressed and rejected an argument that agreements to arbitrate employment discrimination claims should not be enforced because of the disparity in bargaining power between an employee and employer. The Supreme Court stated:

Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we nevertheless held in *Rodriguez de Quijas* and *McMahon* that agreements to arbitrate in that context are enforceable . . . . Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds “for the revocation of any contract.” There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application . . . . [These] claim[s] of unequal bargaining power [are] best left for resolution in specific cases.<sup>4</sup> (citations omitted).

Thus, mandatory arbitration agreements are routinely upheld when factors generally found to be unconscionable are present.<sup>5</sup> As a result, in only the most egregious cases will contract defenses such as fraud, duress, or unconscionability be used to invalidate an arbitration agreement.<sup>6</sup>

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4. *Gilmer*, 500 U.S. at 33.

5. “The degree of conspicuousness, negotiability, bargaining power disparity, and other individualized factors are not typically deemed important in arbitration. In addition, the burden of proof is often placed on the party opposing arbitration, rather than on the party defending the waiver. Uninitialed, unsigned waivers that probably would not be found to be knowing, voluntary and intelligent are nonetheless often found sufficient modes of imposing arbitration. Finally, whereas courts interpret jury trial waivers narrowly, they often interpret arbitration clauses broadly. In fact, rather than demanding a higher level of consent for arbitration clauses than for other contracts, some courts are even requiring a *lower* level of consent, citing the supposed federal policy favoring arbitration.” Sternlight, 16 OHIO ST. J. ON DISP. RESOL. at 710. —

6. See, e.g., Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1018-30 (1996).

*Mandatory Arbitration Agreements Under Pennsylvania State Law*

Consistent with *Gilmer*, the Pennsylvania courts and the United States Court of Appeals for the Third Circuit, in construing Pennsylvania law, have repeatedly held that inequity or disparity in bargaining power, alone, is not a valid basis to invalidate an arbitration agreement on grounds of unconscionability.<sup>7</sup> In *Harris v. Green Tree Financial Corp.*, rejecting the unconscionability argument, the Third Circuit Court of Appeals summarized Pennsylvania case law upholding arbitration provisions:

[I]n *Troshack v. Terminix Int'l Co.*, the District Court for the Eastern District of Pennsylvania has held that language that is clear and unambiguous must be recognized and enforced. Thus, the *Troshack* court rejected a claim that an arbitration clause was unconscionable merely because it was on the reverse side of a contract; since the language directing the contracting party to the reverse side of the contract was clear and in plain view, the court found assent to the agreement. Similarly, in *McCullough v. Shearson Lehman Bros., Inc.*, the District Court for the Western District of Pennsylvania rejected an argument that an arbitration clause was unconscionable, where it was not printed more prominently than other parts of the contract . . . [In] *Cantella & Co. Inc. v. Goodwin*, [the court held] that [the] clause is not “hidden” if it appears on the back of a single-page document, where the “ARBITRATION” notice is in bold, and given a presumption that a party who signs a contract knows its contents.<sup>8</sup> (citations omitted).

In summary, Pennsylvania case law favors the enforcement of arbitration agreements and unconscionability is found in only the most egregious cases.

*Pre-Dispute Jury Waiver Agreements*

Court review of the validity of pre-dispute jury waiver agreements is subject to a different standard from the one governing mandatory arbitration provisions. In short, while the analysis re-

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7. See *Harris*, 183 F.3d at 183.

8. *Id.* at 182.

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sembles an “unconscionability” inquiry,<sup>9</sup> the courts have more latitude to invalidate the pre-dispute jury waiver agreement.<sup>10</sup> The reason for this is because the courts considering the validity of the jury waiver agreement engage in a constitutional analysis<sup>11</sup> that requires the court to consider whether the waiver was entered into knowingly, voluntarily and intentionally.<sup>12</sup> As a result of the jury trial being a fundamental right, the United States Supreme Court has frequently required that courts indulge every reasonable presumption against such a waiver.<sup>13</sup> In applying this standard, courts review several factors: (1) whether there exists gross disparity in bargaining power between the parties; (2) the business or professional experience of the party opposing the waiver; (3) whether the opposing party had the opportunity to negotiate con-

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9. “[U]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” The very factors that indicate unconscionability (*e.g.*, a contract drawn skillfully by a party with the strongest economic position which is offered on a take it or leave it basis; hiding contractual provisions in a maze of fine print; lack of opportunity for meaningful negotiation, etc.) are reviewed by federal courts when determining whether the jury waiver provision meets the knowing, voluntary and intentional standard. See JOHN E. MURRAY, *MURRAY ON CONTRACTS*, § 96 (B)(2)(b) (1990).

10. “While jury trial rights under the Seventh Amendment are admittedly subject to waiver, waiver is tightly constrained by the following principles: (1) jury trial waivers may not be lightly implied; (2) courts look at a whole host of factors to determine whether the waiver was voluntary, knowing, and intentional; (3) many courts provide that the party seeking waiver bears the burden of proof; (4) courts’ holdings render suspect the use of unsigned or uninitiated documents to support the finding of a jury trial waiver; (5) in interpreting purported jury trial waivers, courts have stated that they must be narrowly construed. These waiver principles apply in cases between two private parties, and, thus, no “state action” must be proven to show a violation of jury trial rights.” 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).

11. “The right to a jury trial in civil actions at common law under the Seventh Amendment, jealously guarded by the Supreme Court, is in diversity cases governed by federal, rather than state law. Although the thrust of the Seventh Amendment was to preserve the right of jury trial as fixed by the common law the right extends beyond common-law forms of action recognized in 1791 when the Amendment was adopted and, in particular, extends to new causes of action created by federal statutes under which legal rights and remedies are enforceable in an action for damages in the ordinary courts of law.” Ernest H. Schopler, *Supreme Court’s construction of Seventh Amendment’s guaranty of right to trial by jury*, 40 L. ED. 2d 846.

12. See, *e.g.*, *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. N.Y. 1977); *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602 (S.D.N.Y. 1999); *Connecticut Nat’l Bank v. Smith*, 826 F. Supp. 57 (D.R.I. 1993).

13. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937).

tract terms; and (4) whether the clause containing the waiver was conspicuous.<sup>14</sup>

If the constitutional knowing, voluntary and intentional standard is met, the jury waiver agreement is deemed valid. Because this standard is strictly applied to jury waiver agreements, courts do not need to reach the question of whether the jury waiver agreement was unconscionable. The court need only determine if the agreement was valid under the constitutional standard, and if so, the waiver could never be invalidated by an unconscionability analysis. This result occurs because the constitutional knowing, voluntary and intentional standard is a stricter standard than is applied in an unconscionability analysis.

#### *Summary of Contract Law Considerations*

As discussed above, the contract law standards applied to arbitration agreements and pre-dispute jury waiver agreements vary greatly. The knowing, voluntary and intentional standard applied to pre-dispute jury waiver agreements is imposed as a result of the constitutional right to a jury trial. The standard is strictly applied and courts indulge every reasonable presumption against the waiver. As a result, the jury waiver agreement would be invalidated under the knowing, voluntary and intentional standard well before the contract defense of unconscionability would be triggered. Arbitration agreements, on the other hand, are not subject to the constitutional knowing, voluntary and intentional standard, but instead are subject only to a “limited unconscionability” contract law standard. As a result of a liberal federal policy favoring arbitration, arbitration agreements are only invalidated under unconscionability contract law standards in the most egregious cases.

#### *B. Federal Constitutional and Statutory Employment Law Considerations*

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14. See *Phoenix Four Grantor Trust #1 v. 642 N. Broad St. Assoc.*, No. 00-597, 2000 U.S. Dist. LEXIS 16524 (E.D. Pa. Nov. 15, 2000); *Aamco Transmissions, Inc. v. Harris*, No. 89-5533, 1990 U.S. Dist. LEXIS 7387 (E.D. Pa. June 13, 1990); *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811 (N.D. Tex. 2002).

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### *U.S. Constitutional Issues*

The Seventh Amendment of the United States Constitution provides the right to a jury trial.<sup>15</sup> The Seventh Amendment states “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....”<sup>16</sup> The Supreme Court in *Kearney v. Case* opined that the Seventh Amendment grants the right to a jury trial, but it does not require one.<sup>17</sup> In *Kearney*, the Supreme Court also said that the right to a jury trial, although considered a fundamental Constitutional right, can be waived.<sup>18</sup> Courts considering waiver of this right are required to indulge every reasonable presumption against the waiver.<sup>19</sup>

The Supreme Court has never directly ruled on the issue of whether pre-dispute jury waivers agreements are enforceable. Federal courts have held that agreements to waive the jury trial right are neither illegal nor contrary to public policy<sup>20</sup> and the parties to a contract may waive the right to a jury trial by prior written agreement.<sup>21</sup> Because Supreme Court jurisprudence requires the courts to indulge every reasonable presumption against waiver of a jury trial,<sup>22</sup> agreements containing jury waiver provisions are strictly and narrowly construed.<sup>23</sup> Thus, federal courts apply a strict test to determine the validity of a pre-dispute jury waiver. This test requires that these pre-dispute jury waiver agreements be entered into knowingly, voluntarily and

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15. It is generally held, in both Federal and State Court, that the right to a jury trial in civil actions and proceedings extends only to such actions and proceedings as are peculiarly “at law,” involving predominately rights and remedies that are “legal” in character, and not cases involving equitable rights and remedies. See, e.g., John Theuman, *Right to jury trial in action under state civil rights law*, 12 A.L.R. 5th 508 (March 2003), (citing 47 A. Jur. 2d, Jury §§31 and 32).

16. U.S. CONST. amend. VII.

17. 79 U.S. 275 (1870).

18. *Id.*

19. *Aetna Insurance Co.*, 301 U.S. at 393.

20. 38 MOORE’S FEDERAL PRACTICE – CIVIL § 38.52(3)(a).

21. *Id.*

22. *Aetna Insurance Co.*, 301 U.S. at 393.

23. 38 MOORE’S FEDERAL PRACTICE – CIVIL § 38.52(3)(b).

intentionally.<sup>24</sup> Whether these factors are met is a factual determination made by the reviewing court on a case-by-case basis. As such, this factual determination is different in each case as illustrated by following cases.<sup>25</sup>

In *Schappert v. Bedford, Freeman & Worth*, the United States District Court for the Southern District of New York concluded that the Plaintiff had knowingly and voluntarily waived her right to a jury trial when she entered into an employment agreement.<sup>26</sup> The Court determined that: (1) plaintiff's admission that she was able to bargain some of the material terms of the Agreement demonstrated her bargaining power; (2) there was no gross inequity in bargaining power between the parties because plaintiff testified that she considered herself a "smart," "savvy," "well educated," and "experienced" business person; (3) plaintiff admitted that the Employment Agreement was negotiated; and (4) the jury waiver was conspicuous and clearly included in the agreement and appeared immediately preceding the parties' signatures.<sup>27</sup>

In *Aamco Trans., Inc. v. Harris*, the United States District Court for the Eastern District of Pennsylvania concluded that Plaintiff Harris had knowingly and voluntarily waived his right to a jury trial when he entered into a franchise agreement with Aamco.<sup>28</sup> The Court determined that: (1) the unequal bargaining power was not sufficient to invalidate the waiver; (2) Harris was an experienced businessman because, at the time of contracting, he not only had a sound general business background and business experience directly related to the franchise agreement in question, but he also acknowledged that any dispute with Aamco would not be settled by a jury; (3) the fact that the franchise agreement was presented as non-negotiable is not sufficient by itself to invalidate the waiver because courts consider the nature of the contract and the circumstances of contracting when determining the negotiability of a waiver; and (4) the jury waiver clause was conspicuous because even though the print was small, it was uniform throughout the

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24. *See supra*, Section II – Contract Law Considerations.

25. For an in depth analysis and additional examples of the applicability of the four factors, *See* Debra Landis, *Contractual jury waivers in federal civil cases*, 92 A.L.R. Fed. 688.

26. *Schappert v. Bedford, Freeman & Worth Publ'g Group, LLC*, 03 Civ. 0058, 2004 U.S. Dist. LEXIS 14153 (S.D.N.Y. July 22, 2004).

27. *Id.*

28. *Aamco Trans., Inc.*, 1990 U.S. Dist. LEXIS 7387 (1990).

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agreement and the placement of the jury waiver clause was logical and unsurprising.<sup>29</sup>

### *Federal Employment Discrimination Statutory Issues*

Although federal courts have routinely decided cases involving the enforceability of jury waivers in various commercial and lease agreements, very few decisions have addressed the question in the context of employment agreements and employment discrimination cases. This section summarizes this limited case law, analyzes Supreme Court jurisprudence on the enforcement of arbitration agreements under these employment discrimination statutes and concludes that jury waiver agreements are enforceable under federal discrimination statutes.

The starting point for an analysis of pre-dispute jury waiver agreements under employment discrimination statutes begins with the United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>30</sup> The Supreme Court in *Gilmer* enforced an arbitration provision in an employment agreement requiring Gilmer to arbitrate his claims under the ADEA. Many lower courts have utilized the holding in *Gilmer* to enforce arbitration provisions requiring the arbitration of claims arising under the ADA, ADEA and Title VII.<sup>31</sup> Many scholars argue, however, that reliance on *Gilmer* to enforce arbitration provisions, forum selection clauses or jury waivers is misplaced, in large part because the 1990 and 1991 amendments to both the ADEA and Title VII were not considered in *Gilmer*.<sup>32</sup>

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29. *Id.*

30. 500 U.S. 20 (1991).

31. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183-84 (3d Cir. 1998); *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359 (11th Cir. 2005); *Miller v. Public Storage Mgmt.*, 121 F.3d 215 (5th Cir. 1997)

32. See Mark Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?*, 44 WAYNE L. REV. 1619 (Winter 1999); Stuart H. Bompey & Michael P. Pappas, *Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 EMPLOYEE REL. L. J. 197 (1993-94); John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-Gilmer Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113 (1992).

*The Civil Rights Act and the ADA*

The Civil Rights Act of 1964 ("1964 CRA") prohibits discrimination in employment actions based upon an individual's race, color, religion, sex, and/or national origin.<sup>33</sup> Although the statute did not originally provide the right to a jury trial, the enactment of the Civil Rights Act of 1991 ("1991 CRA") (collectively referred to as "Title VII") provide the right to a jury trial for claims arising under the statute.<sup>34</sup> The 1991 CRA also included the ADA, which also provides for the right to a jury trial.<sup>35</sup>

Numerous circuit courts have held that the Supreme Court's reasoning in *Gilmer* applies to Title VII claims and that pre-dispute arbitration agreements to arbitration Title VII claims are permissible.<sup>36</sup> The First Circuit Court in *Rosenberg* took the position that:

[w]hether pre-dispute agreements are prohibited by Title VII is a question of whether Congress intended to preclude their use. It is not a question of resolving the lively current public policy debate about whether use of arbitration, rather than a court, to resolve claims of employment discrimination hinders or advances the vindication of basic civil rights.

Two courts have, without discussion, held that the 1991 CRA supports enforcement of pre-dispute agreements to arbitrate Title VII claims. See *Patterson*, 113 F.3d at 837 (stating that "the arbitrability of Title VII claims finds support in the Civil Rights Act of 1991"); *Austin*, 78 F.3d at 881 ("The language of the statutes could not be any more clear in showing Congressional favor towards arbitration.").

The Third Circuit has interpreted section 118 [of the 1991 CRA's] reference to "the extent authorized by law" to refer to the Federal Arbitration Act, not to case law as it

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33. 42 U.S.C. § 2000e-2(a)(1).

34. See 42 U.S.C. § 1981a (c)(1) "Jury Trial – If a complaining party seeks compensatory or punitive damages under this section any party may demand a trial by jury."

35. *Id.*

36. See *Sues v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. Pa. 1998); *Williams v. CIGNA Fin. Advisors*, 56 F.3d 656 (5th Cir. 1995); and *Rosenberg v. Merrill Lynch*, 170 F.3d 1 (1st Cir. 1999).

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stood at the time Congress drafted the 1991 CRA. Like this court in *Bercovitch*, the Third Circuit first looked to the plain meaning of section 118, stating that section 118's endorsement of arbitration "simply cannot be 'interpreted' to mean that the FAA is impliedly repealed with respect to agreements to arbitrate Title VII and ADEA claims that will arise in the future." See *Seus*, 146 F.3d at 182. We agree.

We hold that neither the language of the statute nor the legislative history demonstrates an intent in the 1991 CRA to preclude pre-dispute arbitration agreements.<sup>37</sup>

The Third Circuit Court of Appeals in *Seus v. Nuveen & Co., Inc.*, stated:

Although the holding in *Gilmer* involved only ADEA claims and not Title VII claims, numerous courts have determined that the holding is equally applicable to Title VII proceedings. Moreover, as we noted, the Supreme Court in *Gilmer* expressly disavowed its earlier expressed view that an arbitral forum was inferior to a judicial one for deciding Title VII claims.

Because Title VII and the ADEA "are similar in their aims and substantive provisions," we find Title VII entirely compatible with applying the FAA to agreements to arbitrate under Title VII claims.<sup>38</sup> (citations omitted).

Although the case law on enforceability of pre-dispute jury waiver agreements under Title VII is scant, the United States District Court for the Southern District of New York ("District Court for the SDNY") has held, on two separate occasions that the right to a jury trial under Title VII can be waived by prior agreement. The District Court for the SDNY enforced a pre-dispute jury waiver agreement in *Brown v. Cushman & Wakefield, Inc.*<sup>39</sup> In *Brown*, Plaintiff Brown alleged that Cushman & Wakefield breached her written employment agreement and discriminated against her on the basis of "sex, pregnancy and childbirth" by terminating her employment while she was on maternity leave in

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37. *Rosenberg*, 170 F.3d at 27-28.

38. *Seus*, 146 F.3d at 182.

39. 235 F. Supp. 2d 291, 292 (S.D.N.Y. 2002).

violation of Title VII, the New York State Human Rights Law and the New York City Human Rights Law.<sup>40</sup> Brown argued that her employment agreement which stated in part “C&W and Employee shall and hereby do waive a trial by jury in any action, proceeding or counter-claim brought or asserted by either of the parties...” only waived the jury trial for her contract claims, but did not waive a jury trial for her discrimination claims.<sup>41</sup> The Court in *Brown* rejected that argument and held that Brown’s employment agreement constituted a “contractual jury waiver of a jury trial [that] applies to all of [Brown’s] claims, including those arising under federal and state discrimination statutes.”<sup>42</sup> In reaching this conclusion the Court adopted the knowing, voluntary and intentional standard to determine if the pre-dispute jury waiver was valid.<sup>43</sup> The Court determined that: (1) the jury waiver was a conspicuous part of Brown’s employment agreement; (2) that Brown, equipped with a Harvard M.B.A., had worked as an investment banker before becoming a commercial real estate broker; and (3) that she could have negotiated the terms of the clause.<sup>44</sup> Thus, the Court concluded that the waiver was knowing and voluntary and therefore enforceable.<sup>45</sup>

As the First Circuit stated in *Rosenburg* and Third Circuit stated in *Sues*, if Congress was concerned about plaintiffs waiving their procedural and/or substantive rights or claims under Title VII, as amended, they would have explicitly prohibited such waivers or at a minimum they could have adopted and implemented strict waiver requirements similar to those present in the ADEA as amended by the Older Workers Benefit Protection Act (“OWBPA”). By virtue of Congress not explicitly including such strict waiver requirements or excluding such agreements in the 1991 CRA, it becomes clear that the standard for waiving any claim or

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40. *Brown*, 235 F. Supp. 2d at 292.

41. *Id.* at 293.

42. *Id.*

43. *Id.*

44. *Id.* at 294.

45. See *Schappert*, 2004 U.S. Dist. LEXIS 14153 (S.D.N.Y. July 22, 2004) (where the District Court for the SDNY enforced a pre-dispute contractual jury waiver in which violations of Title VII, the ADEA, and the applicable state and local laws governing employment discrimination were alleged).

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right under Title VII is much less stringent than required by the OWBPA.

The rationale for enforcing mandatory arbitration of ADA and Title VII claims should apply with equal force to cases seeking to enforce pre-dispute waivers of the right to a jury trial under those same statutes.<sup>46</sup> An employee's agreement to have claims resolved by an arbitrator necessarily sacrifices both the right to a jury and the judicial forum itself. The jury trial waiver at least allows the case to proceed in federal court.

### *ADEA and the OWBPA*

The Age Discrimination in Employment Act ("ADEA") was enacted in 1967 by Congress to promote employment of older persons based on their ability rather than their age and to prohibit arbitrary age discrimination in employment.<sup>47</sup> The ADEA, unlike Title VII, conferred the right to a jury trial from its inception.<sup>48</sup> In 1990, the ADEA was amended by the OWBPA which established procedures that must be followed when any right or claim conferred by the ADEA is waived.<sup>49</sup> In order to successfully waive a claim or right under the ADEA, the OWBPA amendment requires the waiver to be knowing and voluntary.<sup>50</sup> The waiver is not

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46. For a similar analysis of the enforceability of arbitration agreements under the ADA, see *Rosenberg*, 170 F.3d at 17.

47. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 621(b).

48. *Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575, 578 (2002) (citing 29 U.S.C. § 626(c)(2); *Lorillard v. Pons*, 434 U.S. 575, 582-83 (1978); *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1293 (4th Cir. 1979)).

49. 29 U.S.C. § 626(f)(1).

50. *Id.*

knowing and voluntary unless, at a minimum, certain enumerated requirements are met.<sup>51</sup>

*Supreme Court Discussion of Waivers Under the OWBPA and  
The Gilmer Dicta*

While the Supreme Court has addressed the broader issue of waiving substantive rights under the ADEA,<sup>52</sup> it has never addressed the question of a standard for waiving procedural rights under the OWBPA. The closest the Supreme Court has come to addressing this issue was in *Gilmer* where the Court had to determine whether a claim under the ADEA could be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application.<sup>53</sup> The OWBPA was not implicated in that case because Plaintiff Gilmer's employment agreement was executed prior to the OWBPA's enactment.<sup>54</sup> In dicta, however, the Supreme Court discussed the waiver of procedural rights under the OWBPA, stating that:

Congress...did not explicitly preclude arbitration or other  
non-judicial resolution of claims, even in its recent

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51. 29 U.S.C. 626(f):

Waiver -- (1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate; (B) the waiver specifically refers to rights or claims arising under this Act; (C) the individual does not waive rights or claims that may arise after the date the waiver is executed; (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled; (E) the individual is advised in writing to consult with an attorney prior to executing the agreement; (F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement; (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired; (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate....

52. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

53. *Gilmer*, 500 U.S. at 23.

54. The OWBPA applies to waivers executed on or before October 16, 1990. See Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 202(a), 104 Stat. 978, 984 (1990).

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amendments to the ADEA. “If Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention [would] be deducible from text or legislative history.”<sup>55</sup>

The Court in *Gilmer* was certainly referring to the OWBPA when it referred to “recent amendments to the ADEA.”<sup>56</sup> It seems as though the Supreme Court was indicating that after conducting a review of the ADEA’s and the OWBPA’s text and legislative history, there was no evidence that supported a conclusion that Congress intended to protect both substantive and procedural rights equally under the OWBPA.

Several Courts of Appeals have also reached the same conclusion when enforcing arbitration agreements, forum selection clauses or jury trial waivers in disputes arising under the ADEA and the OWBPA. In these cases, the courts have not required the waiver of procedural rights to comply with the OWBPA’s stringent waiver requirements.<sup>57</sup>

The Third Circuit Court of Appeals, for example, in *Sues v. John Nuveen & Co., Inc.*, rejected Plaintiff Sues and the EEOC’s argument that the language “any right or claim” in the OWBPA encompasses the right to a jury trial and therefore the OWBPA prohibits the enforcement of any agreement that requires an individual, in advance of litigation, to forego his/her statutory right to a jury trial.<sup>58</sup> The Third Circuit held that the OWBPA’s waiver requirements did not apply to Sues’ arbitration agreement because it was executed prior to the enactment of the OWBPA. The Third Circuit did, however, address this issue in dicta by stating:

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55. *Gilmer*, 500 U.S. at 29 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628).

56. The Supreme Court in *Gilmer* could only have been referring to the OWBPA because this is the only amendment to the ADEA that would have addressed this issue. In addition, the October 1990 OWBPA amendment was the sole amendment to § 626 of ADEA. Section 626 contains the waiver requirements established by the OWBPA. In 1991, the ADEA’s most recent amendments included: (1) November 5, 1990 amendment to § 623; and (2) the enactment of the OWBPA of 1990 in October 16, 1990 amending §§ 623, 626 and 630. The most recent amendments to the ADEA prior to the 1990 amendments occurred in December of 1989 and October of 1986.

57. See *Sues v. John Nuveen & Co.*, 146 F.3d 175 (3rd Cir. 1998); *Williams v. CIGNA Fin. Advisors*, 56 F.3d 656 (5th Cir. 1995); *Rosenburg v. Merrill Lynch*, 170 F.3d 1 (1st Cir. 1999).

58. *Sues*, 146 F.3d at 182 (1998).

[A]ssuming arguendo that the OWBPA did apply to Seus's case, its legislative history and the background against which it was enacted provide persuasive evidence that the protection it affords is limited to the waiver of substantive rights under the ADEA. As the Fifth Circuit explained in *Williams v. Cigna Financial Advisors, Inc.*, "in enacting the OWBPA, Congress' primary concern was with releases and voluntary separation agreements in which employees were forced to waive their rights...a right or claim, not against the waiver of a judicial forum.

We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from the text or legislative history."<sup>59</sup>

The Third Circuit went on to say:

When referring to Congress's "recent amendments to the ADEA," the Supreme Court clearly meant the OWBPA. While dicta, the Court's comments provide persuasive evidence contradicting the EEOC's assertion that "by its plain terms the OWBPA prohibits the enforcement of any agreement that requires an individual, in advance of an actual dispute, to forgo her statutory right of action in a district court." Clearly, the Supreme Court did not interpret the OWBPA's reference to "any right or claim" as encompassing procedural rights such as the right to a judicial forum. We thus conclude that the ADEA, as amended by the OWBPA, still reflects Congressional intent to except from the FAA pre-dispute agreements to arbitrate the ADEA claims.<sup>60</sup>

*Two Approaches to Pre-Dispute Jury Waiver Agreements Under the ADEA*

The enforceability of pre-dispute jury waiver agreements under the ADEA and OWBPA have been considered by the District Court for the SDNY and the United States District Court for the

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59. *Sues*, 146 F.3d at 182.

60. *Id.* at 182.

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Eastern District of Virginia. The outcome of these cases has not been consistent.

### *Approach 1: District Court for the Eastern District of Virginia*

The District Court for the Eastern District of Virginia in *Hammaker v. Brown & Brown, Inc.*<sup>61</sup> refused to enforce a pre-dispute jury trial waiver under the ADEA and the OWBPA. In *Hammaker*, Plaintiff Wilbur Hammaker alleged that his employment was terminated in violation of the ADEA and in his complaint he demanded a jury trial. Defendant Brown moved to strike Hammaker's jury trial demand claiming that Hammaker waived his right to a jury trial by signing an employment agreement. Hammaker's primary argument was that the waiver was not valid because it did not conform to the waiver requirements of the ADEA as amended by the OWBPA. Defendant Brown argued that the OWBPA waiver requirements are inapplicable to procedural rights such as the right to a jury trial or the right to judicial forum.

Brown's argument relied upon several cases in which other United States Courts of Appeals held that the OWBPA was inapplicable to waivers of judicial forum on the premise that Congress intended the waiver requirements to apply only to substantive rights.<sup>62</sup> The Court in *Hammaker*, however, rejected Brown's argument and refused to follow these cases by distinguishing them in two respects: (1) they address the enforceability of arbitration agreements wherein employees waived their rights to a judicial forum altogether; and (2) the cases rely heavily upon the Supreme Court decision in *Gilmer v. Interstate/Johnson Lane* which did not directly consider the effect of the OWBPA on procedural rights. The *Hammaker* Court then engaged in a statutory construction analysis and concluded that:

...[T]he language of the statute is plain and unambiguous. The waiver requirements apply to "any right or claim under this chapter ...." § 626(f)(1). The term "any" is defined as "one or more." Thus, the term "any" is subject to a broad interpretation, and should be read to apply to all

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61. 214 F. Supp. 2d 575 (2002).

62. *Hammaker*, 214 F. Supp. 2d at 579.

rights conferred by the ADEA, including the right to a jury trial.<sup>63</sup> (citations omitted).

The Court further concluded:

If Congress wanted the protections of the OWBPA to apply only to substantive rights, Congress could have adopted language that clearly conveyed such intent. It is not within the province of this Court to render the phrase "any right or claim under this chapter" superfluous. *Virginia v. Browner*, 80 F.3d 869, 876 (4th Cir. 1996). Thus, the plain meaning of the statute requires that waivers of any statutory right, including the right to a jury trial, must conform to the OWBPA to be enforceable. *Theile v. Merrill Lynch, Pierce, Fenner & Smith*, 59 F. Supp.2d 1060, 1064 (S.D. Ca. 1999). Because the waiver in this case does not conform to the OWBPA, it is not knowing and voluntary as defined by § 626(f)(1) and is thus unenforceable.<sup>64</sup>

As a result of this analysis, the Court concluded that pre-dispute jury waivers must conform to the OWBPA's waiver requirement to be valid.

*Approach 2: District Court for the Southern District of New York*

In *Schappert*, the District Court for the SDNY, reached the opposite result by holding that the OWBPA's waiver requirements do not apply to procedural rights such as the right to a jury trial.<sup>65</sup> In *Schappert*, Plaintiff Schappert claimed that her employment

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63. *Id.* at 580.

64. *Id.* at 581.

65. *Schappert*, 2004 U.S. Dist. LEXIS 14153 (citing, e.g., *Rosenberg v. Merrill Lynch*, 170 F.3d 1, 13 (1st Cir. 1999) ("courts which have considered the issue have interpreted OWBPA's reference to 'any right' to apply [only] to substantive rights"); *Seus*, 146 F.3d at 181 (3d Cir. 1998); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995); *Meyer v. Starwood Hotels & Resorts Worldwide, Inc.*, 00 Civ. 8339, 2001 U.S. Dist. LEXIS 6663, 2001 WL 396447, at \*1 n.1 (S.D.N.Y. April 18, 2001); *Hart v. Canadian Imperial Bank of Commerce*, 43 F. Supp. 2d 395, 400 (S.D.N.Y. 1999); [\*32] *Rice v. Brown Bros. Harriman & Co.*, 96 Civ. 6326, 1997 U.S. Dist. LEXIS 3628, 1997 WL 129396, at \*4 (S.D.N.Y. Mar. 21, 1997) ("Congress intended the OWBPA requirements to apply to the waiver only of substantive ADEA claims, and not procedural rights such as the right to a judicial forum"); see also *Wisdom v. Intrepid Sea-Air Museum*, No. 91 Civ. 4439, 1992 U.S. Dist. LEXIS 9424, 1992 WL 168224, at \*6 (S.D.N.Y. June 26, 1992) ("The right to trial by jury is a procedural right.").

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was terminated on the basis of her age and gender and that she was replaced by a younger, less qualified male candidate in violation of Title VII, the ADEA, the New York State Human Rights Law and the New York City Human Rights Law. Defendant Brown moved to strike Schappert's jury demand because the parties had an express written contract to waive any right to a jury trial. Schappert argued that the jury trial waiver was unenforceable because it violated the ADEA, as amended by the OWBPA, and that she did not knowingly and voluntarily waive her right to a jury trial. Schappert relied solely on *Hammaker* to assert that the jury trial waiver was unenforceable. The Court rejected Schappert's argument and stated that the right to a jury trial is a procedural right and "[the] OWPBA's requirements do not apply to procedural rights such as the right to a jury trial."<sup>66</sup> In reaching this conclusion, unlike the Court in *Hammaker*, the Court in *Schappert* followed the *Gilmer* line of cases.

These are the only two cases that have decided the issue of whether the OWBPA's waiver requirements apply to procedural rights. Many courts when deciding whether the OWBPA waiver requirements apply to pre-dispute arbitration or jury trial waiver agreements wrestle with the question of whether the OWBPA requirements apply to both procedural and substantive rights protected by the ADEA. The majority of courts have enforced pre-dispute arbitration and jury trial waiver agreements under the OWBPA by following the precedent established by the Supreme Court in *Gilmer*.

### *Analyzing These Two Approaches to Ensure Enforceability Under the ADEA and OWBPA*

At some point the Courts of Appeals or ultimately the Supreme Court will have to resolve the differing approaches to the enforceability of pre-dispute arbitration and jury waiver agreements under the ADEA and OWBPA. The District Court for the Eastern District of Virginia has held that pre-dispute jury waiver agreements must conform to the waiver requirements of the OWBPA to be enforceable. The District Court for the SDNY and the First and Fifth Circuits,<sup>67</sup> however, have all held that the waiver require-

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66. *Schappert*, 2004 U.S. Dist. LEXIS 14153.

67. See *Williams*, 56 F.3d 656 (5th Cir. 1995); and *Rosenburg v. Merrill Lynch*, 170 F.3d 1 (1st Cir. 1999).

ments of the OWBPA do not apply to procedural rights such as the right to a jury trial.<sup>68</sup>

Judging from the dicta in *Gilmer* discussed above, it seems likely that the Supreme Court will uphold the view that the OWBPA applies only to substantive rights and not procedural rights.

In the unlikely event that the Supreme Court does agree with the Court in *Hammaker*, pre-dispute arbitration and jury waiver agreements will be required to conform to the OWBPA's waiver requirements to be valid. Thus, the agreement would have to: (1) specifically refer to the right or claim being waived; (2) advise the individual in writing to consult with an attorney; (3) provide the individual 21 days to consider the agreement; (4) provide a period of at least 7 days following the execution of the agreement to allow the executing party to revoke the agreement; and (5) must be supported by adequate consideration. Presumably, even the Court in *Hammaker* would have enforced a pre-dispute jury waiver agreement that met these waiver requirements.

If the pre-dispute jury waiver agreement does conform to the waiver requirements of the OWBPA, the issue remains whether the statute permits an individual to waive rights or claims that may arise after the date the waiver is executed.<sup>69</sup> The general rule is that employees cannot waive future substantive rights under the OWBPA.<sup>70</sup> The only logical result of the Court's reasoning in *Hammaker* is that the same rule does not apply to the right to a jury trial because it is procedural in nature. The opposite conclusion would undermine the rationale for the *Hammaker* decision in the first instance.

### III PRE-DISPUTE JURY WAIVER AGREEMENTS UNDER PENNSYLVANIA CONSTITUTIONAL LAW AND THE PENNSYLVANIA HUMAN RELATIONS ACT

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68. The Third Circuit in *Sues* stated in dicta that, "...assuming *arguendo* that the OWBPA did apply to *Seus's* case, its legislative history and the background upon which it was enacted provide persuasive evidence that the protection it affords is limited to the waiver of substantive rights under the ADEA." *Sues*, 146 F.3d at 181.

69. 29 U.S.C. § 626(f)(1)(C).

70. *Oubre*, 522 U.S. at 428.

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### *Pennsylvania Constitutional Issues*

In *Aetna Insurance Company*, the U.S. Supreme Court held that the Seventh Amendment right to a jury trial is fundamental.<sup>71</sup> The Seventh Amendment right to a jury trial, however, is not selectively incorporated through the Fourteenth Amendment and therefore does not apply in state court.<sup>72</sup> Many state constitutions and statutes, nevertheless, provide a right to a jury trial, and courts in those states have reached different conclusions on the question of whether the right can be waived.<sup>73</sup>

The majority of these states have adopted the federal standard when reviewing pre-dispute contractual jury waivers. These states require pre-dispute contractual jury waivers to be strictly construed<sup>74</sup> and require that they be entered into knowingly, voluntarily and intentionally.<sup>75</sup>

In Pennsylvania, limited case law indicates that the Pennsylvania courts are willing to enforce pre-dispute contractual jury waivers. While there are a number of Pennsylvania decisions ruling on jury waivers generally, *Academy Industries Inc. v. PNC Bank N.A.*<sup>76</sup> was the first to address the enforceability of pre-dispute jury waiver agreements.<sup>77</sup> In *Academy Industries*, the parties entered into and executed several loan and forbearance agreements all of which included language waiving the right to a jury trial in actions relating to the relevant documents. The Court of Common Pleas in Philadelphia held that the state law right to trial by jury may be waived by express agreement and that Academy Indus-

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71. *Aetna Insurance Co.*, 301 U.S. at 393.

72. *McKinney v. Pate*, 985 F.2d 1502, 1510 (11th Cir. 1993).

73. For a state by state analysis on waiving the right to a jury trial, see Jay M. Zitter, *Contractual Jury Waivers in State Civil Cases*, 42 A.L.R. 5th 53 (2004).

74. Jay M. Zitter, 42 A.L.R. 5th 53 (2004).

75. *Id.*

76. 54 Pa. D. & C.4th 424 (2001).

77. The decision in *Academy Industries* is the first case in Pennsylvania to rule directly on the issue of pre-dispute jury waiver agreements. There have also been decisions in the United States District Court for the Eastern District of Pennsylvania, see *Aamco Trans. Inc., v. Harris*, No. 89-5533, 1990 U.S. Dist. LEXIS 7387 (1990); *Aamco Trans. Inc., v. Graham*, Nos. 89-49676, 89-6379, 1990 U.S. Dist. LEXIS 5037 (1990); *National Acceptance Co. v. MYCA Products, Inc.*, 381 F. Supp. 269 (W.D. Pa. 1974).

tries waived its right in that case.<sup>78</sup> In reaching the decision that the waiver was valid, the Court adopted the four-prong test applied by federal courts when determining whether a jury waiver is knowing and voluntary.<sup>79</sup> There was no appellate review of the holding by the Court of Common Pleas nor have there been any additional decisions on point. While it remains to be seen whether Pennsylvania appellate courts will adopt the decision in *Academy Industries*, the Court of Common Pleas at the very least set forth the likely framework for resolution of this issue.<sup>80</sup>

### *The Pennsylvania Human Relations Act*

In the employment context, however, jury trial waivers are not necessary to avoid jury trials for claims arising under the Pennsylvania Human Relations Act ("PHRA"). The Pennsylvania Supreme Court in *Wertz v. Chapman Township*<sup>81</sup> considered the availability of a jury trial in employment discrimination cases under both the Pennsylvania Constitution and the Pennsylvania Human Relations Act ("PHRA"). In reaching its decision on the right to a jury trial under the PHRA, the Court reviewed the applicable section of the PHRA<sup>82</sup> and determined that the statute was silent as to the right to trial by jury and that for two reasons the General Assembly did not intend to provide for a trial by jury under the PHRA.<sup>83</sup> The Court concluded that the use of the term "court" by the General Assembly in the applicable section of the PHRA provides "strong evidence that under the PHRA, it is a tribunal, rather than a jury, that is to make findings and provide

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78. *Academy Industries, Inc.*, 54 Pa. D. & C.4th at 428.

79. *Id.* at 428.

80. *See Id.* at 429. "...Pennsylvania courts have found interpretations of the Seventh Amendment persuasive when addressing the right to a jury trial under Article I, Section 6 of the Pennsylvania Constitution. (citing *Nealy v. State Farm Mutual Automobile Co.*, 695 A.2d 790 (Pa. Super. 1997) (relying on several federal court cases addressing the Seventh Amendment right to jury trial))."

81. 741 A.2d 1272 (Pa. 1999).

82. 43 P.S. § 692(c)(3) of the PHRA states:  
If the court finds the respondent has engaged in such discriminatory practices charged in the complaint, the court shall enjoin the respondent from engaging in such unlawful discriminatory practice and order affirmative action which may include, but is not limited to, reinstatement or hiring of employees, granting of back pay, or any other legal or equitable remedy as the court deems appropriate....

83. *Wertz*, 741 A.2d at 1274.

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relief.”<sup>84</sup> In addition, the Court noted that “[t]he General Assembly is well aware of its ability to grant a jury trial in its legislative pronouncements, as it has done in other contexts...,” reasoning that the General Assembly’s express granting of a jury trial in some enactments means that it did not intend to permit for a jury trial under the PHRA.<sup>85</sup>

In *Wertz*, the PA Supreme Court next had to determine whether a jury trial in a PHRA case was constitutionally mandated by Article I, Section 6 of the Pennsylvania Constitution. Article I, Section 6 states, “Trial by jury shall be as heretofore and the right thereof shall remain inviolate.”<sup>86</sup> In reaching its conclusion, the PA Supreme Court stated:

From this [Court’s] case law emerges the legal tenet that jury trials are constitutionally required only in those cases where a jury trial for the claim would have been available when the Pennsylvania Constitution was adopted.”<sup>87</sup>

The PA Supreme Court concluded that the Pennsylvania Constitution does not require a jury trial in cases that arise under the PHRA because the legislature did not provide for a trial by jury and jury trials were not required for discrimination cases before the Constitution was adopted in 1790.<sup>88</sup> Therefore, plaintiffs raising PHRA claims in Pennsylvania state court are not entitled to a jury trial.

This ruling of course does not preclude a plaintiff from demanding and obtaining a jury trial in federal court for causes of action arising under the PHRA where a federal court has pendent jurisdiction over the matter.<sup>89</sup> Once a federal court has jurisdiction

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84. *Id.*

85. *Id.*

86. PA CONST. art. I, § 6.

87. *Wertz*, 741 A.2d at 1274.

88. *Id.* at 638-639.

89. See, e.g., *Grabosky v. Tammac Corporation*, 127 F. Supp. 2d 610 (2000); *Graham v. Toltzis Communications, Inc.*, No. 98-6269, 2000 U.S. Dist. LEXIS 5191 (2000); *Cortes v. R.I. Enterprises, Inc.*, 95 F. Supp. 2d 255 (2000).

over the matter, federal law governs in determining the right to a jury trial.<sup>90</sup>

#### IV. FACTORS TO BE CONSIDERED BY EMPLOYERS WHEN IMPLEMENTING PRE-DISPUTE JURY WAIVER AGREEMENTS

There are a number of factors to consider when contemplating the decision to implement pre-dispute jury waiver agreements. As discussed at great length above, the case law addressing a party's ability to waive his/her rights under Title VII, the ADA and the ADEA is far from settled. The biggest question mark at this point is whether the ADEA's waiver provisions apply to "procedural rights," mainly the right to waive a jury trial or judicial forum in a pre-dispute agreement.

Nevertheless, parties seeking to implement pre-dispute jury waiver agreements should carefully consider and prepare to meet the knowing, voluntary and intentional standards established and followed by courts when the validity of a jury waiver is challenged. Established case law indicates that federal courts consider all of the following factors when determining the enforceability of contractual jury waivers: (1) whether there exists gross disparity in bargaining power between the parties; (2) the business or professional experience of the party opposing the waiver; (3) whether the opposing party had the opportunity to negotiate contract terms; and (4) whether the clause containing the waiver was conspicuous.<sup>91</sup>

All of these factors must be considered and great care should be taken to meet the established requirements. A record should be prepared and kept in order to prove that the provision was explained and reviewed with the waiving party. The jury waiver should be clear and in a conspicuous section of the agreement. Evidence of any terms that were changed or any negotiation sessions that took place should be maintained. If the individual lacks the required business knowledge or acumen, it would be beneficial to inform the waiving party to review the provision with an attorney of his/her choice.

In addition to the knowing, voluntary and intentional standard, the party seeking to implement and enforce a jury waiver agree-

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90. *Simler v. Conner*, 372 U.S. 221, 221 (1963).

91. See *Phoenix Four Grantor Trust #1 v. 642 North Broad Street Assoc.*, No. 00-597, 2000 U.S. Dist. LEXIS 16524 (EDPA 2000); *Aamco Trans., Inc. v. Harris*, No. 89-5533, 1990 U.S. Dist LEXIS 7387 (EDPA 1990); *RDO Financial Servs. Co. v. Powell*, 191 F. Supp. 2d 811 (N.D. Tex. 2002).

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ment may want to consider the standard set out by the Eastern District of Virginia in *Hammaker* which requires that these agreements conform to the OWBPA's waiver requirements. Conforming the pre-dispute jury waiver agreement to the OWBPA's waiver requirements is a conservative approach and would prevent a court from holding the waiver invalid under the *Hammaker* standard.

The above are recommendations that may be taken in order to ensure that your jury trial waiver agreement is found valid under the test established by federal courts. These recommendations are by no means intended to be all-inclusive. It is recommended that research is completed in your jurisdiction to determine the standards that are applied to jury trial waivers.

### V. CONCLUSION

This article concludes by predicting that the Supreme Court will uphold pre-dispute jury waiver agreements in cases arising under the ADEA, ADA and Title VII so long as they meet the knowing, voluntary and intentional standard. Although neither the Supreme Court nor Congress has explicitly addressed a party's ability to waive their right to a jury trial under the ADEA, ADA or Title VII, Supreme Court jurisprudence in *Gilmer* and the Circuit Court interpretation of *Gilmer* indicates that these waivers are enforceable and will be upheld by the Supreme Court upon review.