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I. INTRODUCTION

Contractual waivers of the right to a jury trial are increasingly inserted into agreements creating a conflict between the Seventh Amendment right to a jury trial and the freedom to contract. Disputes over these contract provisions between citizens of different states will undoubtedly lead to more federal courts sitting in diversity being faced with the decision of whether federal or state law is to be applied. Thus far, courts have consistently avoided making the choice of law determination under the required guidance of the *Erie* doctrine, and have instead applied inconsistent and irrelevant standards in drawing choice of law conclusions.

Part II of this Comment will introduce the Seventh Amendment right to a jury trial and various standards that have been applied at the state and federal level to the validity of contractual jury waivers. Part II also addresses the standards that apply to the validity of other forms of jury right waiver. Lastly, it will explore the method of determining whether federal or state law is to be applied in federal courts sitting in diversity. Part III of this Comment will outline the conflicting approaches taken by circuit courts addressing contractual waivers of the jury right. Part IV will explain the irrelevance of *Simler v. Conner* to determining the validity of contractual waivers of the jury right and will conduct an *Erie* analysis to conclude that there is no bright-line rule as to whether courts sitting in diversity are to apply federal or state law when determining the validity of contractual jury right waivers. Lastly, this Comment argues that if federal law is to be applied, the less rigorous standard, similar to that of arbitration agreements, should be applied to waivers of the jury right.

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II. BACKGROUND

The Constitution of the United States guarantees numerous protections to the citizens of the United States. With the increased use of waivers of the right to a jury trial, there are conflicts between the Seventh Amendment right to a jury trial and the freedom to contract. There are also several methods for waiving the right to a jury trial including: contractual waiver, waiver by agreement to arbitrate, and Rule 38(d) waiver by failure to request. Each of these types of waiver is subject to varying degrees of scrutiny, and ambiguity exists as to the standard to be applied under federal law as well as the varying scrutiny applied by individual states, when applying state law with regard to contractual waivers. These conflicts are apparent when a dispute over a contractual waiver of the right to a jury trial is moved into federal court sitting in diversity because the court must resolve the choice of law issue in order to establish the relevant standard to be applied to the waiver. In order to resolve the choice of law issue, the courts must tackle the *Erie* doctrine, established in *Erie R.R. v. Tompkins* and its progeny, which set forth the rules governing choice of law issues. This Part discusses the Seventh Amendment right to a jury trial and various ways that right can be waived. Next, it explores the varying state and federal contractual jury right waiver standards. Lastly, this Part gives a background of *Erie* and explains the *Erie* doctrine analysis courts have used and should apply in future cases when resolving conflicts of law while sitting in diversity in federal court.

A. Seventh Amendment

The Seventh Amendment to the United States Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[1] The Seventh Amendment has not been incorporated to the states through the Due Process Clause of the Fourteenth Amendment.[2] However, almost all states protect the right to a trial by jury through their state constitutions.[3] The Seventh Amendment extends the right to a jury trial

1. U.S. CONST. amend. VII.

2. *See* Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.").

3. Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis:*

in federal civil cases where, if tried in 1791, would have had a common law right to trial by jury.[4] The Supreme Court has interpreted the Seventh Amendment right to a jury to apply to mixed cases involving equity and law and has asserted that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[5] The Court has held that the right to a jury trial may be waived.[6] The Supreme Court has also held that the right to a trial by jury is a fundamental guarantee, and "every reasonable presumption should be indulged against its waiver."[7]

B. Methods for Waiver of the Jury Right

Waiver of the jury right can be exacted in several ways, each subject to varying degrees of scrutiny by the courts. Arbitration clauses allow for parties to agree in advance to forego dispute resolution in the court system and instead "present their case to a neutral third party decision-maker instead of a judge, jury, or administrative agency."[8] As a result, an agreement to arbitrate implicitly includes a waiver of the right to a jury trial. The standard applied to determine the validity of consent to arbitrate is the same as contract law consent standards[9] and was established by the Federal Arbitration Act.[10] The contract approach to agreements consenting to arbitrate applies "mutual manifestations of assent"[11] to validate consent, by which "[t]he requirement to form a contract is not that parties actually assent to its terms. . . . [but] that they take actions—such as signing their names on a document or saying

Constitutional Implications, 55 TEX. L. REV. 759, 797 (1977).

4. Rachael E. Schwartz, *"Everything Depends on How You Draw the Lines": An Alternative Interpretation of the Seventh Amendment*, 6 SETON HALL CONST. L.J. 599, 600 (citing 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 38.08 42 (Daniel R. Coquillette, et al., eds., 2d ed. 1995)).

5. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510–11 (1959); *see also* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472–73 (1962).

6. Bank of Columbia v. Okley, 17 U.S. 235, 244 (1819).

7. Hodges v. Easton, 106 U.S. 408, 412 (1882).

8. Brian D. Weber, *Contractual Waivers of a Right to Jury Trial – Another Option*, 53 CLEV. ST. L. REV. 717, 726 (2006).

9. Stephen J. Ware, *Mandatory Arbitration: Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROB. 167, 170 (2004).

10. *Id.* "[T]he Federal Arbitration Act provides that a 'written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* (quoting 9 U.S.C. § 2 (2000)).

11. *Id.* at 171.

certain words—that would lead a reasonable person to believe that they have assented to the terms of the contract."[12]

The jury right can also be waived inadvertently through a failure to properly and timely request a jury trial. Federal Rule of Civil Procedure 38(d) states that "[a] party waives a jury trial unless its demand is properly served and filed."[13] Waiver can be exacted by accidentally failing to file a proper request, so the standard applied to this type of contractual waiver is extremely low.

A final means to waive the jury right is through consent in a pre-executed contractual agreement. The standard applied to contractual waiver of the jury right has been inconsistent in the lower courts, specifically surrounding the issue of whether federal or state law applies. *Erie R.R. v. Tomkins* and its progeny established the methods for determining whether state or federal law is to be applied in federal courts, which has become known as the *Erie* doctrine and will be explored later in this Comment.

C. Federal Versus State Law Contractual Jury Waiver Standards

This subpart will explain the somewhat ambiguous federal standard that has been applied to contractual jury right waivers. It also addresses the varying state law standards applied when state courts have addressed contractual waivers of the jury right.

1. Federal Standard

The Supreme Court has never expressed a specific standard for civil cases evaluating the contractual waiver of the jury right,[14] but the Court has applied a "knowing, voluntary, intentional standard" in criminal cases involving waiver of constitutional rights.[15] The Sixth Circuit Court of Appeals has acknowledged that the Supreme Court in *Fuentes v. Shevin*[16] "in applying the knowing and voluntary standard to a waiver of due process rights in a conditional sales agreement, cautioned that it was 'not holding that [the] standards [governing waiver of constitutional

12. *Id.* (quoting Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 113 (1996) (citing E. ALLAN FARNSWORTH, CONTRACTS 8.5 (3d ed. 1999))).

13. FED. R. CIV. P. 38(d).

14. 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, 678 (2001).

15. *See id.* at n.40 (citing Brady v. U.S., 397 U.S. 742, 748 (1970)).

16. Fuentes v. Shevin, 407 U.S. 67 (1972).

rights in a criminal proceeding] must necessarily apply.'"[17] The *Fuentes* Court established that a waiver of a constitutional right "must, at the very least, be clear."[18] With limited exceptions, the lower courts have applied the heightened standard "variously expressed in words such as knowing, voluntary, and intentional" in determining the legitimacy of contractual waivers of the jury right.[19]

2. State Standard

Standards applied to determine the validity of contractual waivers of the jury right differ depending upon the state law being applied. The Seventh Circuit, in applying Illinois state law to jury right waivers held that the Uniform Commercial Code (UCC)[20] applied and no heightened requirement of separate signing or separate negotiation existed.[21] Other states have used ordinary contract standards to determine the enforceability of contractual waivers.[22] Still other states such as Georgia and California have held that contractual waivers of the jury right cannot be enforced.[23] Moreover, "[c]ontractual jury waivers are unenforceable in Montana by statute and in Oklahoma by constitutional provision."[24] Finally, many states have adopted the heightened federal standards requiring voluntary, knowing and intentional waiver and strict construction of the waivers.[25]

17. K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752, 756 (6th Cir. 1985) (quoting *Fuentes*, 407 U.S. at 94).

18. *Fuentes*, 407 U.S. at 95.

19. Sternlight, *supra* note 14.

20. The Uniform Commercial Code was created in response to a need for "greater uniformity among the states in commercial law" and is a collection of "revised versions of the most significant uniform acts adopted earlier in the twentieth century by the National Conference of Commissioners." CHARLES L. KNAPP ET AL., RULES OF CONTRACT LAW: SELECTIONS FROM THE UNIFORM COMMERCIAL CODE, THE CISG, THE RESTATEMENT (SECOND) OF CONTRACTS, AND THE UNIDROIT PRINCIPLES, WITH MATERIAL ON CONTRACT DRAFTING AND SAMPLE EXAMINATION QUESTIONS 1–2 (2007).

21. I.F.C. Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 992 (7th Cir. 2008).

22. Brian S. Thomley, Comment, *Nothing is Sacred: Why Georgia and California Cannot Bar Contractual Waivers in Federal Court*, 12 CHAP. L. REV. 127, 134 (2008) (citing L&R Realty v. Conn. Nat'l Bank, 715 A.2d 748, 753 (Conn. 1998)).

23. *Id.* (citing Bank S., N.A. v. Howard, 444 S.E.2d 799, 799 (Ga. 1994); Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 493 (Cal. 2005)).

24. *Id.* (citing MONT. CODE ANN. § 28-2-708 (2007); OKLA. CONST. art. XXIII, § 8).

25. Robert Frankhouser, *The Enforceability of Pre-Dispute Jury Waiver Agreements in Employment Discrimination Cases*, 8 DUQ. BUS. L.J. 55, 74 (2006) (citing Jay M. Zitter, Annotation, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R. 5th 53 (2004)).

D. The Erie *Doctrine*

The *Erie* doctrine, as established and developed in *Erie R.R. v. Tompkins* and its progeny, provides a roadmap for determining whether federal or state law is to be applied by federal courts sitting in diversity jurisdiction. This determination is significant with regard to contractual waivers of the right to a jury trial because contract disputes, which are typically resolved in state courts, can be removed to federal court on the basis of the diversity of citizenship of the parties to the litigation. The federal court sitting in diversity must determine which law to apply. This Comment will first explore the relevant statutes applicable to an *Erie* analysis and explain the evolution of the doctrine through Supreme Court decisions. This Comment will next establish the diverging paths of the analysis through exploration of Supreme Court decisions applying and developing the doctrine.

1. Relevant Statutes

Two relevant statutes relate to the application of the *Erie* doctrine. The Rules Enabling Act[26] provides that

> (a) [t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals; (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.[27]

Essentially, this gives the Supreme Court the authority to enact procedural rules for federal courts and establishes that any law that conflicts with federal procedural law is not applicable in federal court.

The Rules of Decision Act[28] (RDA) provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[29] The RDA establishes that in civil actions in federal court, state law is to be applied unless the federal Constitution, treaties, or statute governs the issue.

26. 28 U.S.C. § 2072 (2006).
27. *Id.*
28. 28 U.S.C. § 1652 (2006).
29. *Id.*

2. *Swift v. Tyson*

In *Swift v. Tyson*,[30] the Supreme Court interpreted the word "laws" in the RDA to include state statutes and local customs only, and not the state court decisions or state common law, established by state courts.[31] *Swift* was a diversity case brought in federal court in New York because it centered on the enforcement of a bill of exchange and turned on "whether a pre-existing debt constituted consideration for an endorsement of the bill, making the endorsee a 'holder in due course.'"[32] The outcome of the case depended upon whether federal common law or New York common law applied.[33] The Court narrowly construed the language of the RDA to apply only state statutes and local customs and did not require the federal courts to apply state common law.[34] *Swift* established that in diversity cases, federal courts were to apply state statutes and local customs, but could disregard state common law on issues including contract interpretation and commercial law and should instead look to "general principles and doctrines" in making decisions.[35] The doctrine established in *Swift* was highly controversial,[36] and led to judicial decisions that affirmed abusive behavior.[37] Despite the

30. Swift v. Tyson, 41 U.S. 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

31. *Id.* at 18–19.

32. RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 919 (4th ed. 2008).

33. *Id.* Federal common law would have found valid consideration while New York common law would have concluded that there was invalid consideration. *Id*.

34. *See Swift*, 41 U.S. at 18–19. The Supreme Court stated that "[i]n the ordinary use of language it will hardly be contended that the decisions of the Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws." *Id.*

35. *See id.* at 19.

36. *See* TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM 92 (1981) ("By the 1890s the *Swift* doctrine had become a center of controversy dividing the nation's bar, proponents of federal judicial reform in Congress, the judges of the lower federal courts, and the justices of the Supreme Court of the United States."); *see also* Guaranty Trust Co. v. York, 326 U.S. 99, 102 (1945) ("During the period when *Swift v. Tyson* (1842–1938) ruled the decisions of the federal courts, its theory of their freedom in matters of general law from the authority of state courts pervaded opinions of this Court involving even state statutes or local law." (quoting Vandenbark v. Owens-Illinois Co., 311 U.S. 538, 540 (1941))).

37. For example, *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.* involved a contractual agreement between Louisville and Nashville Railroad and Brown & Yellow Taxicab, for the exclusive rights to board trains and solicitation of passengers as well as use of land to await arrival of trains. Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 522–23 (1928). The railroad company was incorporated in Kentucky and initially Brown & Yellow was incorporated in Kentucky, but reincorporated in Tennessee in order to create diversity of citizenship that would allow the controversy to be reconciled in federal, rather than state court. *Id.* at 522–24. Brown and Yellow sued to enjoin Black and White, a competing Kentucky corporation, for interfering with the agreement by soliciting passengers in violation of the contractual agreement between Brown and the railroad. *Id.* Although state common law decisions invalidated similar contracts, the Supreme Court, in upholding the

controversy, the holding in *Swift* was controlling law for 96 years until the case was overruled by *Erie R.R. v. Tompkins*[38] in 1938.

3. *Erie R.R. v. Tompkins*

The Supreme Court's decision in *Erie* stood for several propositions: (1) state law should be applied in cases unless the issue is governed by the Federal Constitution or federal statutes;[39] (2) state law includes state statutes and state common law;[40] (3) "there is no federal general common law;"[41] and (4) the holding in *Swift* created an "unconstitutional assumption of powers by courts of the United States."[42] *Erie* involved a Pennsylvania citizen, Tompkins, who was injured after being struck by a door on a freight train belonging to the Erie Railroad Company, a New York corporation, which was passing by him as he walked alongside the right of way.[43] Tompkins brought an action against Erie Railroad alleging negligence.[44] Erie argued that Pennsylvania common law applied, which would have declared Tompkins to be a trespasser and would have reduced Erie's liability to cases involving wanton and willful negligence as opposed to ordinary negligence.[45] Tomkins argued that federal general common law should be applied, and Pennsylvania common law was irrelevant.[46]

The holding in *Erie* established that unless the issue deals with the

injunction, relied on *Swift* and stated that the federal courts were "free to exercise their own independent judgment" on questions of general law. *See id.* at 527–30.

38. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

39. *Id.* at 78.

40. *See id.*

41. *Id.*

42. *Id.* at 79 (quoting Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

43. *Id.* at 69.

44. *Id.*

45. *See id.*

46. *See id.* The Supreme Court cited several reasons for its decision to overturn *Swift*. First, the court established that the Supreme Court misinterpreted the RDA in *Swift* by excluding state common law in its interpretation of "laws." *See id.* at 71–74. Secondly, the Supreme Court stated that the benefits of a more uniform state common law and increased certainty expected to result from *Swift* never came to fruition. *See id.* at 74. Thirdly, the Supreme Court stated that the purpose of diversity of citizenship, to prevent non-citizens from discrimination in state courts, was being thwarted by the application of the doctrine of *Swift*, which was creating an avenue for non-citizens to discriminate against citizens through the use of forum shopping and abuse of the lack of uniformity in the law. *See id.* at 74–75. The court noted that citizens willing to relocate to another state could reap the benefits of diversity jurisdiction and the federal general common law. Finally, the Supreme Court asserted that the holding in *Swift* was unconstitutional. *Id.* at 77–78 ("Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,'" and "no clause in the Constitution purports to confer such a power upon the federal courts.").

Federal Constitution or Acts of Congress, state substantive law, including state common law, should be applied.[47] *Erie* established that state substantive law was to be applied by the federal courts in diversity cases, but federal procedure was to be applied.[48] Federal courts often struggled with the divide between procedural law and substantive law. Procedure has been defined as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[49]

4. *Hanna v. Plumer*

Subsequent cases established the diverging paths of analysis under *Erie*. *Hanna v. Plumer* and its progeny govern the judicial determination of what law is to be applied when the case is governed by the Federal Rules of Civil Procedure. The second path of *Erie* analysis involves cases where no federal rule or statute directly controls the issue, which requires the courts to apply the RDA with regard to the "twin aims of *Erie*."

a. Hanna *and the REA*

Prior to the Supreme Court's decision in *Hanna*, the Court decided *Guaranty Trust Co. v. York*,[50] which established an "outcome determinative" test that ignored the distinction between substance and procedure and held that in diversity cases in federal court, the federal court should defer to the state rule if ignoring it could result in the determination of the case being decided differently in federal rather than state court.[51] The elimination of the line between substance and procedure following *York* led to several decisions which held that state procedures should apply in diversity in the face of conflicting federal rules seemingly on point.[52]

In *Hanna v. Plumer*, the Supreme Court held that in diversity actions

47. *See id.*

48. Hanna v. Plumer, 380 U.S. 460, 465 (1965).

49. *Id.* at 464 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

50. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

51. *See id.* at 108–09.

52. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (In a stockholder's derivative action, the Supreme Court applied a New Jersey statute requiring plaintiff to give security instead of Federal Rule of Civil Procedure 23 with no security requirements); Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530 (1949) (In determining proper tolling of the statute of limitations, the Supreme Court applied a Kansas statute that required service of summons to begin tolling and not Federal Rule of Civil Procedure 3, which requires filing of a complaint.).

where a federal rule directly conflicts with state procedural law, the Rules Enabling Act (REA), and not the RDA as construed by *Erie*, is to govern the decision and that federal courts should apply the federal rule as long as the rule is not in violation of the REA.[53] *Hanna* involved a suit filed in federal court in Massachusetts based on diversity between Hanna, an Ohio resident, and the defendant, a Massachusetts resident.[54] The suit claimed damages stemming from injuries suffered by Hanna in an automobile accident where the defendant was allegedly negligent.[55] The dispute centered on whether the statute of limitations had expired based on inadequate service of process.[56] Under Federal Rule of Civil Procedure 4(d)(1) at the time *Hanna* was decided, service was sufficient if left at the dwelling with a person,[57] whereas under Massachusetts state law, proper service required delivery in hand.[58] The Court concluded that Rule 4(d)(1) "neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds" and the rule should have been used to determine the sufficiency of the service of process.[59] The holding in *Hanna* established that when the conflicting laws involve federal and state procedure, the federal rule should govern unless the federal rule violates the REA.[60] Subsequent cases clarified that if the federal rule is "'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court," the federal rule must be applied.[61]

53. *See Hanna*, 380 U.S. at 470–71.

54. *Id.* at 461.

55. *Id.*

56. *Id.* at 461–62.

57. *Id.* "The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . ." *Id.*

58. *Id.* at 462 (citing MASS. GEN. LAWS ch. 197, § 9 (1958) ("served by delivery in hand")).

59. *Id.* at 464.

60. *See id.* at 471.

61. Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987) (citing Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980); *Hanna*, 380 U.S. at 471–72). The Supreme Court held that Federal Rule of Appellate Procedure 38, which grants discretionary authority to courts to award damages after concluding appeals were frivolous, governed a diversity action over a state law mandatory penalty on unsuccessful appeals. *See id.* at 8. The Supreme Court concluded that the federal rule and the state provision sufficiently conflicted through the federal rule's discretionary impact and the state provision's mandatory effect. Therefore, the federal rule would preclude the application of the state provision in diversity actions. *Id.* at 7.

b. RDA and the Twin Aims of Erie

In cases not involving a conflict where a federal rule is directly on point, conflict of law decisions are resolved under the RDA and the twin aims of *Erie*. Few cases have explored the application of the RDA and the twin aims of *Erie*, and the scope of the application has been limited.

In dicta, the Supreme Court in *Hanna* expressed that in conflicts not arising from a federal rule, when determining whether state or federal law should apply, *York*'s "outcome determinative" test is used with reference to the twin aims of *Erie*, which are "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[62] Forum shopping with regard to choice of law issues involves choosing to issue a complaint and litigate in state or federal court on the basis of the advantages a party would receive through application of the law of the forum. Inequitable administration of the laws requires "allowing an unfair discrimination between noncitizens and citizens of the forum state."[63] Inequitable administration of the law has also been explained as being violated when one party to litigation has "access to a favorable rule unilaterally."[64] Inequitable administration has also been described as "subjecting a person involved in litigation with a citizen of a different state to a body of law different from that which applies when his next door neighbor is involved in similar litigation with a co-citizen."[65]

The Supreme Court asserted that "every procedural variation is 'outcome determinative.'"[66] The Court stated that "nonsubstantial, or trivial, variations [in the law were] not likely to raise the sort of equal protection problems which troubled the Court in *Erie*; they are also unlikely to influence the choice of a forum."[67] The Court concluded that although the application of the federal rule would be "outcome determinative," the difference between the rules would not lead to forum shopping or inequitable administration of the laws.[68] Under *Hanna*

62. *Hanna*, 380 U.S. at 468.

63. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 40 (1988) (Scalia, J., dissenting) (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938)).

64. Robert A. de By, Note, *Forum Selection Clauses: Substantive or Procedural for* Erie *Purposes*, 89 COLUM. L. REV. 1068, 1080 (1989).

65. Geri J. Yonover, *A Kinder, Gentler Erie: Reigning in the Use of Certification*, 47 ARK. L. REV. 305, 348 (1994) (quoting John H. Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 712 (1974)).

66. *Hanna*, 380 U.S. at 468.

67. *Id.*

68. *See id.* at 468–69. The Court stated that in choosing the forum, the difference between federal and state law would not bar recovery, but would only change the manner of service of process. *Id.* In concluding that there would not be inequitable administration of the laws, the Court stated that the difference between in hand and third party service would not "alter[] the mode of enforcement of state-

dicta, if the conflict of laws does not involve a federal rule, the "outcome determinative" test of *York* is to be applied with reference to the twin aims of *Erie* to determine if state or federal law applies.[69]

In *Stewart Organization, Inc. v. Ricoh*,[70] Justice Scalia's dissenting opinion engaged in a full *Erie* analysis.[71] *Stewart* involved a dispute over a dealership agreement that contained a forum selection clause selecting state and federal courts in New York City or Manhattan as the forum for any disputes.[72] Using diversity jurisdiction, the suit was filed in federal court in Alabama, a state with law unfavorable to forum selection clauses.[73] The respondent moved to have the case transferred to the Southern District of New York under 28 U.S.C. § 1404(a),[74] a federal venue statute, or to have the case dismissed for improper venue.[75] The majority concluded that § 1404(a) governed the dispute,[76] but Justice Marshall, writing for the majority, conceded that § 1404(a) and the related state law were not "perfectly coextensive."[77] In his dissent, Justice Scalia concluded that § 1404(a) was not "sufficiently broad to cause a direct collision with state law or implicitly to control the issue before the Court."[78] Justice Scalia noted that § 1404(a) "is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law."[79] After reaching this conclusion, Justice Scalia concluded that because there was no relevant federal rule or statute guiding the legality of the clause, an analysis of the twin aims of *Erie* was necessary to determine whether state or federal judge-made law would control the issue.[80]

Justice Scalia concluded that applying federal law would encourage forum shopping because plaintiffs would sue in state court to avoid enforcement of forum selection clauses, where nonresidents would seek

created rights in a fashion sufficiently 'substantial' to raise the sort of equal protection problems to which the *Erie* opinion alluded" *Id.*

69. *See id.* at 467–68.

70. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988).

71. *See id.* at 34–41.

72. *Id.* at 24 n.1.

73. *Id.*

74. 28 U.S.C. § 1404(a) (2006). "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.*

75. *Stewart*, 487 U.S. at 24.

76. *Id.* at 28.

77. *Id.* at 30.

78. *Id.* at 34 (Scalia, J., dissenting).

79. *Id.* at 37.

80. *See id.* at 38–39.

out favorable law in federal court.[81] Justice Scalia next addressed the issue of inequitable administration of the laws, and concluded that the outcome was chiefly determined by the importance of the question at issue, and "[i]t is difficult to imagine an issue of more importance, other than one that goes to the very merits of the lawsuit, than the validity of a contractual forum-selection provision."[82] Lastly, Justice Scalia noted that courts cannot and should not "ignore that issues of contract validity are traditionally matters governed by state law."[83]

When there is a choice of law issue, federal courts sitting in diversity are to apply *Erie* and its progeny. Under the first path of *Erie*, governed by *Hanna*, federal courts are to apply the REA and the federal rule when the rule directly governs the issue. Under the second path, when there is no federal rule or statute directly governing the issue, federal courts are to apply the RDA and conduct a twin aims of *Erie* analysis to determine whether application of federal law would lead to forum shopping or inequitable administration of the laws. If either of these would result, federal courts are to apply state law in resolving the dispute.

III. CIRCUIT COURT APPROACHES TO JURY RIGHT WAIVERS

Several federal courts sitting in diversity have addressed the issue of the validity of contractual waivers of the right to a jury trial. A majority of courts have applied the federal "knowing, intentional, voluntary" standard to determine the validity of the waivers. Recently, the Seventh Circuit Court of Appeals engaged in a limited *Erie* analysis to conclude that state law governed the validity of a contractual waiver of the right to a jury trial. This decision created a divide with the Second and Sixth Circuits. This Part will explain the conflicting cases and the reasoning behind each court's decision.

81. *See id.* at 40.

82. *Id.*

83. *Id.* at 41. The twin aims or *Erie* were also analyzed in *Chambers v. NASCO*, where the defendant argued that if "federal courts [could] use their inherent power to assess attorney's fees as a sanction in some cases, they are not free to do so when they sit in diversity, unless the applicable state law recognizes the 'bad-faith' exception to the general rule against fee shifting." Chambers v. NASCO, 501 U.S. 32, 51 (1991). The Supreme Court held that sanctions by the court did not implicate either of the twin aims of *Erie* because they would not lead to forum shopping because issuing sanctions under the bad-faith exception doesn't depend on the victorious party to the lawsuit, but rather on the actions of the parties during the litigation, which would fail to lead to forum shopping. *Id.* at 53. The Supreme Court next concluded that the decision would not lead to inequitable administration of the laws because the parties to the dispute had the ability to decide whether they would receive sanctions based on their behavior and both citizens and non-citizens were able to be sanctioned. *See id.*

A. I.F.C. Credit Corporation v. United Business & Industrial Federal Credit Union

In *I.F.C. Credit Corporation v. United Business & Industrial Federal Credit Union*, the the Seventh Circuit Court of Appeals applied Illinois state law in concluding that a waiver of a right to a trial by jury found in a lease provision was valid and enforceable.[84] *I.F.C.* involved a telecommunications equipment and services provider, Norvergence, which entered into contractual agreements with customers that contained forum-selection and mandatory bench trial provisions.[85] I.F.C. Credit Corporation was a commercial factor that purchased the right to payments under the contractual agreements between Norvergence and its customers.[86] I.F.C. filed the action to enforce the mandated bench trial clause contained in Norvergence's contracts with customers in order to recover payments due under those contracts.[87]

The Seventh Circuit first concluded that the enforcement of the contractual waiver was governed by Illinois state law.[88] In reaching this conclusion, the court relied on *Abbott Labs. v. Tokeda Pharm. Co.*,[89] which dealt with the validity of a forum selection clause and held that the clause's validity would be determined under the law of the jurisdiction that controlled the remainder of the contractual agreement.[90] I.F.C. argued that under *Simler v. Connor*,[91] the validity of the bench trial clause was to be determined under federal law.[92] In *Simler v. Connor*, the Supreme Court held that a right to a jury trial was to be determined under federal law, in all actions.[93] The Seventh Circuit found that although federal law controls the meaning of the Seventh Amendment, "[i]t does not follow that national law also controls the

84. *See* I.F.C. Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 991–92 (7th Cir. 2008).

85. *See id.* at 991.

86. *See id.* Norvergence's business was successful for some time, but the corporation's success was halted after its products were found to lack the benefits that had been advertised. *See id.* Subsequently, Norvergence discontinued providing services to customers, who in turn stopped payment under their contracts. *See id.*

87. *See id.* The district court held that the mandatory bench trial provision was invalid and the issue was submitted to a jury. *See id.* The jury returned a verdict on the suit for payments for the defendant, United Business & Industrial Federal Credit Union. *See id.*

88. *See id.* at 991–92.

89. Abbott Labs. v. Takeda Pharm. Co., 476 F.3d 421 (7th Cir. 2007).

90. *See id.* at 423.

91. Simler v. Connor, 372 U.S. 221 (1963).

92. *I.F.C.*, 512 F.3d at 991.

93. *Simler*, 372 U.S. at 222.

validity of a contractual agreement to a bench trial."[94] The court stated that under *Erie R.R. v. Tompkins*,[95] no general federal law of contracts exists.[96]

Next, the Seventh Circuit concluded that the UCC[97] governed the validity of the contractual waiver of a jury right because Illinois enacted the UCC.[98] The court concluded that under the UCC, form contract terms are enforceable unless there is a "battle of the forms" or the terms of the agreement are unconscionable, neither of which applied to the contractual waiver.[99] The court concluded that there were no relevant UCC provisions requiring any separate-signing or separate-negotiation for contractual agreements mandating bench trials.[100] With regard to form agreements, the state of Illinois "honors straightforward terms with understandable meanings,"[101] and the court found no ambiguities in the bench trial clause.[102]

Lastly, the Seventh Circuit addressed the Second and Sixth Circuit arguments that the contractual waiver of the right to a jury trial requires "knowing and intelligent" waiver by comparing this heightened standard to the relatively low standards of waiver under Federal Rule of Civil Procedure 38 and contractual agreements to arbitrate.[103] The Seventh Circuit stated that the heightened scrutiny placed on contractual waivers of the jury right would be inconsistent with the fact that a person can waive the right merely by "accidental forfeiture."[104] Along with accidental waiver under Rule 38, the court held that agreements to arbitrate, which forfeit jury trial rights along with rights to any judicial forum, are not subject to the scrutiny given to contractual waivers of the right to a trial by jury.[105] *I.F.C.* established that contractual waivers of the right to a jury trial should be resolved by applying state law.

94. *I.F.C.*, 512 F.3d at 991.

95. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

96. *I.F.C.*, 512 F.3d at 991–92.

97. KNAPP ET AL., *supra* note 20.

98. *I.F.C.*, 512 F.3d at 992.

99. *Id.*

100. *Id.*

101. *Id.* (citing Nicor, Inc. v. Assoc. Elec. & Gas Ins. Servs., Ltd., 860 N.E.2d 280, 285–86 (Ill. 2006)).

102. *Id.*

103. Rule 38 states "[a] party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent." FED. R. CIV. P. 38(d).

104. *I.F.C.*, 512 F.3d at 993.

105. *Id.* at 994.

B. National Equipment Rental, Ltd. v. Hendrix

In *National Equipment Rental, Ltd. v. Hendrix*,[106] the Second Circuit Court of Appeals held that a loan repayment contract provision forfeiting the right to a jury trial was invalid and unenforceable under federal law because there was no evidence of knowing and intentional relinquishment of the right to a jury trial.[107] H. Walter Hendrix owned a construction company and purchased two pieces of equipment, which created large outstanding debts to be paid down on a monthly basis.[108] Hendrix became unable to pay down the required amounts under the debts and sought a solution to his financial dilemma.[109] Hendrix entered into an agreement with National Equipment Rental (NER) whereby NER paid Hendrix's outstanding debts and in turn, Hendrix would make monthly payments to NER.[110] Without explanation, the Second Circuit applied federal law to the issue of the contractual waiver of the right to a trial by jury.[111]

The Second Circuit briefly addressed the issue of the standard to be applied in determining the validity of contractual waivers of jury trial rights. The court cited *Johnson v. Zerbst*[112] for the proposition that "[i]t is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally."[113] The court failed to note that *Johnson* was a criminal case involving the validity of a voluntary waiver of the Sixth Amendment right to assistance of counsel.[114] The court concluded that the location of the waiver "literally buried in the eleventh paragraph of a fine print, sixteen clause agreement" did not satisfy the alleged knowing and intentional waiver requirement for the Seventh Amendment right to a jury trial.[115]

Along with *Johnson*, the Second Circuit quoted Justice Black's dissenting opinion in *Equipment Rental, Ltd., v. Szukhent*, which argued that a printed form provision "buried in a multitude of words is too weak an imitation of a genuine agreement to be treated as a waiver of so

106. Nat'l Equip. Rental, Ltd., v. Hendrix, 565 F.2d 255 (2d Cir. 1977).
107. *See id.* at 258.
108. *Id.* at 256.
109. *Id.*
110. *Id.* at 257.
111. *See id.* at 258.
112. Johnson v. Zerbst, 304 U.S. 458 (1938).
113. *Hendrix*, 565 F.2d at 258.
114. *See Zerbst*, 304 U.S. 458 (1938).
115. *Hendrix*, 565 F.2d at 258.

important a constitutional safeguard."[116] In *Szukhent*, the Supreme Court upheld a form provision regarding service of process on an agent specified in the contractual agreement.[117] In distinguishing this decision, the Second Circuit argued that the right to a jury trial is more fundamental than the right to personal service and requires knowing and intentional waiver.[118] Lastly, the Second Circuit argued that the contractual waiver failed to satisfy the knowing and intentional requirement as a result of the gross inequality in bargaining power of the parties to the contract.[119] *National Equipment* established that contractual waivers of the right to a jury trial are governed by the federal "knowing and intentional standard."[120]

C. K.M.C. Co., Inc. v. Irving Trust Co.

In *K.M.C. Co., Inc. v. Irving Trust Co.*,[121] the Sixth Circuit Court of Appeals held that a contractual waiver of a jury right provision in a financing agreement was invalid and unenforceable under federal law.[122] K.M.C. was a wholesale and retail grocery corporation which entered into a financing agreement with Irving, whereby Irving obtained an interest in K.M.C.'s accounts receivable and inventory and in return provided K.M.C. with a line of credit that was originally $3 million and was later extended to $3.5 million.[123] In 1982, Irving refused to advance K.M.C. money under the agreement, which was within the $3.5 million limit, and K.M.C. filed an action for a breach of a duty of good faith performance against Irving.[124] At trial, although the financing agreement contained a provision waiving a right to a trial by jury, the Magistrate ordered a jury trial as a result of a statement by K.M.C.'s president that before the agreement was signed, an Irving representative informed him that the jury waiver would not be enforced.[125] The jury returned a verdict in favor of K.M.C. and awarded over $7.5 million in damages for the breach of contract violation.[126]

116. *Id.* (quoting Nat'l Equip. Rental, Ltd., v. Szukhent, 375 U.S. 311, 332–33 (1964) (Black, J., dissenting)).

117. *Id.* at 258 n.1.

118. *Id.*

119. *Id.* (citing Fuentes v. Shevin, 407 U.S. 67 (1972)).

120. *Id.* at 258.

121. K.M.C. Co., Inc., v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985).

122. *See id.* at 755–58.

123. *Id.* at 754.

124. *Id.*

125. *Id.* at 755.

126. *Id.*

On appeal, the Sixth Circuit briefly concluded that the right to a jury trial was to be determined by federal, not state law.[127] The Sixth Circuit reasoned that "the constitutional right to jury trial may only be waived if done knowingly, voluntarily and intentionally, and that whether this standard was met in a given case is a constitutional question separate and distinct from the operation of rules of substantive contract law."[128]

Next, the Sixth Circuit addressed the issue of what standard should apply to determine the validity of contractual waiver of a jury right. The court acknowledged that the Supreme Court, in *Fuentes v. Shevin*,[129] "in applying the knowing and voluntary standard to a waiver of due process rights in a conditional sales agreement, cautioned that it was 'not holding that [the] standards [governing waiver of constitutional rights in a criminal proceeding] must necessarily apply.'"[130] In *Fuentes*, the Supreme Court established that a waiver of a constitutional right "must, at the very least, be clear."[131] Following the Sixth Circuit's acknowledgment that the Supreme Court's language could be interpreted as setting forth ambiguous standards to be applied to contractual waivers of a jury right, the Sixth Circuit maintained its position relying on the bandwagon effect and arguing that an overwhelming majority of cases dealing with the validity of contractual waivers of jury rights applied the knowing and voluntary standard.[132]

The Sixth Circuit also acknowledged the irregularity between the knowing and voluntary standard applied to contractual waivers of jury trials and the enforcement of inadvertent waivers of the same right under Federal Rule of Civil Procedure 38(d).[133] While Rule 39(b) grants the court discretion in granting the right to jury trials after a party fails to demand the right, "it is settled today that the mere statement of 'oversight' or 'inadvertence' does not suffice to invoke the discretion of the court."[134] The Sixth Circuit responded to this by noting that the distinction between a pre-litigation contractual waiver and a procedural error made after the initiation of litigation created a valid rationale for

127. *Id.* (citing Simler v. Conner, 372 U.S. 221 (1963)).

128. *Id.* at 755–56.

129. Fuentes v. Shevin, 407 U.S. 67 (1972).

130. *Irving*, 757 F.2d at 756 (quoting *Fuentes*, 407 U.S. at 94).

131. *Fuentes*, 407 U.S. at 95.

132. *See Irving*, 757 F.2d at 756 (citing Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977); N. Feldman & Son, Ltd. v. Checker Motors Corp., 572 F. Supp. 310, 313 (S.D.N.Y. 1983); Dreiling v. Peugeot Motors of Am., Inc., 539 F. Supp. 402, 403 (D. Colo. 1982); Sanchez v. Sirmons, 467 N.Y.S.2d 757, 760 (1983)).

133. *Id.* at 756 n.4.

134. *Id.* (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 39.09, at 39–30 (2d ed. 1984)).

the opposing standards.[135] To support this proposition, the court cited *Francis v. Henderson*,[136] where the Supreme Court acknowledged that in criminal cases the interests of "the orderly administration of criminal justice" would allow for constitutional rights to be subject to procedural default.[137]

In reaching its conclusion that the contract waiver was invalid, the Sixth Circuit reasoned that the contractual waiver in the financing agreement failed both the knowing and voluntary and "clear" standards due to the understanding of K.M.C.'s president that the jury waiver provision would not be enforced.[138]

IV. DISCUSSION

This Comment argues that the language in *Simler v. Connor* is not applicable to cases involving contractual waivers of the right to a jury trial. Next, this Comment conducts an *Erie* analysis on the issue of contractual waivers of the jury right and concludes that there is no bright-line rule for which law should apply. Finally, this Comment argues that if federal law is to be applied, the federal standard should not be the heightened knowing, voluntary, and independent standard that has been applied in criminal cases involving waiver, but rather the lower standard consistent with the Federal Arbitration Act and Federal Rule of Civil Procedure 38.

A. Simler *Does Not Apply*

Cases use the language in *Simler v. Conner*[139] that "the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions"[140] for the proposition that federal law automatically applies to contractual waivers of the right to a jury trial. Taken out of context, the assertion by the Supreme Court in *Simler* could be viewed as being determinative of the choice of law dispute present between the circuit courts. *Simler* involved a dispute over whether a claim was legal or equitable,[141] which determines the right to a trial by jury in federal courts. However, the dispute in *Simler* did not

135. *Id.*

136. Francis v. Henderson, 425 U.S. 536 (1976).

137. *Irving*, 757 F.2d at 756 (quoting *Francis*, 425 U.S. at 539).

138. *Id.* at 757.

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

140. *Id.* at 222.

141. *Id.*

involve a contractual waiver of the right to a jury trial, nor did the court address any issues of federal common law regarding contractual waivers of the right to a jury trial. Thus, the language of the Supreme Court in *Simler* has no bearing on the validity of a contractual waiver of the right to a jury trial. Under this interpretation of *Simler*, a full analysis of the choice of law conflict is required.

This interpretation of *Simler* may generate criticism for underplaying the Court's seemingly strong language. Under a stronger reading of the *Simler* language, which would assume that the contractual waiver of a jury right is implicitly encompassed by the language of the Court, the result would be an application of federal law to the issue of contractual waivers. This interpretation still does not completely resolve the issue because there is no federal law on the issue of contractual waivers of the right to a jury trial.[142] While the choice of law issue would be eliminated, no statutes or Federal Rules of Civil Procedure directly addresses the contractual waiver of the Seventh Amendment right.[143] There still must be a determination of what the content of the federal law should be under the guidance of *United States v. Kimbell Foods*.[144]

B. Erie *Analysis*

Courts must conduct a full *Erie* analysis in order to determine whether state or federal law is to be applied when determining the validity of contractual waivers of the right to a jury trial. The first step is to determine whether a federal rule or statute directly governs the issue of the validity of contractual waivers of the right to a jury trial. If no rule or statute exists, the *Erie* analysis then moves to whether the application of federal law would implicate the twin aims of *Erie*. If application of the federal waiver standard would lead to either forum shopping or an inequitable administration of the law, state law must be applied.

1. REA

The first hurdle in conducting an *Erie* analysis is to determine whether a federal rule or federal procedural statute covers the issue in

142. Sternlight, *supra* note 14, at 678.

143. The FAA covers arbitration agreements, which implicitly include waivers of the right to a jury trial, but to the best of the author's knowledge, the FAA standard has not been applied by federal courts sitting in diversity.

144. U.S. v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

controversy.[145] The statute or rule must be "sufficiently broad to cause a direct collision with state law or implicitly control the issue before the Court."[146] Rule 38 is the only relevant rule governing waiver of the jury right, but the rule is not sufficiently broad to govern the validity of contractual waivers of the right to a jury trial. Rule 38(d) establishes a procedure whereby a party in a suit waives the right to a jury if the right is not demanded.[147] As Justice Scalia pointed out in his dissenting opinion in Stewart, the allegedly conflicting federal provision "nowhere mention[ed] contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law," and therefore did not sufficiently conflict with state law.[148] Similarly, Rule 38(d) contains no language mentioning contracts, agreements, or the validity of such agreements, and therefore is not sufficiently broad to automatically govern the choice of law issue surrounding contractual waivers of the right to a jury trial. In concluding that the federal venue provision did not govern the dispute, Justice Scalia noted that "it is difficult to believe that state contract law was meant to be pre-empted by this provision that we have said 'should be regarded as a federal judicial housekeeping measure.'"[149] Justice Scalia's language is applicable to Rule 38(d), which could be viewed as a "housekeeping measure" to ensure that litigants follow the proper steps in requesting a jury. Federal Rule 38(d) is not sufficiently broad to cover the issue of contractual waivers of the right to a jury trial because the statute contains no language relevant to contracts, agreements, and applicable laws, and because the Rule is merely a "housekeeping measure" used to ensure proper requests for the jury right that in no way encompasses the issue of contractual jury right waivers.

Similarly, the Federal Arbitration Act does not directly govern the validity of contractual waivers of the right to a jury trial. The Act specifically addresses issues surrounding agreements to arbitrate. While arbitration agreements implicitly include waivers of the right to a jury trial, the Act does not explicitly govern contractual waivers and cannot be read to encompass all forms of jury right waiver.

2. RDA

Because no federal rule or statute directly governs the issue of

145. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 34 (1988) (Scalia, J., dissenting).

146. *See id.* (citing Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987)).

147. *See* FED. R. CIV. P. 38(d).

148. *Stewart*, 487 U.S. at 37 (Scalia, J., dissenting).

149. *Id.* (quoting Van Dusen v. Barrack, 376 U.S. 612, 636–37 (1964)).

contractual waivers of the right to a jury trial, it must be determined whether the twin aims of *Erie* are implicated by the application of federal law. Due to the ambiguous federal standard and the varying state laws, no bright-line rule exists as to whether state or federal law should be applied. Individual courts will need to engage in a twin aims analysis on a case by case basis with regard to the laws of the state implicated by the dispute. For the purposes of this *Erie* analysis, it will be assumed that the federal standard is the frequently applied knowing, independent, and voluntary standard. If application of the federal standard would lead to either forum shopping or inequitable administration of the law, the state standard must be applied.

a. Forum Shopping

Applying federal law will likely lead to forum shopping in cases where the applicable state standard differs from the heightened federal standard. Forum shopping will not be implicated in cases where the applicable state law parallels the heightened federal law standard. In states such as Illinois, which apply UCC contract standards,[150] forum shopping would be implicated by application of federal law. Consistent with Justice Scalia's conclusion of the implication of forum shopping with regard to forum selection clauses in *Stewart*,[151] here, plaintiffs seeking to enforce waivers would sue in state court to reap the advantageous, less rigorous state standard governing validity, where nonresidents seeking to avoid enforcement of the waiver would seek out the more favorable and more stringent federal standard in federal court.

In states such as Georgia and California, which expressly prohibit contractual waivers of the jury right,[152] forum shopping would also be implicated. Litigants seeking to avoid waivers will sue in state court where the waiver has no chance of surviving the express prohibition, where litigants seeking to enforce the waivers will seek the somewhat more advantageous federal standards in federal court that would at least give a possibility for the waiver to be found valid.

In contrast, application of federal law would not lead to forum shopping in states with standards similar to the heightened federal standard. In these instances, there would be no added benefit to a litigant filing suit in either forum. There can be no bright-line rule for a

150. I.F.C. Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 992 (7th Cir. 2008).

151. *See Stewart*, 487 U.S. at 39–40 (Scalia, J., dissenting).

152. Thomley, *supra* note 22, at 127 (citing Bank S., N.A. v. Howard, 444 S.E.2d 799, 799 (Ga. 1994); Grafton Partners, L.P. v. Superior Court, 116 P.3d 479, 493 (Cal. 2005)).

determination of whether forum shopping will be encouraged by the application of federal law because of the varying state standards as well as the ambiguous federal standard.

b. Inequitable Administration of the Law

If application of federal law is not found to lead to forum shopping, the federal court must next determine whether application of federal law would lead to inequitable administration of the law. Inequitable administration of the laws requires "allowing an unfair discrimination between noncitizens and citizens of the forum state."[153] The analysis regarding this prong of the twin aims of *Erie* is somewhat unclear. Justice Scalia noted that a determination of whether the discrimination would be unfair turned upon the importance of the issue in question.[154]

In states where the state standard is lower than the federal standard applied to waivers, a nonresident plaintiff seeking to enforce the waiver will sue a resident defendant in the state court. This gives the nonresident plaintiff a "unilateral choice" whether or not to enforce the contractual waiver.[155] "A resident defendant cannot remove the action to federal court."[156] This gives the nonresident plaintiff a unilateral choice of which standard will be applied to govern the waiver. "On the other hand, a nonresident defendant can remove [a case] to federal court."[157] This establishes that a nonresident plaintiff and a nonresident defendant are given a benefit over a resident defendant[158] in determining what standard will be applied to the enforceability of the contractual waiver of the right to a jury trial. "This is the kind of discrimination by 'non-citizens against citizens' that *Erie* tried to avoid."[159]

Some have argued that this does not lead to inequitable administration because a resident plaintiff is able to file suit in federal or state court against a nonresident defendant.[160] If the plaintiff seeks to avoid enforcement of the waiver and files suit in state court, the nonresident

153. *Stewart*, 487 U.S. at 40 (Scalia, J., dissenting) (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938)).

154. *Id.* (citing Hanna v. Plumer, 380 U.S. 460, 467–68 (1965)).

155. Robert A. de By, Note, *Forum Selection Clauses: Substantive or Procedural for* Erie *Purposes*, 89 COLUM. L. REV. 1068, 1080 (1989).

156. *Id.* (citing 28 U.S.C. § 1441(a) (1982)).

157. *Id.*

158. *Id.*

159. *Id.* (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938)).

160. *Id.* (citing P. BATOR, D. MELTZER, P. MISHKIN, D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 788 (3d ed. 1988)).

defendant can remove the case to federal court.[161] Removal to federal court is not an option for a resident defendant, therefore, "compared to another resident plaintiff who sues a co-citizen, the resident plaintiff suing the nonresident defendant is at a disadvantage."[162]

In states where the federal and state standards parallel each other, the problems that lead to inequitable administration of the laws will not occur. Decisions by resident and nonresident plaintiffs and defendants alike will not be altered by the option of federal or state court. There will be no advantage to filing in state or federal court, and there will also be no benefit to nonresidents in being able to remove cases filed in state court to federal court because the applicable standards will be the same. Therefore, there is no bright-line determination of whether or not application of federal law will lead to inequitable administration of the laws. This will only occur in cases where the federal and state standards applied to contractual waivers of the right to a jury trial are dissimilar.

C. Federal Standard

If an *Erie* analysis concludes that federal law is to be applied in a diversity case involving a contractual waiver of a jury right, there is still no clear federal standard to be applied.[163] This Comment recommends that the applicable federal standard that should be applied should be a lower contract standard that is consistent with the lower standards set forth in the Federal Arbitration Act and more consistent with the Federal Rule of Civil Procedure 38(d) "inadvertence" standard, rather than the heightened "intelligent, knowing and voluntary" standard that has been commonly applied in lower courts. Adoption of a federal standard that is consistent with standards applied to other forms of jury right waiver will lead to a more uniform application of laws regarding jury right waiver and more homogeneous results with regard to the outcome of litigation involving jury right waivers.

V. CONCLUSION

Courts cannot continue to skirt the choice of law issue by failing to engage in a full and complete *Erie* analysis and placing unwarranted reliance on the Supreme Court's language in *Simler*. There can be no bright-line rule under *Erie* as to whether federal or state law should be

161. *Id.*

162. *Id.* at 1080–81 (citing John H. Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 712 (1974)).

163. *See supra* notes 14–19.

applied because in certain circumstances, federal law significantly differs from state law, and in other instances, federal law and state law parallel each other. Federal courts sitting in diversity must engage in a full analysis under *Erie* to determine whether application of federal law will lead to forum shopping or inequitable administration of the law.

While most courts appear to adopt the criminal law waiver standard of "knowing, voluntary, and intelligent" waiver, the federal standard is somewhat unclear. A federal standard should be adopted that is more consistent with the FAA and Rule 38(d), which would apply contract standards of waiver in determining the validity of a contractual waiver of the right to a jury trial.