No Prelitigation Contractual Waiver of Jury Trial: Bank South, N.A. v. Howard, A Step Backward for Georgia

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INTRODUCTION

Both the Georgia Constitution\(^1\) and the Georgia Civil Practice Act\(^2\) guarantee civil litigants the right to a jury trial in most cases. This right may be expressly waived by "written stipulation filed with the court or by an oral stipulation made in open court and entered in the record\(^3\) or impliedly waived by voluntary participation in a nonjury trial.\(^4\) Additionally, parties may waive rights that the law has established in their favor when such waiver does not "injure others or affect the public interest.\(^5\)

While the right to a jury trial can be waived, the requirements for a valid waiver remain uncertain. Because the constitutional right to a jury trial is fundamental, waivers of this right are strictly construed and any ambiguity is decided against waiver.\(^6\)

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1. GA. CONST. art. I, § 1, ¶ XI. "The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. . . ." Id.

2. O.C.G.A. § 9-11-38 (1993). "The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate." Id.

3. Id. § 9-11-39.


5. O.C.G.A. § 1-3-7 (1990); Georgia Fertilizer Co. v. Walker, 156 S.E. 820 (Ga. 1931); see also Manderson & Assocs., Inc. v. Gore, 389 S.E.2d 251, 257 (Ga. Ct. App. 1989) (holding that a contractual jury trial waiver provision to which all parties agreed did not violate the public policy of Georgia), cert. denied, 193 Ga. App. 910 (Ga. 1990).

6. Phoenix Leasing, Inc. v. Sure Broadcasting, Inc., 843 F. Supp. 1379, 1388 (D. Nev. 1994) (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 503-04 (1959)); National Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977). For example, in Hendrix the Second Circuit distinguished between the right to a jury trial and the right to waive personal service. 565 F.2d at 258 n.1. The court stated that although it upheld a waiver of the right to personal service that was buried in a contract, a jury trial right could not be waived unless it was knowingly and intentionally waived because that right was fundamental. Id. The court then
Recently, the Georgia Supreme Court in Bank South, N.A. v. Howard held that the right to a jury trial cannot be waived contractually prior to pending litigation. However, a majority of jurisdictions considering the issue have upheld contractual waivers.

Part I of this Comment reviews both the majority and dissenting opinions of the Georgia Supreme Court’s decision in Bank South, N.A. v. Howard and suggests that the dissenting

analogized the right to a jury trial with the right to due process and refused to uphold the contractual waiver of the right to jury trial because there was no evidence the person allegedly waiving the right was aware of the waiver. Id.

8. See, e.g., Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837-38 (10th Cir. 1988), cert. denied, 490 U.S. 1021 (1989); Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832-33 (4th Cir. 1986); K.N.C. Co. v. Irving Trust Co., 757 F.2d 752, 755 (6th Cir. 1985); Reggie Packing Co. v. Lazere Fin. Corp., 671 F. Supp. 571, 573 (N.D. Ill. 1987); Smith-Johnson Motor Corp. v. Hoffman Motors Corp., 411 F. Supp. 670, 677 (E.D. Va. 1975); Seligson v. Plum Tree, Inc., 361 F. Supp. 748, 758 (E.D. Pa. 1973); Mall, Inc. v. Robbins, 412 So. 2d 1197, 1199-1200 (Ala. 1982); Gaylord Dept Stores v. Stephens, 404 So. 2d 586, 588 (Ala. 1981); Azalea Drive-In Theatre, Inc. v. Sargoy, 214 S.E.2d 131, 136 (Va.), cert. denied, 423 U.S. 940 (1976); Nowey v. Kravitz, 51 A.2d 495, 496 (Conn. 1947); Vista Centre Venture v. Unlike Anything, Inc., 603 So. 2d 576, 578 (Fla. Dist. Ct. App. 1992); Gun v. Palmieri, 589 N.Y.S.2d 577, 577 (App. Div. 1992); Trizec Properties, Inc. v. Superior Court, 280 Cal. Rptr. 885, 886-87 (Cal. Ct. App. 1991) (holding that California Constitution requiring written waiver to be filed with the court "cannot be read to prohibit individuals from waiving, in advance of any pending action, the right to trial by jury in a civil case"); Central Inv. Assocs., Inc. v. Leasing Serv. Corp., 362 So. 2d 702, 704 (Fla. Dist. Ct. App. 1978) (interpreting New York law); Union Commerce Bank v. Kimbro, 162 N.E.2d 926, 927 (Cleveland Mun. Ct. 1959); 73 A.L.R.2d 1332, 1333 § 2. But see Zeesell Realty Co. v. Cunningham, 211 N.Y.S. 591, 592 (Sup. Ct. 1925) (anticipatory provision waiving jury trial void because not one of the methods expressly defined by statute by which a right to jury trial may be waived was used). Furthermore, since Bank South was decided, a federal judge for the Northern District of Georgia was confronted with the issue of whether to apply the Bank South decision to a controversy in federal court based on diversity jurisdiction. Perlmutter v. Gelco Corp., No. 1:94-CV-1505-JOF (N.D. Ga. Mar. 31, 1995). In its March 31, 1995 order, the district court upheld prelitigation contractual jury trial waiver provisions, reasoning that "the right to a jury trial is a procedural issue to be determined by looking to federal law." Id. at 9. Because it found that jury trial waivers do not violate public policy under federal law, the district court enforced the jury trial waiver provision. Id. at 8-9. The importance of this decision, if upheld, is that it limits the Bank South decision to cases brought in Georgia state courts. Thus, parties can avoid the application of Bank South if they are able to bring their action in federal court.

9. The author of this Comment will refer to both the Georgia Supreme Court and Georgia Court of Appeals decisions as well as the various briefs and motions filed by each party in this case. To help distinguish, the author will cite to Howard when referring to the decision of the Georgia Court of Appeals and briefs and motions filed with the Court of Appeals. Bank South will be used when the author refers to the decision of the Georgia Supreme Court or briefs and motions of the parties filed with
opinion's reasoning is more sound. Part II compares the benefits and burdens of permitting prelitigation jury trial waivers. Finally, in Part III, the author proposes a test by which Georgia courts should judge the validity of prelitigation jury trial waivers. This Comment concludes that prelitigation jury trial waivers should be permitted under Georgia law as a method whereby parties can agree to resolve their disputes.

I. Bank South, N.A. v. Howard: A Sound Opinion?

Bank South, N.A. and Norris Howard entered into a contract that contained a provision that purported to waive each party's right to a jury trial. In the majority opinion, the Georgia Supreme Court held that prelitigation contractual jury trial waivers are invalid in Georgia. Justice Sears, along with Justice Fletcher, dissented.

A. Factual Summary

Norris Howard was an officer, director, and shareholder of The Pine Connection, Inc. Howard was allegedly approached by Charles Paris, a Bank South loan officer, and Laron Allen, the president of The Pine Connection and a future codefendant. Allegedly, Paris and Allen told Howard that the bank required both Howard and Allen to sign personal guarantees so that The Pine Connection could increase its line of credit by $800,000. Upon acquiring information regarding the financial status of The Pine Connection provided by Allen and Paris, Howard signed the note and guaranty on which this suit was based.

the Georgia Supreme Court.
10. Bank South, 444 S.E.2d at 800.
11. Id.
12. Id. at 800-01.
15. Id. at 2.
16. Id. The line of credit was also secured by the business's accounts receivable and inventory. Id. (citing Record at 580). Howard claimed that advances under the line of credit to Pine Connection were made based on reports of accounts receivable and inventory, which Bank South knew to be false. Id. at 5 (citing Record at 587-88). This action, according to Howard, "increased [Pine Connection's] unsecured debt, and ultimately contributed to the financial failure of the business, thus increasing Howard's risk as guarantor and rendering the stock owned by Howard worthless." Id.
The note and guaranty at issue contained a clause that purported to waive the parties' right to a trial by jury. The contract stated that:

[Howard] does hereby waive: . . . notice of extension of credit from time to time given by [Bank South] to [Pine Connection] and the creation, existence or acquisition of any Indebtedness; . . . notice of any adverse change in [Pine Connection's] financial condition or of any other fact which might increase [Howard's] risk; . . . notice of default or acceleration; and all other notices and demands to which [Howard] might otherwise be entitled. [Howard] further waives the right to jury trial in any action hereunder . . . Nothing shall discharge or satisfy the liability of [Howard] except the full performance and payment of the Indebtedness . . . .

Subsequently, the business failed and Bank South initiated this suit to collect over two million dollars from Howard under the terms of the guaranty agreement. Howard filed an answer and raised several defenses and counterclaims, including fraud in the inducement of the contract. Howard also filed a demand for a jury trial. In addition to several other motions, Bank South filed a motion to dismiss Howard's counterclaims for failure to state a claim.

In its order, the trial court "expressly determin[ed] that there was no just reason for delay" and entered final judgment, striking most of Howard's affirmative defenses and dismissing his counterclaims. Additionally, the trial court granted Bank

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17. Id. at 2; see also Brief for Petitioner Bank South, N.A. at 2, Bank South, N.A. v. Howard, 444 S.E.2d 799 (Ga. 1994) (No. S93C1658).
18. The action brought by Bank South, N.A. against Howard was allegedly based on two agreements, a 1985 guaranty and a 1988 guaranty. Howard v. Bank South, N.A., 433 S.E.2d 625, 626 (Ga. Ct. App. 1993). Howard admitted execution of the 1988 guaranty, but denied execution of the 1985 guaranty. Id. The 1988 guaranty was the agreement at issue in this case. Id.
22. Id.
23. Id.
24. Id.
South’s motion to sever Howard’s cross-claim against Allen from Bank South’s claims on the guarantees.\textsuperscript{25} Furthermore, the trial court struck Howard’s demand for a jury trial.\textsuperscript{26} The only defense that the trial court did not strike was Howard’s assertion that Bank South acted in a commercially unreasonable manner.\textsuperscript{27}

Howard appealed the trial court’s order striking his demand for a jury trial,\textsuperscript{28} and the Georgia Court of Appeals reversed.\textsuperscript{29} The Court of Appeals reasoned that a waiver of the right to a jury trial must be “knowing and voluntary, i.e., demonstrates full understanding of all circumstances surrounding relinquishment of the known right.”\textsuperscript{30} The court found that the waiver at issue was unenforceable because Howard could not have foreseen all the circumstances of any future claim when he signed the agreement in 1988.\textsuperscript{31}

Subsequently, Bank South petitioned the Georgia Supreme Court for review of the Court of Appeals decision. The Georgia Supreme Court granted certiorari to determine whether a prelitigation contractual jury trial waiver is enforceable under Georgia law.\textsuperscript{32}

\textit{B. Majority Opinion}

The Georgia Supreme Court held that a jury trial waiver provision is unenforceable under Georgia law.\textsuperscript{33} The court first recognized that the right to a trial by jury is guaranteed by both the Georgia Constitution\textsuperscript{34} and the Georgia Civil Practice Act.\textsuperscript{35} The court then noted that, under the terms of the Georgia Constitution, the right may be waived “when no issuable defense is filed and when the parties fail to demand [in writing] a jury

\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id. at 627-28. Although Howard appealed the trial court’s order striking his defenses, dismissing his counterclaims, and severing his cross-claim against Allen, the following discussion is limited to Howard’s appeal of the trial court’s decision striking his demand for a jury trial.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id. at 628.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Bank South, N.A. v. Howard, 444 S.E.2d 799 (Ga. 1994).
\item \textsuperscript{33} Id. at 800.
\item \textsuperscript{34} Id.; GA. CONST. art I, § 1, ¶ XI.
\item \textsuperscript{35} Bank South, 444 S.E.2d at 800; O.C.G.A. § 9-11-38 (1993).
\end{itemize}
trial. Furthermore, the court noted that the right may be waived by express stipulation under Georgia Code section 9-11-39(a).

In addition, the court noted that neither the constitution nor the Civil Practice Act expressly provides for prelitigation contractual waivers of jury trials, the relevant provisions contemplate the existence of pending litigation at the time the right is waived. Because waiver of the right to a jury trial is “carefully controlled” by statute and prelitigation contractual waivers of that right are not expressly provided by statute, the court held them unenforceable under Georgia law.

In further support of its conclusion, the Georgia Supreme Court analogized jury trial waiver provisions to confessions of judgment. A confession of judgment is “the act of a debtor in permitting judgment to be entered against him by his creditor, for a stipulated sum, by a written statement to that effect or by warrant of attorney, without the institution of legal proceedings of any kind.” According to the court, confessions of judgment are similar to prelitigation contractual jury trial waiver provisions because both “entail[] giving up valuable rights.” Furthermore, the court noted that the terms of the statute providing for a confession of judgment contemplate the pendency of litigation, as does the statute providing for waiver of jury trial. The court found that because parties cannot enter

36. Bank South, 444 S.E.2d at 800; Ga. Const. art. I, § 1, ¶ XI.
37. Under O.C.G.A. § 9-11-39(a), express stipulation means “either written and filed in the record or made orally in open court.” Bank South, 444 S.E.2d at 800.
38. Id.
39. Id.
40. Id. (citing Manderson & Assocs., Inc. v. Gore, 389 S.E.2d 251 (Ga. Ct. App. 1989)).
41. Id.
42. Id.
43. BLACK'S LAW DICTIONARY 842 (6th ed. 1990) (defined under “judgment”). Because of the potential for abuse, confessions of judgment are strictly regulated or prohibited by statute. BARRON'S LAW DICTIONARY 88 (3d ed. 1991); see also BLACK’S LAW DICTIONARY, supra, at 259-60 (defining cognovit judgment as “[w]ritten authority of debtor and his direction for entry of judgment against him in the event he shall default in payment. . . . Such agreements are prohibited, or greatly restricted, in many states; though, where permitted, the constitutionality of such has been upheld”).
44. Bank South, 444 S.E.2d at 800.
45. O.C.G.A. § 9-12-18(b) (1993) (“No confession of judgment shall be entered except in the county where the defendant resided at the commencement of the action unless expressly provided for by law. The action must have been regularly filed and docketed as in other cases. . . .”).
46. Bank South, 444 S.E.2d at 800; see Ga. Const. art. I, § 1, ¶ XI; O.C.G.A. § 9-
into a confession of judgment prior to pending litigation,\textsuperscript{47} prelitigation contractual jury trial waiver provisions should also not be allowed.\textsuperscript{48}

After noting the similarities between confessions of judgment and jury trial waiver provisions, the court contrasted these provisions with arbitration provisions.\textsuperscript{49} It found that the Georgia General Assembly, by enacting the Georgia Arbitration Act,\textsuperscript{50} expressly approves of arbitration clauses in all contracts.\textsuperscript{51} Because the General Assembly has addressed the issue of arbitration, but not confessions of judgment and jury trial waivers, the court decided that arbitration provisions were not similar to contractual jury trial waiver provisions.\textsuperscript{52}

In conclusion, the court stated that because jury trial waiver provisions are so similar to confessions of judgment, the same rule should apply.\textsuperscript{53} Thus, it held that prelitigation contractual jury trial waivers are unenforceable under Georgia law.\textsuperscript{54}

\textbf{C. Dissenting Opinion}

Justice Sears, with Justice Fletcher joining, dissented to the majority's opinion.\textsuperscript{55} According to Justice Sears, a knowing and intelligent decision to waive the right to a jury trial prior to pending litigation should be allowed because the ability of parties to make such a decision benefits the legal system and promotes freedom of contract.\textsuperscript{56} Invoking public interest, Justice Sears stated that such a provision would "economize litigation for the parties and for an already overburdened court system" because it would avoid the delays and expense of a jury trial.\textsuperscript{57}

\textsuperscript{47} See, e.g., Bank South, 444 S.E.2d at 800 (citing Information Buying Co. v. Miller, 161 S.E. 617 (Ga. 1931)).
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 800 n.5.
\textsuperscript{51} Bank South, 444 S.E.2d at 800 n.5 (citing Weyant v. MacIntyre, 438 S.E.2d 640 (Ga. Ct. App. 1993)).
\textsuperscript{52} Id. Although the court acknowledged this distinction, it failed to recognize the similarities between jury trial waivers and arbitration provisions. See infra text accompanying notes 96-128.
\textsuperscript{53} Bank South, 444 S.E.2d at 800.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 801 (Sears, J., dissenting).
\textsuperscript{56} Id.
\textsuperscript{57} Id.
Justice Sears began her dissent by criticizing the majority's reasoning concerning the language of the Georgia Constitution and the Georgia Code.\textsuperscript{58} She found that the language of the Georgia Constitution and Code does not preclude pretrial contractual jury trial waivers.\textsuperscript{59} Because the silence of the Georgia Constitution and Code creates ambiguity, pretrial jury trial waivers should be allowed under a freedom of contract theory.\textsuperscript{60} In support of her argument, Justice Sears cited Georgia contract law, which holds that parties may contract on anything they desire as long as the contract does not violate public policy and is not prohibited by statute.\textsuperscript{61} According to Justice Sears, because there is no statute expressly prohibiting such a provision or necessarily implying such a restriction on contract law, the court should not create such a restriction.\textsuperscript{62}

Furthermore, Justice Sears disagreed with the majority's analogy to confessions of judgment.\textsuperscript{63} While both provisions involve giving up valuable rights, a confession of judgment involves giving up the right to trial altogether.\textsuperscript{64} In contrast, a pretrial jury trial waiver only waives the right to a jury trial and not the right to a bench trial.\textsuperscript{65} Because a party who waives the right to a jury trial is still entitled to litigate the dispute, the impact of a jury trial waiver is not similar to that of a confession of judgment.\textsuperscript{66}

Similarly, according to Justice Sears, prior case law holding that confessions of judgment cannot be entered into prior to pending litigation is not applicable to jury trial waiver provisions.\textsuperscript{67} Because a confession of judgment takes the place of a verdict, it follows that a confession of judgment cannot be made prior to pending litigation.\textsuperscript{68} However, a jury trial waiver

\textsuperscript{58} Id. at 800-01.
\textsuperscript{59} Id. at 801.
\textsuperscript{60} Id.
\textsuperscript{61} Id. (citing Duffett v. E & W Properties, Inc., 430 S.E.2d 858 (Ga. Ct. App. 1993)).
\textsuperscript{62} Id. (citing Porubiansky v. Emory Univ., 275 S.E.2d 163 (Ga. Ct. App. 1980), aff'd, 282 S.E.2d 903 (Ga. 1981)).
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
provision does not take the place of a verdict and, thus, is not similar to a confession of judgment.\textsuperscript{69}

D. Analysis

The reasoning of the majority’s opinion is faulty in two respects. First, neither the Georgia Constitution nor the Georgia Code prohibit jury trial waiver provisions. Second, jury trial waiver provisions are not analogous to confessions of judgment. In contrast, jury trial waiver provisions are similar to arbitration provisions and choice of forum clauses, which are both permissible under state law.

1. Prelitigation Jury Trial Waivers Permitted Under Georgia Law

As Justice Sears noted in her dissent in Bank South\textsuperscript{70} and Chief Justice Hunt reiterated in his dissent in American Southern Financial Ltd. \textit{v.} Yang,\textsuperscript{71} nothing in Georgia law prohibits prelitigation contractual jury trial waivers. The majority in Bank South noted, as support for its conclusion that such waivers are not allowed under Georgia law, that the Georgia Constitution and the Georgia Code allow for waiver only after the parties have entered litigation and do not expressly permit prelitigation waivers.\textsuperscript{72} However, legislative silence on an issue does not imply a prohibition.\textsuperscript{73} In fact, because the sections of the Georgia Constitution and Code that set forth the methods of waiver\textsuperscript{74} presuppose pending litigation, those sections are arguably inapplicable to this factual situation because the contract in this case was entered into prior to pending litigation.\textsuperscript{75}

The California Court of Appeals addressed the issue of whether to enforce a contract provision purporting to waive the

\textsuperscript{69} Id.
\textsuperscript{70} Id. at 800-802.
\textsuperscript{71} 448 S.E.2d 450 (Ga. 1994) (Hunt, C.J., dissenting). Note that Hunt was disqualified in Bank South, a four to two decision. Thus, Hunt's decision to join the dissent in American Southern Financial made the split in the court now four to three.
\textsuperscript{72} Bank South, 444 S.E.2d at 800.
\textsuperscript{73} See id. at 801 (Sears, J., dissenting).
right to a jury trial. In *Trizec Properties, Inc. v. Superior Court*, the court noted that the California Constitution and Code of Civil Procedure provide that the right to a jury trial can be waived by ‘written consent filed with the clerk or judge.’ However, unlike the Georgia Supreme Court, the California Court of Appeals held that California law could not be read to prohibit prelitigation contractual jury trial waiver provisions.

While the California Court of Appeals noted that “[t]he right to trial by jury in a civil case is a substantial one not lightly to be deemed waived,” it nevertheless acknowledged that parties are entitled to contract away this right. The court, however, placed some limitations on jury trial waiver provisions. According to the court, a jury trial waiver will be enforced only when it is “unambiguous and unequivocal.” Further, the court concluded that a contract provision clearly indicating the parties’ intent to waive their right to a jury trial is neither illegal nor contrary to public policy and, thus, is enforceable under the laws of California.

Prior Georgia case law supports the reasoning used by the California Court of Appeals in *Trizec Properties*. First, the Georgia Court of Appeals has held that a jury trial waiver provision does not violate the public policy of Georgia. For example, in *Manderson & Associates, Inc. v. Gore*, the Georgia Court of Appeals considered whether a contract containing a jury trial waiver provision executed under the laws of Alabama would be enforceable under Georgia law. The court first inquired whether enforcement of the provision would violate Georgia law.

76. Id. at 886.
77. Id. (citing CAL. CONST. art. I, § 16; CAL. CIV. PROC. CODE § 631(a)(2)).
79. Id. at 887.
80. Id.
81. Id.
82. Id.
83. *Manderson & Assoc.*, Inc. v. Gore, 389 S.E.2d 251, 257-58 (Ga. Ct. App. 1989) (interpreting the validity of a contractual waiver of the right to a jury trial under Alabama law). The author recognizes that *Manderson* is a decision by the Georgia Court of Appeals and not the highest court in the state; however, the decision supports the position that the Georgia Supreme Court in *Bank South* could have recognized the validity of prelitigation jury trial waivers by adopting the reasoning in *Manderson*. Justice Sears used the same line of reasoning as the court in *Manderson* in her dissent in *Bank South*. See *Bank South*, 444 S.E.2d at 500-01 (Sears, J., dissenting).
public policy.\textsuperscript{85} Citing Georgia Code sections 13-8-1 and -2, the court found that a prelitigation jury trial waiver provision did not violate Georgia public policy.\textsuperscript{86}

Specifically, Georgia law provides that "[a] contract to do an immoral or illegal thing is void"\textsuperscript{87} and "[a] contract which is against the policy of the law cannot be enforced."\textsuperscript{88} The court of appeals has restricted the application of these laws for the purpose of voiding contracts by stating that:

[a] contract cannot be said to be contrary to public policy unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of law.\textsuperscript{89}

The Georgia General Assembly has not expressly declared prelitigation contractual jury trial waiver provisions against public policy.\textsuperscript{90} Furthermore, this type of contract does not further any illegal or immoral purpose. Thus, as the court of appeals in Manderson held, a contract containing a prelitigation jury trial waiver provision does not violate the public policy of Georgia.\textsuperscript{91}

More importantly, Georgia law recognizes the freedom parties have to contract. As Justice Sears noted in her dissent in Bank South, "[p]arties are free, except as prohibited by statute or public policy, to contract on any terms and about any subject matter they so desire,"\textsuperscript{92} and any 'impairment of that right [to contract] must be specifically expressed or necessarily implied by the legislature in a statutory prohibition and not left to speculation.'\textsuperscript{93} Because Georgia has already recognized that

\textsuperscript{85} Id. at 257.
\textsuperscript{86} Id.
\textsuperscript{87} O.C.G.A. § 13-8-1 (1981).
\textsuperscript{88} Id. § 13-8-2.
\textsuperscript{90} See O.C.G.A. § 13-8-2 (1981). Although the list of contracts that violate public policy is illustrative and not exhaustive, contractual jury trial waiver provisions are not of the same nature as the listed examples.
\textsuperscript{91} Manderson, 389 S.E.2d at 257-58.
\textsuperscript{93} Id. (Sears, J., dissenting) (citing Porubiansky v. Emory Univ., 275 S.E.2d 163
such a waiver is not against public policy and because Georgia supports freedom of contract, the Georgia Supreme Court should not have inferred from the lack of legislation addressing the issue that such a contract provision is not enforceable under the laws of Georgia.


The Georgia Supreme Court in *Bank South* analogized jury trial waiver provisions to confessions of judgment. While many other courts have addressed this issue, no other court has viewed a waiver of a jury trial as analogous to a confession of judgment. Although that fact does not mean that the two cannot be similar, the similarities given by the Georgia Supreme Court are not sufficient to support an application of the same rule.

As Chief Justice Hunt pointed out in his dissent in *American Southern Financial*, when parties agree to a jury trial waiver provision, “they are not giving up their right to maintain or defend their position in any dispute.” Rather, they are electing to settle their dispute in front of a judge instead of a jury. In contrast, when parties make a confession of judgment, they give up the right to any trial whatsoever.

Additionally, the Georgia Supreme Court has held that a “confession of judgment is ‘the substitute for a verdict’.” however, the same cannot be said for a jury trial waiver provision because the parties are still entitled to a bench

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94. Manderon, 389 S.E.2d at 257-58; see also author's comments, supra note 83.
95. Duffett v. E & W Properties, 430 S.E.2d 858, 860 (Ga. Ct. App. 1993);
    Porubiansky, 275 S.E.2d at 165.
96. Bank South, 444 S.E.2d at 800.
97. Id. at 801 (Sears, J., dissenting); see also American S. Fin. Ltd. v. Yang, 448
98. See sources cited supra note 8.
100. See Bank South, 444 S.E.2d at 800.
101. American S. Fin., 448 S.E.2d at 450; see also Bank South, 444 S.E.2d at 801
    (Sears, J., dissenting).
102. American S. Fin., 448 S.E.2d at 450; Bank South, 444 S.E.2d at 801 (Sears, J.,
    dissenting).
103. Bank South, 444 S.E.2d at 801 (Sears, J., dissenting).
104. Id. (citing Information Buying Co. v. Miller, 161 S.E. 617, 619 (Ga. 1931)).
Furthermore, the Georgia Code section that permits confessions of judgment "expressly provides that no confession of judgment shall be entered up unless the cause has been regularly sued out." In deciding the question whether confessions of judgment could be entered into prior to litigation, the Georgia Supreme Court in Information Buying Co. v. Miller read the above code section in conjunction with the long-standing "common-law principle that a confession of judgment is one made after the action is commenced" and held that a confession of judgment entered into prior to the commencement of the suit is invalid.

In contrast, the Georgia statute permitting waiver of a jury trial does not contain a limitation that "the cause must be regularly sued out." Furthermore, there is no long-standing principle under Georgia law that prohibits prelitigation contractual jury trial waivers. Thus, as Justice Sears correctly pointed out in Bank South, the reasons for disallowing prelitigation confessions of judgment do not apply to prelitigation jury trial waivers. A comparison of jury trial waiver provisions to arbitration or choice of forum clauses, which has been done by many other courts, is more logical.

Moreover, in Bank South the majority failed to distinguish sufficiently jury trial waiver provisions from arbitration provisions. The majority simply noted that the legislature has addressed the issue of contractual arbitration provisions by enacting the Georgia Arbitration Act, but has not passed similar legislation with regard to jury trial waivers or confessions of

105. Id.
107. Id.
108. Compare id. (construing confession of judgment under the civil code) with Bank South, 444 S.E.2d at 801 (Sears, J., dissenting) (contrasting confession of judgment with waiver of jury trial).
109. Bank South, 444 S.E.2d at 801 (Sears, J., dissenting).
judgment. For this reason, the majority concluded that jury trial waiver provisions and confessions of judgment were in "sharp contrast" to arbitration.

However, several courts in other jurisdictions have noted the similarity between contractual jury trial waiver provisions and arbitration agreements. Contractual jury trial waivers are logically treated like arbitration agreements because contractual jury trial waivers may be viewed as less extreme arbitration agreements. Arbitration agreements "circumvent our existing justice system entirely" while jury trial waivers merely require a judge, instead of a jury, to decide the dispute. Thus, the parties to a contract containing a jury trial waiver provision still have all the rights and privileges that the judicial system recognizes. For example, parties that participate in a bench trial are entitled to discovery, whereas parties settling a dispute through arbitration may not be entitled to discovery, depending upon the rules of the arbitrator or the laws of the state. Likewise, the rules of evidence do not apply to arbitration proceedings.

Additionally, choice of forum clauses are similar to contractual jury trial waiver provisions. A choice of forum clause is a "clause in a contract preselecting a particular forum, such as a given state, country, court or administrative proceeding, for the resolution of a dispute." Jury trial waiver provisions are

112. Bank South, 444 S.E.2d at 800 n.5.
113. Id.
116. Id.
118. Id.
120. Smith-Johnson, 411 F. Supp. at 675-76.
analogous to choice of forum clauses because they select a judge instead of a jury for the resolution of a dispute. 122

In *Smith-Johnson Motor Corp. v. Hoffman Motors Corp.*, the United States District Court for the Eastern District of Virginia analogized contractual jury trial waiver provisions to choice of forum clauses. 123 The court in *Smith-Johnson* cited a United States Supreme Court case that held “the provisions of a contract fixing the forum in which actions might be brought to litigate disputes is binding on the parties unless the opposing party can meet the heavy burden of showing that its enforcement would be unreasonable, unfair or unjust.” 124 The court in *Smith-Johnson* found that the enforcement of a jury trial waiver provision is not unreasonable, unfair, or unjust and, thus, enforced the provision and ordered the case to trial without a jury. 125

Clearly, there are situations when contracting parties should be entitled to agree in advance of the litigation to substitute a judge for a jury, just as they are entitled to agree where the suit will take place 126 or elect to take it out of the court's hands entirely. 127 Thus, many courts now recognize valid jury trial waiver provisions as another contract provision for which parties may bargain. 128 The following section discusses the benefits and burdens of allowing contractual jury trial waiver provisions.

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122. Rusoff, supra note 111, at 23.
124. Id. at 675 (citing Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)).
125. Id. at 677.
126. Parties to a contract may include a "choice of forum" clause whereby they choose where the suit will take place in the event of a dispute over the contract. See, e.g., Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972).
127. Parties may contractually agree to arbitration in the event of a dispute over the contract. See, e.g., Prima Paint Corp., v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). By agreeing to arbitration, parties agree to have the dispute settled by an arbitrator or arbitration panel as opposed to a judge or jury. Rusoff, supra note 111, at 26.
II. Benefits v. Burdens: An Unbalanced Scale

Congestion of the courts,\textsuperscript{129} strain on the legal system,\textsuperscript{130} and excessive costs\textsuperscript{131} to both the parties and the court system are but a few of the reasons that have been cited as benefits of acknowledging the validity of prelitigation contractual jury trial waiver provisions. On the other side of the scale is the constitutional right to a trial by jury. While the right to a jury trial is fundamental, that fact alone should not determine whether it can be waived contractually prior to litigation.\textsuperscript{132} This principle is especially true because there are other ways in which a party may waive this right.\textsuperscript{133} Although there are some problems inherent in allowing a waiver of a constitutional right,\textsuperscript{134} the benefits far outweigh the burdens in the case of contractual jury trial waivers.

A. Benefit: Money

Jury trials are expensive. First, jurors must be paid.\textsuperscript{135} While this fact may seem inconsequential, Congress appropriated $43.4 million in 1986 for the payment of jury fees and juror expenses.\textsuperscript{136} Although this figure accounts for both criminal and civil jury trials in the federal court system,\textsuperscript{137} it indicates that the government is spending a significant amount of money to

\begin{footnotesize}
\begin{enumerate}
\item See Cane, \textit{supra} note 128, at 18.
\item See, e.g., \textit{Trizzac Properties}, 280 Cal. Rptr. at 887; Cane, \textit{supra} note 128, at 18.
\item See, e.g., \textit{Bonfield}, 717 F. Supp. at 594 (citing a conversation during a hearing in which one of the parties to the contract mentioned cost as a possible reason for including the jury trial waiver provision); \textit{Wells Joins Trend Against Jury Trials, supra} note 117.
\item See Rusoff, \textit{supra} note 111, at 21.
\item For example, mere failure by either party to demand a jury trial can result in a waiver of the right to a jury trial. GA. CONST., art. I, § 1, ¶ XI.
\item For example, enforcement of contractual jury trial waiver provisions may create more litigation in that parties will now argue their validity. See, e.g., Telem, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 335, 837 (10th Cir. 1988). However, a possible solution to this problem is proposed later in this section.
\item Bunge, \textit{supra} note 135, at 237.
\item See \textit{id}.
\end{enumerate}
\end{footnotesize}
provide civil litigants with juries. Thus, bench trials cost less simply because there are no jurors to pay.

Second, time is money; bench trials indirectly cost less money than jury trials because they take less time. For example, in some cases, it may take several weeks simply to pick a jury. Additionally, some post-trial motions, which further delay trials, are unnecessary with a nonjury trial. Thus, by avoiding the extra time inherent in a jury trial, not only will both parties save money, but the court will also be able to hear more cases.

B. Benefit: Fairness

First, a jury may not reach a fair result in a trial when the case involves complex issues that the jurors do not fully understand. Judges are in a better position than the average juror to handle the complexity of the evidence presented in some trials.

Second, because juries tend to sympathize with certain groups of people, juries are usually more generous than judges in awarding damages. For example, large jury verdicts are becoming common in cases involving employment discrimination, and juries tend to be unsympathetic toward the banking industry. While judges are also human, they are better capable of divorcing themselves emotionally from the situation because they deal with such issues on a daily basis.

Lastly, courts should favor contractual jury trial waivers because juries are not always impartial. Specifically, a decision by a jury is sometimes based on emotion, not fact.

138. See also Rusoff, supra note 111, at 14 (noting that a state saves money when a nonjury trial is conducted because it is relieved from paying jury salaries).

139. See Cane, supra note 128, at 18; see also Wells Joins Trend Against Jury Trials, supra note 117, at C1. See generally Rusoff, supra note 111, at 14.

140. Cane, supra note 128, at 18.

141. Rusoff, supra note 111, at 14.

142. Cane, supra note 128, at 18; Anthony M. DeStefano, Ameruso Waives Jury, NEWSDAY, June 30, 1987, News, at 20 (stating that a complex defense may confuse a jury).

143. See Cane, supra note 128, at 18.

144. See Bonfield v. AAMCO Transmissions, Inc., 717 F. Supp. 589, 596 (N.D. Ill. 1989); see also Frank Swoboda, Employers Find a Tool to End Workers' Right to Sue: Arbitration, WASH. POST, Sept. 18, 1994, at H8; Rusoff, supra note 111, at 5.

145. See Arbitration to be the Rule at BofA, S.F. CHRON., June 3, 1992, at C1; Wells Joins Trend Against Jury Trials, supra note 117.

146. See Rusoff, supra note 111, at 10-14.

147. Id. at 5. Although it may be argued that our system benefits from the fact
Again, judges are not infallible, but they are legally trained and, thus, are in a better position to appreciate and adhere to their duty to be impartial. For these reasons, parties should be entitled to agree to a contractual jury trial waiver provision so that some of the uncertainties inherent in jury trials can be avoided.

C. Burden: Administration

Although many courts are joining the trend to recognize contractual jury trial waivers, there is still a reluctance by some courts to enforce these provisions.\textsuperscript{148} Courts attach a higher standard by which to judge contractual jury trial waiver provisions as opposed to other contract provisions because the right to a jury trial is a constitutional right.\textsuperscript{149} For example, a party must knowingly and voluntarily agree to a prelitigation jury trial waiver for such a waiver to be found valid.\textsuperscript{150} However, courts that recognize such provisions disagree on the proper definition of "knowing and voluntary."

1. Court Imposed Requirements

According to the California Court of Appeals, not all jury trial waiver provisions will be enforced.\textsuperscript{151} In Trizec Properties, Inc. v. Superior Court, the court held that the waiver must be clear and conspicuous and its language must be unambiguous and unequivocal to constitute a knowing and voluntary waiver.\textsuperscript{152} The court specifically noted that a waiver would not be enforced against a party who unknowingly signs a document including a jury trial waiver provision.\textsuperscript{153}


\textsuperscript{150} Some courts apply "knowing and voluntary" as the standard, and others apply a "knowing and intentional" standard. \textit{National Equip.}, 565 F.2d at 258 (knowing and intentional standard); Reggie Packing Co. v. Lazere Fin. Corp., 671 F. Supp. 571, 573-74 (N.D. Ill. 1987) (knowing and voluntary standard).


\textsuperscript{152} \textit{Id. But see} Reggie Packing Co. v. Lazere Fin. Corp., 671 F. Supp. 571, 574 (N.D. Ill. 1987) ("Only in extreme cases will the courts invalidate a waiver clause due to its inconspicuous location in a contract.").

\textsuperscript{153} \textit{Trizec Properties}, 280 Cal. Rptr. at 887.
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In *Howard v. Bank South, N.A.*, the Georgia Court of Appeals held that the jury trial waiver provision at issue could not have been waived knowingly and voluntarily.\(^{154}\) The court of appeals reasoned that Howard could not have foreseen the circumstances of a future claim at the time he waived the right.\(^{155}\) Thus, the court refused to enforce the waiver.\(^{156}\)

Moreover, some courts have stated that unequal bargaining power will invalidate the knowing and voluntary nature of the waiver. For example, the Second Circuit Court of Appeals refused to enforce a jury trial waiver provision in *National Equipment Rental, Ltd. v. Hendrix*.\(^{157}\) Although the court recognized the validity of jury trial waiver provisions, the court noted that a "gross inequality in bargaining power suggests... that the asserted waiver was neither knowing nor intentional" and, thus, unenforceable.\(^{158}\)

In contrast, the court in *ARH Distributors, Inc. v. ITT Commercial Financial Corp.*\(^{159}\) held that parties are bound by what they sign. In *ARH Distributors*, the party seeking to avoid the waiver claimed that he had to sign a large number of documents at once.\(^{160}\) The court rejected this defense, even when the provision was a jury trial waiver, by stating:

Such an argument cuts no ice in this court, even for waiver of as important a right as the right to a jury trial in a civil case. "Just as courts do not grant relief to parties who fail to read contracts at all, so too should they be circumspect in helping any but the most unsophisticated parties whose cases rely on their failure to read well."\(^{161}\)

2. *The Need for Uniformity*

From the above discussion, it is apparent that there is no uniform standard by which to judge prelitigation contractual jury trial waiver provisions. Thus, were Georgia to adopt a rule recognizing the validity of jury trial waivers, by which standard

\(^{155}\) Id.
\(^{156}\) Id.
\(^{157}\) 565 F.2d 255, 258 (2d Cir. 1977).
\(^{158}\) Id.
\(^{160}\) Id. at *2.
\(^{161}\) Id. (citation omitted).
should Georgia courts judge the particular contract provision to confirm its validity? Furthermore, who should decide the validity of the jury trial waiver when one party alleges fraud in the inducement of the contract, a judge or a jury? These are a few of the problems that courts face when determining whether to enforce a particular jury trial waiver. However, if Georgia embraces a uniform standard by which to judge such provisions, administrability would cease to pose a burden.

III. A PROPOSED STANDARD

The author of this Comment proposes that Georgia adopt a test that combines the standard used in Alabama with a standard used by the federal courts. Under this composite test, a jury trial waiver provision will be valid only if it is shown that: (1) the waiver is conspicuous; (2) there is equal bargaining power between the parties to the contract; and (3) the claim directly relates to and arises out of the terms of the contract.

Under this test, courts would be able to enforce prelitigation contractual jury trial waivers in many cases, while preserving the ability to prohibit the provision when any of these elements is missing. The best example of when courts should enforce jury trial waiver provisions is in the purely commercial setting. As Chief Justice Hunt noted in his dissent in American Southern Financial, if a court is concerned with a situation in which parties are not on "equal footing," there are traditional contract theories under which the provision can be invalidated.

However, in addition to the traditional contract theories of non-

162. Fraud in the inducement of the contract was one issue raised against enforcement of the jury trial waiver provision in Brief for Respondent Norris Howard at 14, Bank South, N.A. v. Howard, 444 S.E.2d 799 (Ga. 1994) (No. S93C1658).
163. Mall, Inc. v. Robbins, 412 So. 2d 1197, 1199 (Ala. 1982) (stating that contractual jury trial waiver agreements will be upheld when the parties have equal bargaining power as long as the "controversies [are] directly related to and arising out of" the contract); see also Manderson & Assocs., Inc. v. Gore, 389 S.E.2d 251, 258 (Ga. Ct. App. 1989) (enforcing contract under Alabama law).
165. See, e.g., Rodenburg v. Kaufman, 320 F.2d 679, 683-84 (D.C. Cir. 1963) (holding that jury trial was not waived on claim for personal injuries because claim did not arise out of the lease even though lease contained jury trial waiver provision).
166. See American S. Fin. Ltd. v. Yang, 448 S.E.2d 450 (Ga. 1994) (Hunt, C.J., dissenting).
167. Id. at 450 (citing fraud, mistake, misrepresentation, undue influence, and contracts of adhesion).
enforcement, courts using the proposed test will have the means to avoid an unfair result without having to make a widespread ban on all prelitigation contractual jury trial waiver provisions.

In response to the issue of how fraud in the inducement of the contract affects the jury trial waiver provision, the author proposes that Georgia courts should follow the Tenth Circuit Court of Appeals decision in *Telum, Inc. v. E.F. Hutton Credit Corp.*[168] In *Telum*, the contract at issue involved an equipment lease agreement.[169] The contract provided that "[t]heesee waives all right to trial by jury in any litigation arising herefrom or in relation hereto."[170]

Because there was no case law on this issue, the Tenth Circuit compared jury trial waiver provisions and arbitration provisions.[171] The court noted that fraud in the inducement of an arbitration provision will affect the enforcement of the provision, whereas fraud in the inducement of an entire contract will not.[172] Georgia should adopt this approach to the issue of how fraud affects jury trial waiver provisions because, as Part I of this Comment illustrates, jury trial waiver provisions are analogous to arbitration provisions.[173]

In sum, courts face problems in interpreting such contractual provisions. However, by adopting the standard proposed by the author, courts will have a guide by which to determine the enforceability of a particular jury trial waiver provision. Additionally, parties entering into contracts will have a guide to use in drafting the particular contract.[174]

**CONCLUSION**

As our society becomes more advanced, everyday business becomes more complex. Additionally, more people are becoming

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169. *Id.* at 836.
170. *Id.* at 837.
171. *Id.* at 837-38.
172. *Id.*
173. See *supra* text accompanying notes 111-19.
174. For example, under the proposed test, parties to a contract desiring to waive their right to a trial by jury would want to do the following to ensure enforcement of the provision: (1) set the provision apart from the rest of the contract using clear and unambiguous language; (2) reflect in the contract that there was equal bargaining power; for example, show the consideration given for the particular jury trial waiver provision; and (3) state specifically under what circumstances the jury trial waiver provision will apply.
specialists in certain fields. When litigation arises under these circumstances, the question for contracting parties becomes who is more capable of deciding these legal issues—a judge or a jury.

Another problem facing our court system today, which is of concern to contracting parties, is the increasing cost of litigation. Not only do companies who sue and get sued have to pay enormous legal fees, the loser is often slapped with a large jury award. Because businesses exist to make money, corporations spread these costs to the consumer. Thus, in cases in which juries are sympathetic and award large amounts of money to the “poor plaintiff,” the jury, oftentimes, ends up hurting those doing business with the corporation rather than the corporation itself.

Lastly, the court system is adversely affected by lengthy jury trials involving complex litigation. Because jury trials can take longer when the issues are complex, the court is unable to hear as many cases. Consequently, parties are forced to postpone judicial resolution of their cases until the jury trial docket clears.

The court system has begun to recognize alternative methods of dispute resolution,¹⁷⁵ and Georgia should reconsider its decision in Bank South because it is a move away from allowing parties to voluntarily choose alternatives to a jury trial. Neither the Constitution of Georgia nor the Official Code of Georgia prohibit prelitigation contractual jury trial waiver provisions. Thus, the majority in Bank South erred in refusing to enforce the jury trial waiver provision. Because bench trials offer parties every protection under the legal system that a jury trial offers without the problems associated with a jury trial, parties should have the freedom to contractually waive the right to a jury trial. Admittedly, there are some problems associated with allowing contracts of this nature; however, the benefits of allowing jury trial waivers outweigh the burdens associated with such waivers.

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¹⁷⁵. E.g., arbitration and mediation.