



See you in Court!? Arbitration Agreements and Jury Waivers

Presented by



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Arbitration Agreements

Federal Arbitration Act

Arbitration Agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *9 U.S.C. §2.*

Texas Arbitration Act

(a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that:

(1) exists at the time of the agreement; or

(2) arises between the parties after the date of the agreement.

(b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract. *Tex. Civ. Prac. & Rem. Code § 171.001.*

The Federal Arbitration Act

“[H]ostility towards arbitration that prompted the FAA had manifested itself in ‘a great variety’ of ‘devices and formulas’ declaring arbitration against public policy.”

- *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011).

FAA vs. State Law

The FAA “reflects an emphatic federal policy in favor of arbitral dispute resolution,” and States are not at liberty to interfere with this policy, even in furtherance of their own legitimate public policies.

- *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

FAA vs. State Law

- *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (FAA pre-empts state law granting state commissioner exclusive jurisdiction to decide certain issues).
- *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 683 (1996) (FAA pre-empts notice requirements under state law).
- *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (FAA pre-empts state law requiring judicial resolution of claims involving punitive damages).
- *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (FAA pre-empts state-law requirement litigants be provided a judicial forum for wage disputes).
- *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (FAA pre-empts state financial investment statute's prohibition of arbitration of claims brought under that statute).

FAA vs. State Law

- DIRECTV service agreements with its customers contained an arbitration provision with a class-action waiver expressly governed by the FAA, but also provide:

“[i]f . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration provision] is unenforceable.”
- California *Discover Bank* rule renders class arbitration waivers in consumer contracts unenforceable, BUT... SCOTUS found it is preempted by the FAA.

DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015)

FAA vs. State Law

- Agreement is Enforceable!
- “The law of your state” could only mean “valid state law.”
- The “law of your state” language should be interpreted in light of the *Discover Bank* rule’s subsequent invalidation by *Concepcion*.
- Nothing in the Court of Appeal’s decision suggests that a California court would interpret the “law of your state” language the same way in any other context.
- “The view that state law retains independent force even after it has been authoritatively invalidated by [the U.S. Supreme Court] is one courts are unlikely to accept as a general matter and to apply in other contexts.”

DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).

FAA vs. Federal Law

- The FAA requires courts to enforce arbitration agreements according to their terms.
- “That is the case even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’”

CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012)
(quoting *Shearson/American Express Inc., v. McMahon*, 482 U.S. 220, 226 (1987)).

Class Waivers Have Withstood Attacks

And consistent with [the FAA], courts must “rigorously enforce” arbitration agreements according to their terms, including terms that “specify with whom the parties choose to arbitrate their disputes,” and “the rules under which that arbitration will be conducted.”

Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (citations omitted).

FAA vs. NLRA

The NLRB continues to apply its *DR Horton* analysis, finding that class-action waivers violate employees' rights to engage in concerted activities under Section 7 of the NLRA.



FAA vs. NLRA

- The FAA does not yield to the NLRA
- “[T]he effect of [the NLRB’s] interpretation is to disfavor arbitration” and “requiring a class mechanism is an actual impediment to arbitration and violates the FAA.”
- “Neither the NLRA's statutory text nor its legislative history contains a congressional command against the application of the FAA,” and such a congressional command could also not be inferred.
- Class-action waivers in FAA-governed arbitration agreements do not violate Section 7 rights under the NLRA.

DR Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).

FAA vs. NLRA

- On May 26, 2016, the Seventh Circuit became the first U.S. Circuit Court of Appeals to accept the NLRB's position.
- Class, collective or representative proceedings are “concerted activity” and a protected right under Section 7 of the NLRA.
- Since the arbitration agreement required employees to relinquish a right that the NLRB had declared to be substantive, it was not enforceable under the FAA.

Lewis v. Epic Sys. Corp., 2016 U.S. App. LEXIS 9638 (7th Cir. May 26, 2016).

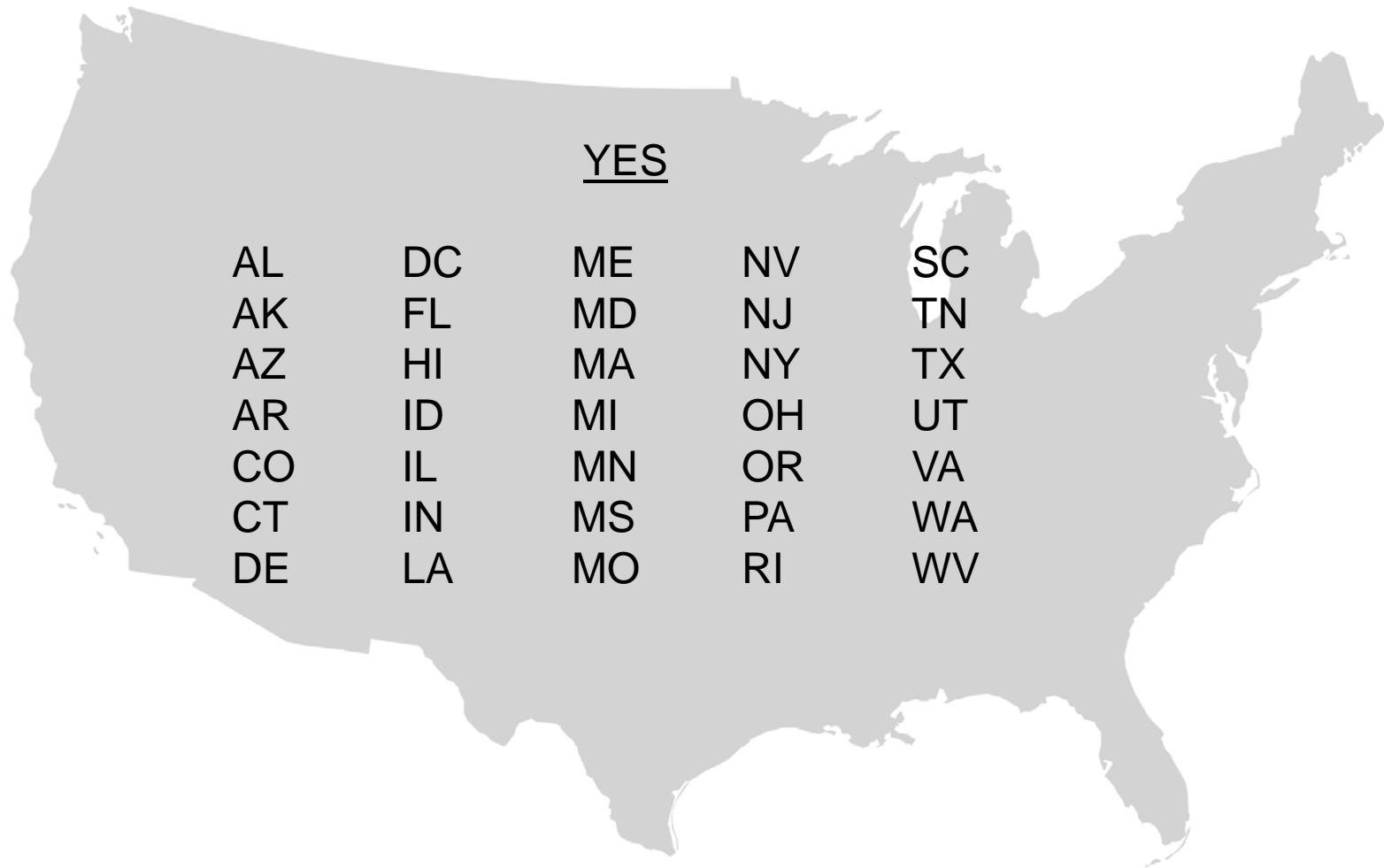
FAA vs. NLRA



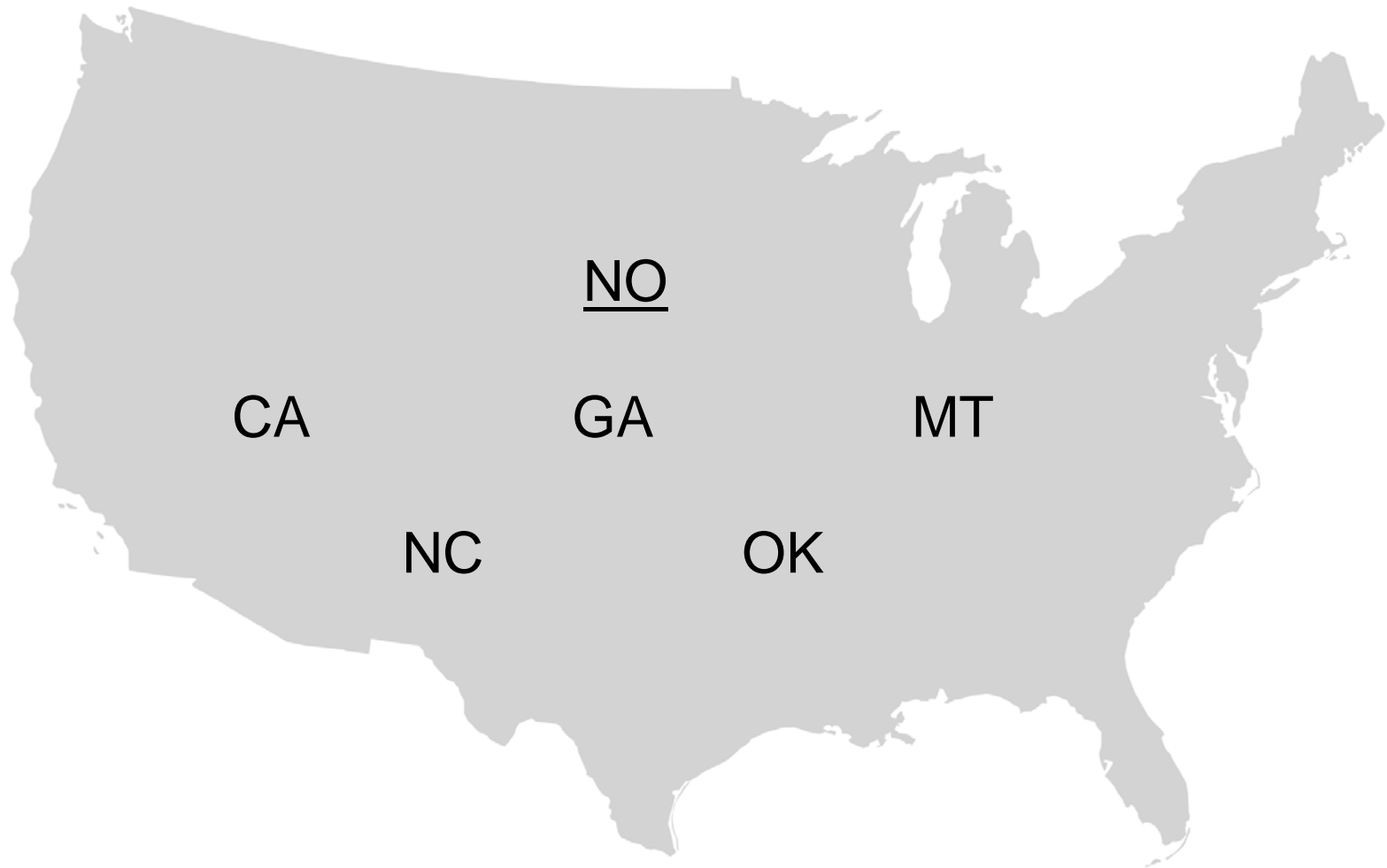
Jury Waivers



Are Jury Waivers Enforceable?



Are Jury Waivers Enforceable?



CA

NO

GA

MT

NC

OK

Are Jury Waivers Enforceable?

UNCLEAR

IA	NH	VT
KS	NM	WI
KY	ND	WY
NE	SD	

Jury Waivers - Federal Law

“As the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.”

Aetna Ins. Co. v. Kennedy ex rel. Bogash, 301 U.S. 389, 393 (1937).

Jury Waivers - Federal Law

Federal Standard

- **Majority View:** Knowing and Voluntary.
- **Seventh Circuit:** No special showing necessary; they should be enforced in line with contract law generally and in harmony with enforcement of arbitration agreements. *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 992 (7th Cir. 2008).
- **Ninth Circuit:** “Knowing and voluntary” standard—is a federal constitutional minimum. Federal courts sitting in diversity must apply the relevant state law to evaluate the validity of a pre-dispute jury trial waiver when that law is more protective than federal law. *Cnty. of Orange v. United States Dist. Court*, 784 F.3d 520, 531-32 (9th Cir. 2015).

Jury Waivers - Federal Law

Burden of Proof

- **Majority view:** The party seeking enforcement of the waiver has the burden of showing that the consent of the party making the waiver was knowing, voluntary, and intelligent.
- But ... a circuit split exists. See *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985) (party objecting to the jury waiver provision bears the burden of demonstrating that consent was not knowing and voluntary).

Jury Waivers - Federal Law

Factors:

- Gross disparity in bargaining power between the parties;
- The business or professional experience of the party opposing the waiver;
- Whether the opposing party had an opportunity to negotiate contract terms;
- Whether the clause containing the waiver was inconspicuous.

Jury Waivers – Texas Law

- In Texas, there is no presumption against contractual jury waivers.
- The party seeking enforcement does not bear the burden to prove that the opposing party agreed to waive its constitutional right to a jury trial knowingly, voluntarily, and with full awareness of the legal consequences.
- A conspicuous jury waiver in an agreement shifts the burden to the opposing party to rebut that the waiver was made voluntarily, knowingly, and with full awareness of the legal consequences.

In re Bank of Am., N.A., 278 S.W.3d 342 (Tex. 2009).

Jury Waivers – Texas Law

- Employee claimed he was coerced into signing jury waiver because employer threatened to fire employee if he did not sign
- Trial Court and Court of Appeals refused to enforce waiver
- Texas Supreme Court reversed:

“An employer’s threat to exercise its legal right cannot amount to coercion that invalidates a contract.”

In re Frank Kent Motor Co., 361 S.W.3d 628 (Tex. 2012).



QUESTIONS?



THANK YOU!