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## New Year and New Changes to SBA Lending Regulations

*Edward Haddock*

## Lock the Vault, Lock the Doors, Lock Your Network

*Todd Nielson*

## What is Level 2 and Level 3 Processing?

*Karla Wilson*

## Arkansas Disallows Pre-Dispute Jury Waivers

*Mary Tipton-Thalheimer*

## How the Evolution of the Employee Benefits Industry Results in Big Wins for HR

*Derek Owens*

[2018 BSA/AML  
Conference](#)

[2018 CFO  
Conference](#)

[2017  
Advocacy Overview  
Page 20](#)

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# Arkansas Disallows Pre-Dispute Jury Waivers

BY MARY TIPTON-THALHEIMER

To avoid the time, expense, and uncertainty of submitting a claim to a jury, banks commonly include provisions in their loan documents that conspicuously state the parties to the loan documents waive their right to a jury trial for any claims arising out of or related to the loan documents. The majority of courts all over the country have upheld such jury-waiver provisions.

On December 7, 2017, Arkansas adopted the minority view when the Arkansas Supreme Court (the “Court”) delivered its opinion in *Tilley v. Malvern National Bank*.<sup>2</sup>

• THE AUTHOR •



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In July 2010, Kenneth W. Tilley and Malvern National Bank (the “Bank”) entered into a loan agreement. The loan agreement included a jury-waiver provision, but when the Bank filed a foreclosure action against Mr. Tilley, he demanded a jury trial on his counterclaims against the Bank and a former bank employee. The trial court and the Arkansas Court of Appeals found that, pursuant to the jury-waiver provision, Mr. Tilley waived his right to a jury trial. The Court found otherwise.

The Court examined the counterclaims raised by Mr. Tilley and concluded that because his counterclaims were historically submitted to a jury and the sole remedy sought was monetary damages, his claims were the type that should be submitted to a jury as a legal matter. The Bank asserted that even if Mr. Tilley’s counterclaims were the type that should be submitted to a jury, he waived the right to a jury trial by executing the loan agreement, which included a jury-waiver provision. Mr. Tilley asserted that, notwithstanding the jury-waiver provision in the loan agreement, the Arkansas Constitution provides that the right to a jury trial “shall remain inviolate.”

While the Arkansas Constitution does state “the right of trial by jury shall remain inviolate,” it also states “a jury trial may be waived by the parties in all cases in the manner prescribed by law.” The Court interpreted “in the manner prescribed by law” to mean any waiver must be governed by Arkansas statutes and the Arkansas Rules of Civil Procedure. For example, as noted by the Court, arbitration agreements are enforceable because the Arkansas Arbitration Act has been codified in Arkansas Code Annotated §§ 16-108-201 *et seq.* Currently, no Arkansas statutes or rules of civil procedure expressly

provide for pre-dispute waivers of the right to a jury trial. Additionally, the Arkansas Rules of Civil Procedure that do address waiver of a jury trial indicate that the waiver may only take place after a party makes a jury demand. Accordingly, a narrow majority of the Court held that contractual jury waivers are not enforceable under the Arkansas Constitution.

As a result of the Court’s ruling in *Tilley v. Malvern National Bank*, banks can no longer rely on the jury-waiver provisions included in their loan documents to shield them from the possibility of a jury trial. Because a foreclosure action is an equitable action, the *Tilley* ruling does not affect a bank’s right to submit its foreclosure claim to the judge instead of a jury. However, if the bank also has legal claims or the borrower has legal counterclaims against the bank in connection with the subject loan, the borrower can demand that the legal claims be submitted to a jury regardless of whether the borrower executed an agreement that includes a jury-waiver provision. Therefore, the only way for Arkansas banks to ensure claims arising out of or related to their loan documents are not submitted to a jury is to include an arbitration clause in the loan documents.

While inclusion of an arbitration clauses in loan documents is currently the only way to absolutely avoid a jury trial in Arkansas, that might not always be the case. As noted by Justice Wood in her dissenting opinion, the Arkansas General Assembly has the authority to determine how a party may waive his or her right to a jury trial. Thus, the Arkansas General Assembly could always enact a statute that explicitly states parties to a contract may waive the right to a jury trial. Additionally, for contracts with out-of-state borrowers, the loan documents could include a choice of law provision designating the other state’s law as the governing law. Thus, despite the *Tilley* ruling, banks should not rush to strike jury-waiver provisions from their loan documents.

<sup>1</sup>Prior to December of 2017, only California and Georgia found pre-dispute jury-waiver provisions unenforceable. See *Grafton Partners L.P. v. Superior Court*, 116 P.3d 479 (Cal. 2005); *Bank South, N.A. v. Howard*, 264 Ga. 339, 444 S.E.2d 799 (1994).

<sup>2</sup>*Tilley v. Malvern Nat'l Bank*, 2017 Ark. 343.

<sup>3</sup>*Id.* at 2.

<sup>4</sup>*Id.* at 3.

<sup>5</sup>*Id.* at 4.

<sup>6</sup>*Id.* at 2.

<sup>7</sup>*Tilley*, 2017 Ark. 343, at 8.

<sup>8</sup>*Id.* at 9.

<sup>9</sup>*Id.* at 10.

<sup>10</sup>Ark. Const. art. 2, § 7.

<sup>11</sup>*Tilley*, 2017 Ark. 343, at 13–14

<sup>12</sup>*Id.* at 14.

<sup>13</sup>*Id.* at 15.

<sup>14</sup>*Id.* Justices Baker delivered the opinion, and Justices Wynne and Hart and Special Justice Warren joined. Chief Justice Kemp did not participate. Justices Goodson and Wood each authored a dissenting opinion, and Justice Womack joined Justice Wood's dissenting opinion.

<sup>15</sup>See *Tilley v. Malvern Nat'l Bank*, 2017 Ark. 343, at 7.

<sup>16</sup>*Id.* at 20.



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