Arbitration Agreements in Missouri: The Show Me (Consideration) State

By: Daniel P. O’Donnell, Jr. 1

Perhaps no area of Missouri employment law has caused as much conflict within the Missouri Supreme Court recently as in the area of employment arbitration agreements. The last two decisions addressing the issue, Baker v. Bristol Care, Inc. 2 and State ex rel Hewitt v. Kerr 3, generated a total of seven separate opinions among the Supreme Court Justices. Among the issues of disagreement include whether at-will employment constitutes consideration for an arbitration agreement, whether a writ of mandamus is the appropriate mechanism to review a trial court decision granting a motion to compel arbitration, and whether arbitration procedures should be supplied where such procedures are absent or unconscionable. Adding to the confusion, numerous recent lower court decisions have further muddied the contours of what is necessary to draft and successfully enforce arbitration agreements between employers and employees.

First, this article will briefly address background principles regarding the enforceability of arbitration agreements including a history of Missouri case law on the topic. Second, this article will discuss several recent court decisions beginning with Morrow v. Hallmark Cards, Inc., 4 “the seminal case addressing . . . contract elements in the context of enforceability of an arbitration provision against at-will employees.” 5 Third, the article will provide practice tips in both drafting enforceable arbitration agreements in Missouri and successfully enforcing those agreements in Missouri courts based on these recent decisions. 6

Though Missouri courts continue to scrutinize the enforceability of arbitration agreements in the employment context, there are reasons for optimism for those seeking to enforce arbitration agreements under current law. For example, since the Missouri Supreme Court decided Baker, at least two opinions have enforced arbitration agreements in the employment arena, State ex rel Hewitt v. Kerr 7 and Dotson v. Dillard’s, Inc. 8 At the same time,

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2 450 S.W.3d 770 (Mo. 2014). In a nutshell, Morrow held that an at-will employee’s continued employment does not supply consideration necessary to form an arbitration agreement. In the wake of Morrow, arbitration agreements have been closely scrutinized in Missouri appellate courts. Ultimately, in 2014, a majority of the Missouri Supreme Court adopted Morrow’s analysis in Baker v. Bristol Care, Inc.

3 461 S.W.3d 798 (Mo. 2015).

4 273 S.W.3d 15 (Mo. App. 2008).


6 This article focuses on arbitration agreements between individual employees and employers, rather than collective bargaining agreements between employers and unions. For a helpful discussion of the latter, please see Jerome A. Diekemper, Alternative Dispute Resolution, in Missouri Employment Discrimination, §§ 21.5-21.6 (2d ed. 2008).

7 461 S.W.3d 798 (Mo. 2015).
however, several recent Missouri court opinions have continued the trend of finding that no arbitration exists between the employer and employee due to lacking the essential elements of a contract under Missouri law (offer, acceptance, and consideration; usually, finding that consideration is lacking).

**Background Regarding the Enforceability of Arbitration Agreements**

The Federal Arbitration Act ("FAA") governs arbitration in contracts that involve interstate commerce, which, practically speaking, covers virtually every arbitration agreement between an employer and employee.9

The FAA provides that any written agreements which submit controversies to arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”10 In other words, the FAA makes arbitration clauses as enforceable as any other contract provision and subject to the same defenses as applied to other contracts.11 Congress enacted the FAA “to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined . . . by state courts or legislatures.”12 The Supreme Court has noted that the FAA “establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution”13 and courts must “rigorously enforce” arbitration agreements according to their terms.14

Section 2’s savings clause permits agreements to be invalidated by “generally applicable contract defenses,” but not by defenses that apply only to arbitration or derive their meaning from it.

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9 9 U.S.C. § 2. The phrase “involving commerce” is “broad” and is the “functional equivalent” of the phrase, “affecting commerce,” a phrase that “signals Congress’ intent to exercise its Commerce Clause powers to the full.” Allied—Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74 (1995). The United States Supreme Court has called for “broad interpretation” of the phrase to facilitate the FAA’s “basic purpose [of putting] arbitration provisions on the same footing as a contract’s other terms.” Id. at 275. Missouri courts have noted that “Dobson’s effect was to extend the FAA’s reach even to intrastate activities of a very small scale if those activities might affect commerce when combined with similar small scale activities.” Paetzold v. Am. Sterling Corp., 247 S.W.3d 69, 73 (Mo. App. 2008) (emphasis in original). Indeed, in his concurring opinion, Judge Hollinger noted that “[t]he all encompassing interpretation and application of the Federal Arbitration Act through the Commerce Clause is in the process of engulfing the original concept of federalism upon which our system of government was founded. At oral argument, counsel for the bank stated that there would be some situations that would not potentially be covered by federal rather than state law regarding arbitration. Yet he couldn’t think of any. Nor can I.” Id. at 75 (Hollinger, J., concurring).


11 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (“The purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.”).


from the fact that an agreement to arbitrate is at issue. Under the Supremacy Clause, the FAA preempts and invalidates any state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” embodied in the FAA or that takes its “meaning precisely from the fact that a contract to arbitrate is at issue.” Thus, in Concepcion, the Supreme Court invalidated a law conditioning enforcement of arbitration on the availability of class procedure. Similarly, in Missouri the notice of arbitration provision required by the Missouri Uniform Arbitration Act (“MUAA”) is preempted by the FAA.

On issues of contract formation, however, courts look to state law contract principles to determine whether a contract was formed even when the FAA applies (as it usually does). Thus, so long as a court is utilizing the usual state law principles governing the formation of contracts in general, the FAA will not displace such principles. Under Missouri law, a contract is formed with the “traditional elements of offer, acceptance, and consideration.”

Missouri Decisions Regarding the Enforceability of Arbitration Agreements Between Employers and Employees Prior to Morrow

In 1991, the Supreme Court determined, in Gilmer v. Interstate/Johnson Lane Corp., that civil rights claims under the Age Discrimination in Employment Act (“ADEA”) are arbitrable under the FAA. Relying on Gilmer, in 1992, the Missouri Court of Appeals held that an employee’s age discrimination claims under the Missouri Human Rights Act (“MHRA”) were subject to arbitration.

In 2001, the Missouri Court of Appeals, in McIntosh v. Tenet Health Sys. Hosp., Inc., enforced an arbitration clause in an employee’s signed acknowledgement form. In McIntosh, 48 S.W.3d 85 (Mo. App. 2001), "Under the supremacy clause, we are obliged to apply federal law when reviewing an action under the FAA." Id. at 29.
plaintiff worked for the defendant company as a drug counselor. At the beginning of his employment, plaintiff was issued an employee handbook which included a copy of the employer’s “Open Door Policy and Fair Treatment Process.” As a condition of employment, plaintiff signed a form acknowledging receipt of the employee handbook which stated, in pertinent part, “I hereby voluntarily agree to use the Company’s Fair Treatment Process and to submit to final and binding arbitration any and all claims that are related in any way to my employment . . . and that, by agreeing to use arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial.”

Following plaintiff’s termination of employment, plaintiff filed suit for wrongful termination and breach of contract. He also requested the trial court compel arbitration. The company agreed to arbitrate plaintiff’s claim and plaintiff submitted a demand for arbitration. Later, however, plaintiff withdrew his arbitration demand “because of the long delay in establishing the arbitration process.” The company moved to stay the court proceedings pending arbitration. The trial court denied the company’s motion.

The Court of Appeals observed that the “Fair Treatment Process” was set forth in an employee handbook. It then noted that handbooks are generally not considered contracts “because they normally lack the traditional prerequisites of a contract.” However, the Court of Appeals held that plaintiff’s signed acknowledgement form included an arbitration clause, which “contemplates a mutual agreement between the parties to submit to the terms of the FTP and thus constitutes an enforceable contract.” Accordingly, the Court of Appeals reversed the trial court’s decision and held that arbitration should be compelled.

What is noteworthy about Missouri court decisions prior to Morrow, is that those decisions do not substantively discuss contract formation (i.e., offer, acceptance, and consideration) though, in each case, the court very well could have still found agreements had been formed. Instead, the cases seemed obliged to enforce the arbitration agreements under the FAA. Beginning with Morrow, however, the substance of Missouri opinions on the enforceability of arbitration agreements in the employment context changed dramatically and began extensively discussing the elements of contract formation.

The Morrow Case and Subsequent Court of Appeals Decisions

In Morrow, the plaintiff had been working for Hallmark for nearly 20 years when the company unilaterally imposed a dispute resolution program (including arbitration) covering all

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24 *Id.* at 87.
25 *Id.*
26 *Id.* at 89.
27 *Id.*
employees and all claims against the company. Hallmark notified its employees that anyone who continued to work for the company after the effective date of the new program would be deemed to have agreed to be bound by it. Ms. Morrow continued to work for Hallmark and, when she later filed a lawsuit against Hallmark arising out of her termination, the trial court compelled her to arbitrate that claim.29

After two unsuccessful attempts to obtain writs to compel the trial court to hear the matter, Ms. Morrow ultimately invoked arbitration approximately eight months after arbitration had been compelled by the trial court.30 The arbitrator then dismissed Ms. Morrow’s claims for lack of timeliness in invoking arbitration.31 Following the arbitrator’s decision, Ms. Morrow sought to vacate what she claimed was an inadequate award on the ground that there was no consideration for her promise to arbitrate. The court of appeals agreed.52

The question before the court of appeals was whether Ms. Morrow’s continued employment – and nothing more – could supply both the acceptance and the consideration needed to make a binding agreement to arbitrate. Morrow stresses that the only reason a consideration analysis was needed was that there were no contemporaneous promises by the employer in exchange for the employee’s arbitration promise.33 Even in the absence of any bargained-for exchange of employment-related promises from Hallmark, Morrow acknowledges there would have been consideration for the employee’s arbitration promise if Hallmark had made an arbitration promise in return. Hallmark did not promise to arbitrate its claims against employees.34 Even the “promise by Hallmark to participate in arbitrating employee claims or in paying arbitrator fees” was not sufficient to supply the needed consideration because Hallmark had reserved the right to make changes — with no prior notice — to any and all aspects of the new policy.35

Because Hallmark made no arbitration-related promises to Ms. Morrow that were not illusory, and because it had made no other promises to Ms. Morrow contemporaneous with and in exchange for her arbitration promise, Morrow turned on a single question: whether the mere continuation of employment — with no new benefit to the employee or detriment to the employer — supplied consideration to make the employee’s arbitration promise binding.36 The court held that it did not.

29 273 S.W.3d at 20-21.
30 Id. at 21.
31 Id.
32 Morrow, 273 S.W.3d at 27.
33 Id. at 24-25 (“When a contract is not bilateral (when promises do not flow both ways), there must be good and sufficient consideration flowing from the non-promising party to support the contract.”).
34 Id. at 25.
35 Id.
36 Id. at 27.
Though its holding that continued at-will employment does not supply consideration to form an arbitration agreement appears to be a minority view\(^\text{37}\) and conflicts with Eighth Circuit precedent\(^\text{38}\), following Morrow, the Missouri Court of Appeals decided a plethora of cases.
involving arbitration agreements in the employment context and, almost universally, refused to enforce the purported arbitration agreements finding such agreements lacking one or more of the required contractual elements of offer, acceptance, and consideration.

For example, in *Frye v. Speedway Chevrolet Cadillac*, the court of appeals rejected the employer’s argument that continued at-will employment provided consideration. The court also noted that plaintiff’s signature (which plaintiff denied making) does not supply, or replace the need for, consideration. The purported agreement did not contain mutual promises to arbitrate because the employer retained the unilateral right to amend the arbitration agreement, as in *Morrow*. Similarly, in *Kunzie v. Jack-In-The-Box, Inc.*, the court of appeals held that mere continued at-will employment is not sufficient to constitute acceptance of an employer imposed arbitration program. The court of appeals refused to enforce arbitration agreements in the following cases:

- *Baier v. Darden Restaurants, Inc.*, 420 S.W. 3d 733 (Mo. App. W.D. 2014), court finds that no arbitration agreement was formed, lacking offer and acceptance, because the purported arbitration agreement was not signed by the employer though it contained a signature line for the employer to sign;

- *Johnson v. Vatterott Educational Centers, Inc.*, 410 S.W. 3d 735 (Mo. App. W.D. 2013), court finds no arbitration agreement because the purported arbitration agreement was contained within an employee handbook which was subject to change by the employer at any time and which specifically stated that it created no contractual rights;

- *Sniezek v. Kansas City Chiefs Football Club*, 402 S.W. 3d 580 (Mo. App. W.D. 2013), court finds no arbitration agreement because the purported arbitration agreement did not contain consideration;

- *Marzette v. Anheuser-Busch, Inc.*, 371 S.W. 3d 49 (Mo. App. 2012), court finds no arbitration agreement based upon arbitration clause in employment application because it lacked consideration;

- *Katz v. Anheuser-Busch, Inc.*, court finds no arbitration agreement based on two purported agreements because one such agreement explicitly terminated and the other was never accepted by the employee;

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39 321 S.W.3d 429 (Mo. App. 2010).

40 330 S.W.3d 476 (Mo. App. 2010).

41 347 S.W.3d 533 (Mo. App. 2011) (held arbitration agreement was terminated by its own terms upon a “change in control” and plaintiff did not accept A-B’s dispute resolution program because, under *Kunzie*, continued employment is not acceptance).
• *Whitworth v. McBride & Sons, Inc.*, 344 S.W. 3d 730 (Mo. App. W.D. 2011), in a complicated case including multiple purported agreements, court finds no arbitration agreement because it lacked mutual assent (offer and acceptance) and consideration.

Notably, in all of these cases, the courts engaged in a detailed analysis of contract formation and ultimately held that an arbitration agreement was not formed because one or more required elements were missing. None of the courts found that an arbitration agreement between employer and employee was unconscionable or subject to another generally applicable contract defense. It did not even get to that part of the analysis.

**In 2014, the Missouri Supreme Court Issues a 4-3 Decision in Baker**

In 2014, the Missouri Supreme Court addressed the issue of contract formation related to arbitration agreements in the employment context for the first time since *Morrow* had been decided by the court of appeals. In *Baker v. Bristol Care, Inc.*, the majority of the Missouri Supreme Court, in an opinion authored by Judge Richard B. Teitelman, adopted the analysis employed by *Morrow* and subsequent appellate cases to hold that continued at-will employment is not consideration to create an enforceable contract. The Missouri Supreme Court further held that the employer’s promise to arbitrate was illusory because the employer retained the unilateral right to amend the agreement and avoid its obligations. The comprehensive dissenting opinion by Judge Paul C. Wilson vigorously disagreed with the majority’s conclusions in several significant respects.

**Facts and Procedural History**

In *Baker*, plaintiff was a former employee of Bristol. Baker and Bristol had contemporaneously signed an employment agreement and arbitration agreement at the time Baker received a promotion from Bristol including a change in pay from hourly to salaried and a new title of Manager.

After Baker attempted to bring a class action against Bristol for allegedly unpaid overtime, Bristol moved to compel arbitration. Bristol argued that, pursuant to a delegation clause in the arbitration agreement, the arbitrator (and not a court) had exclusive authority to resolve any dispute relating to the arbitration agreement’s enforceability or validity. In the alternative, Bristol also contended the arbitration agreement was an enforceable contract because it contained the elements of offer, acceptance, and consideration. With respect to consideration, Bristol argued the arbitration agreement contained two sources: (1) Baker’s promotion, continued employment, and attendant benefits; and (2) Bristol’s promise to arbitrate its claims with Baker and Bristol’s promise to pay the costs of arbitration. The trial court denied Bristol’s motion and Bristol appealed.

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42 450 S.W.3d 770 (Mo. 2014).

43 *Id.* at 775.
**The Majority Opinion**

The Missouri Supreme Court first addressed Bristol’s argument under the delegation clause, which provided “The arbitrator has exclusive authority to resolve any dispute relating to applicability or enforceability of this Agreement.” Thus, Bristol argued that under *Rent-A-Center*, the delegation clause must be enforced and the arbitrator had to decide any issues of arbitrability. The court acknowledged *Rent-A-Center*’s holding but distinguished the language in Baker’s agreement, which did not specifically delegate to the arbitrator issues of contract “formation,” which was the issue to be decided by the court.

After disposing of Bristol’s delegation clause argument, the only contractual formation element at issue was consideration. The court recited the definition of consideration, which “consists either of a promise (to do or refrain from doing something) or the transfer or giving up of something of value to the other party.”

It then held that Baker was an at-will employee both before and after she signed her arbitration agreement. The court was not persuaded that Baker’s promotion changed her status because her employment continued indefinitely and Bristol could still terminate her employment at its sole option. Thus, relying on *Morrow*, her at-will employment did not supply consideration for the arbitration agreement.

The court also disagreed with Bristol’s argument that the arbitration agreement contained consideration in the form of mutual promises to arbitrate. The court found that Bristol’s alleged promise to arbitrate was illusory because the arbitration agreement provided that Bristol “reserves the right to amend, modify, or revoke this agreement upon thirty (30) days’ prior written notice to the Employee.” *Id.* at 773. The supreme court explained that, because the arbitration agreement did not limit the employer’s “authority to modify the arbitration agreement unilaterally and retroactively,” the arbitration agreement did not preclude the employer “from giving [the plaintiff] prior written notice that, effective in thirty days, [the employer] retroactively is disclaiming a promise made in the arbitration agreement.” *Id.* at 776, 777.

Because the court concluded that neither Ms. Baker’s at-will employment nor Bristol’s illusory promise to arbitrate supplied consideration, it held that Ms. Baker and Bristol had not formed an agreement to arbitrate.

**The Dissenting Opinion**

Judge Wilson’s dissent methodically dismantled the majority opinion. At its core, the dissent rejected what it believed was the majority’s attempt to bend Missouri contract law in order to find an agreement to arbitrate had not been formed. The dissent noted that under the FAA, although the court looks to state law to decide the threshold questions of contract formation, the use of state law is limited only to those principles of state law that apply generally to all contracts.

The dissent provided an overview of black letter law regarding contract formation. In addition to the definition of consideration recited by the majority, the dissent noted that courts do

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44 *Id.* at 774 (*quoting Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 25 (Mo. App. 2008)).
not weigh consideration to determine whether it is “adequate.” Rather, courts simply determine whether consideration is present or absent. Further, when determining whether consideration exists, courts look at all contemporaneous promises between the parties at the time of the agreement. The dissent emphasized the point:

Even if courts (in hindsight) continue to indulge the now-preempted notion that arbitration is always ‘bad’ for the employee and ‘good’ for the employer, it does not follow that any employee agreeing to arbitrate her claims has made a bad bargain when viewed at the time the promise is made, as a consideration analysis demands. A reasonable employee might decide that promises relating to arbitration and other things which are uncertain ever to occur are easily given in exchange for promises concerning things such as pay and benefits that have an immediate and certain value to the employee.\(^\text{45}\)

With these principles in mind, the dissent rejected the notion that Ms. Baker received nothing in return for her promise to arbitrate, arguing that Ms. Baker’s promotion, change in pay, and entitlement to severance were detriments to Bristol and should have supplied the requisite consideration to make Ms. Baker’s promise to arbitrate a binding contractual obligation.

The dissent also argued that Bristol’s promise to arbitrate claims brought by Ms. Baker supplied consideration. Moreover, though it was not required to agree to arbitrate its claims against Ms. Baker, Bristol’s promise to arbitrate any claims it may have had against Ms. Baker would supply consideration. The dissent rejected the notion that Bristol’s promises to arbitrate were illusory. The dissent noted that the arbitration agreement incorporated the American Arbitration Association (“AAA”) Rules which provide that once a claim is initiated, Bristol would no longer have the right to modify the arbitration agreement. Moreover, the dissent also referred to the longstanding principle of contract law that when two potential constructions of a contract exist, the construction rendering a contract valid is preferred. “The tendency of the law is to uphold the contract by finding the promise was not illusory when it appears that the parties intended a contract.” Magruder Quarry & Co. v. Briscoe, 83 S.W.3d 647, 650 (Mo. App. 2002). Moreover, courts have found that “[e]ven slight consideration is sufficient to support a promise.” Moore v. Seabaugh, 684 S.W.2d 492, 496 (Mo. App. 1984).\(^\text{46}\) Finally, the arbitration agreement itself also provided that it should be modified by the court to render it enforceable.

\(^{45}\) Id. at XX (Wilson, J., dissenting); see also Weinstein v. KLT Telecom, Inc., 225 S.W.3d 413, 415-16 (Mo. 2007) (“consideration must be measured at the time the parties enter into their contract and that the diminished value of the economic benefit conferred, or even a complete lack of value, does not result in a failure of consideration”); Union Pac. R. Co. v. Kansas City Transit Co., 401 S.W.2d 528, 536 (Mo. App. 1966) (“If the promisor gets what he bargains for there is no failure of consideration, although what he receives becomes less valuable or of no value at all.”).

\(^{46}\) In addition, Judge Wilson quoted Corbin on Contracts, which states, “Frequently, the provision is that one party shall have the power to terminate by notice given for some stated period, such as ‘notice of thirty days,’ or ‘terminable on one week’s notice.’ When this is the case, the contract should never be held to be rendered invalid thereby for lack of ‘mutuality’ or for lack of consideration.”
Not only did the dissent explain why it would have found the arbitration agreement enforceable, it went on to opine that Morrow itself should no longer be followed.

Decades of decisions rejecting Morrow’s holding outside the context of arbitration promises\(^{47}\) show that any effort by this Court to follow Morrow in the present case involving an arbitration promise is, in reality, merely the application of a special rule regarding consideration in employment contracts involving arbitration promises. The FAA, as construed in Casarotto, Perry, and Allied-Bruce, precludes the application of such a rule.\(^{48}\)

Therefore, the dissent would have granted the Bristol defendants’ motion to compel arbitration.

**In 2015, the Missouri Supreme Court Decides Hewitt**

In Hewitt,\(^{49}\) the Missouri Supreme Court enforced an arbitration agreement between an employer and former employee, though not without controversy. Hewitt generated 5 opinions with shifting dissents and concurrences. Three judges concurred in the per curiam opinion – Russell, Breckenridge, and Draper. Judges Teitelman and Stith concurred in part and dissented in part. Judges Fischer and Wilson wrote dissenting opinions. For ease of reference, the five main issues are set forth below along with the views of each judge:

1. Whether writ of mandamus is the appropriate mechanism to review whether the trial court erred in granting the motion to compel arbitration.
   a. Five judges answer yes (Russell, Breckenridge, Draper, Stith, Teitelman)
   b. Two judges answer no (Fischer, Wilson)

2. Whether plaintiff’s employment contract contained a valid and enforceable arbitration clause that required him to arbitrate his disputes, including statutory claims, against the Rams.
   a. Four judges answer yes (Russell, Breckenridge, Draper, Stith)
   b. One judge answers no (Teitelman)

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\(^{47}\) For decades, Missouri courts have held that continued at will employment is sufficient consideration for a non-compete clause. By 1933, the proposition was “well established.” *City Ice & Fuel Co. v. Snell*, 57 S.W.2d 440, 442 (Mo. App. 1933); *Reed, Roberts Associates, Inc. v. Bailenson*, 537 S.W.2d 238, 241 (Mo. App. 1976) (“mutual promises of the parties as to continued employment . . . sufficient consideration” for non-compete); *Computer Sales Int'l, Inc. v. Collins*, 723 S.W.2d 450, 452 (Mo. App. 1986) (“continued employment for 2 1/2 years of an at-will employee, does constitute sufficient consideration” for a non-compete); *Easy Returns Midwest, Inc. v. Schultz*, 964 S.W.2d 450, 454 (Mo. App. 1998) (“employer’s continuance of employment . . . supplies adequate consideration” for a non-compete). Morrow distinguished non-competes. “Although covenants not to compete generally must be in writing to be enforceable, they are not true creatures of contract law, but are more about equity than about contracts, even in cases where there is a formal employment agreement.” *Morrow*, 273 S.W.3d at 28.

\(^{48}\) *Id.* at XX (Wilson, J., dissenting).

\(^{49}\) 461 S.W. 3d 798
c. The other two judges did not address the issue (Fischer, Wilson)

(3) Whether the NFL’s dispute resolution procedural guidelines were incorporated into plaintiff’s contract.
   a. Four judges answer no (Russell, Breckenridge, Draper, Teitelman)
   b. One judge answers yes (Stith)
   c. The other two judges did not address the issue (Fischer, Wilson)

(4) Whether the terms of the contract designating the NFL commissioner, an employee of the team owners, as the sole arbitrator with unfettered discretion to establish the rules for arbitration are unconscionable and, therefore, unenforceable.
   a. Four judges answer yes (Russell, Breckenridge, Draper, Teitelman)
   b. One judge answers no (Stith)
   c. The other two judges did not address the issue (Fischer, Wilson)

(5) Whether the Missouri Uniform Arbitration Act (“MUAA”) provides a mechanism to imply the terms missing from the arbitration agreement and provides rules for appointing an arbitrator to replace the NFL commissioner.
   a. Four judges answer yes (Russell, Breckenridge, Draper, Stith)
   b. The other three judges did not address the issue (Teitelman, Fischer, Wilson)

First, the Court addressed whether a writ of mandamus is the appropriate mechanism to review a trial court’s order granting a motion to compel arbitration. The per curiam opinion holds that mandamus is an appropriate remedy to review the grant of a motion to compel arbitration. (Slip Op. at 7). The per curiam opinion states that plaintiff “has no immediate alternative remedy to his claim that the arbitration agreement is invalid.” (Id.). The plurality opinion further holds that mandamus is an appropriate remedy when alternative remedies waste judicial resources or result in burdensome delay, creating irreparable harm to the parties. (Id.).

Generally, an order staying court proceedings pending arbitration is not a final judgment and, therefore, not appealable. Under the Missouri Uniform Arbitration Act (“MUAA”), there is an exception for those seeking to enforce arbitration agreements but not for those opposing arbitration. Instead, those opposing arbitration generally must wait until after the arbitration is complete for appellate review. After arbitration, the party opposing arbitration has three options: (1) appeal the trial court’s previous grant of the motion to compel arbitration after entry of a final judgment; (2) file a motion to vacate, modify, or correct the award under limited grounds; or (3) accept the arbitration award, rendering the action moot. The practical implication of Kerr’s holding is that when a motion to compel arbitration is granted, the unsuccessful plaintiff/employee will now seek a writ of mandamus in the court of appeals. This is troubling because it ignores the MUAA and goes against the very nature of arbitration and the rationale underlying it – the efficient resolution of disputes – and the lengthy procedural history of Kerr only bolsters this point.

The dissenting Judges echoed this sentiment. Judge Fischer notes that a court should issue a writ of mandamus only if the relator has demonstrated a clear, unequivocal, and specific right to have the respondent take action. (Fischer, J., dissenting at 1). Judge Fischer then writes,
“I would not issue a writ of mandamus in this case because [plaintiff] has an adequate remedy by appeal following arbitration.” (Id.). Judge Fischer explains that the MUAA provides that a party seeking to enforce an arbitration agreement has an immediate right to appeal but that those parties resisting arbitration do not have the same right to an immediate appeal. (Fischer, J., dissenting at 3). Thus, awaiting the end of circuit court proceedings to appeal its rulings is the normal procedure, not the exception. (Id.).

Judge Wilson joins Judge Fischer’s opinion and writes separately to explain that “the only proper purpose of a writ of mandamus is to enforce a clear, unequivocal, and specific right.” (Wilson, J., dissenting at 2). Judge Wilson criticizes the per curiam opinion due to the fact that the “right” it purports to be enforcing is so “clear and unequivocal” that it takes four opinions and dozens of pages to locate it. (Id.).

The second major holding is that where the parties agree to arbitrate but their agreement does not include the arbitration procedure or such procedure is unconscionable, the necessary terms should be implied from the MUAA. The same rationale applies where the selection of arbitrator is not set forth or the designated arbitrator is biased. This holding is a positive development for those seeking to enforce arbitration agreements where the arbitration terms are not clearly incorporated or are otherwise defective.

The per curiam opinion holds that the arbitration provision in plaintiff’s employment contract is to be treated like any other contract, enforced according to its terms, and read as a whole to determine the intention of the parties. (Slip. Op. at 10). Plaintiff argued that the arbitration provision lacked consideration on the basis that both contracting parties were not bound by the arbitration agreement. (Id.). The first sentence of the arbitration provision states that “[plaintiff] agrees to abide by and to be legally bound by the Constitution and By-Laws and Rules and Regulations of the National Football League and by the decisions of the Commissioner of the National Football League, which shall be final, binding, conclusive and unappealable.”

The next sentence in the agreement, however, states “The Rams and [plaintiff] also severally and mutually promise and agree that in any dispute which may arise between them, the matter in dispute shall be referred to the Commissioner of the National Football League for decision . . . .” Thus, the per curiam opinion found that the Rams expressly promised to arbitrate any and all disputes before the commissioner. (Id. at 11). The Rams also signed the employment contract. Accordingly, the per curiam opinion distinguished this case from the cases involving the Kansas City Chiefs. See Sniezek v. Kansas City Chiefs Football Club, 402 S.W.3d 580 (Mo. App. 2013); Clemmons v. Kansas City Chiefs Football Club, 397 S.W.3d 503 (Mo. App. 2013). Unlike the Rams in Kerr, the Chiefs did not promise to arbitrate disputes before the commissioner nor did they sign the agreements at issue. (Id. at 12).

In his concurring opinion, Judge Teitelman disagreed, finding that plaintiff’s contract does not establish mutual assent to the essential terms of an arbitration process. (Teitelman, J., concurring and dissenting at 4). As such, Judge Teitelman contends that the contract and incorporated documents provide only that plaintiff is required to arbitrate disputes pursuant to
unknown and undisclosed terms that the commissioner, in his or her sole discretion, deems appropriate. (Id.).

Plaintiff also argued that the arbitration agreement language did not include a waiver of judicial forum for his statutory claims under the MHRA. The per curiam opinion found that the language at issue mandates arbitration of “any dispute which may arise” between plaintiff and the Rams which plainly means “any dispute,” including claims under the MHRA. (Slip Op. at 21). The per curiam opinion also rejected plaintiff’s argument that the non-signatory defendants could not enforce the arbitration agreement. (Slip Op. at 22). The per curiam opinion found that plaintiff treated all defendants as a single unit (referring to them collectively as “Rams” or “Defendants”) and alleged in his petition that the defendants were responsible for the single act of firing him due to age. (Id. at 23).

The per curiam opinion holds that the guidelines were not referenced in plaintiff’s employment contract nor were they clearly referenced in the constitution and bylaws. (Slip Op. at 15). Instead, plaintiff’s employment contract only refers to “Rules and Regulations of the National Football League.” (Id.). Thus, the per curiam opinion holds that though plaintiff agreed to arbitrate disputes against the Rams, the specific terms of arbitration were not incorporated and, therefore, not enforceable. The per curiam opinion then notes that where an arbitration agreement is valid, but the specific provisions are silent or unconscionable, the failure of the terms is to be implied from the MUAA. (Id. at 17).

Plaintiff also argued that the agreement was unconscionable because the NFL commissioner cannot be neutral and unbiased in a dispute between an employee and a team’s management because the commissioner is selected and his salary determined by the team owners. (Slip Op. at 18). The per curiam opinion agreed and, therefore, held that the terms designating the commissioner as arbitrator were unenforceable. Again, however, the per curiam opinion held that the unconscionability of the terms does not invalidate the entire arbitration agreement. (Id. at 20). Instead, the per curiam opinion held that the arbitrator could be substituted under the MUAA. (Id.).

Missouri Cases Following Baker

In addition to the Baker and Hewitt opinions, the legal landscape regarding the enforceability of arbitration agreements continues to evolve. The court of appeals, relying on

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50 The Missouri Supreme Court also recently enforced an arbitration agreement in Eaton v. CMH Homes, Inc., 461 S.W. 3d 426 (Mo. 2015) First, the Court rejected plaintiff's argument that his agreement to arbitrate was invalid based on the fact that the arbitration clause required plaintiff to arbitrate all claims but gave defendant the right to bring suit in court. Thus, to the extent there were any doubts in light of recent MO decisions, this confirms that an arbitration agreement need not be mutual to be enforceable. Second, though lack of mutuality of the obligation will not automatically invalidate an arbitration agreement, it is one of the relevant factors a court will consider, along with the other terms of the contract, in determining whether the agreement to arbitrate is unconscionable. Third, the Court held that the arbitration agreement, as written, was unconscionable due to the combination of an anti-waiver provision and the lack mutuality. However, the Court found the anti-waiver provision was severable (relying on a severability clause) and the arbitration agreement, without the offending anti-waiver provision, was enforceable and remanded to the trial court for further proceedings.
Missouri Supreme Court precedents, has decided Jimenez, Bowers, and Dotson, with mixed results.

In Bowers and Jimenez, for example, the court of appeals held that the parties had not formed an arbitration agreement in either case. In Jimenez v. Cintas Corp., 2015 Mo. App. LEXIS 11 (Mo. App. E.D. 2015), the court held that “where the practical effect of an arbitration agreement binds only one of the parties to arbitration, it lacks mutuality of promise, and is devoid of consideration.” In so holding, the court relied on a provision in the purported arbitration agreement which exempted from arbitration “any claims for a declaratory judgment on injunctive relief concerning any provision of Section 4,” id. at *4, which, in turn, provided that “Employer may apply to any court of competent jurisdiction for a temporary restraining order, preliminary injunction or other injunctive relief to enforce Employee’s compliance with the obligations, acknowledgements and covenants in Section 4. Employer may also include as part of such injunction action any claims for injunctive relief under any applicable law arising from the same facts or circumstances…” Id.

The Jimenez court then took judicial notice of the records from other reported appellate decisions in Missouri, finding that most cases filed by an employer against an employee are the same cases exempted from arbitration in the purported agreement. Since the employee was bound to arbitrate all disputes while the employer was not so bound, the court found the purported agreement lacked consideration. It is also worth noting that Jimenez also held that “a promise of at-will employment does not qualify as consideration, regardless of whether it is characterized as ‘new,’ ‘future,’ or ‘continued’ at-will employment.” Id. at *9. However, in a concurring opinion, Judge Odenwald wrote that “unlike the majority, I am unwilling to extend Missouri authority holding that an offer of continued at-will employment lacks consideration to support an arbitration agreement.” Id. at *23-24.

In Bowers v. Ashbury St. Louis Lex, LLC, 2015 Mo. App. LEXIS 718, at *2 (Mo. App. 2015), the defendants argued that the following provision in their purported arbitration agreement rendered it distinguishable from Baker: “I also understand that, while the Employee Handbook is otherwise subject to change at the Company’s discretion, this Agreement to Arbitrate and the Company’s Arbitration Policy will be binding and irrevocable for the Company and me as written, with respect to any claim arising while this Agreement is in effect.” Id. at *10.

The Bowers court disagreed. First, the Bowers court noted that the purported arbitration agreement also provided that any dispute arising between plaintiff and defendants would “be subject to final and binding arbitration in accordance with the terms of the . . . Arbitration Rules.” The Arbitration Rules, in turn, contain a modification provision which states:

The Company may change these Rules from time to time to reflect developments in the law and to ensure the continued efficiency of the arbitration process. If the Rules are changed, the Company shall provide at least thirty days[’] notice of the proposed change by posting a written notice at each of the Company’s places of business where employees subject to the Arbitration Agreement are employed or by other means designed to alert employees to the
change. Such notice shall clearly state the change or changes to the Rules and the effective date of such change or changes. If an employee does not wish to agree to the change, the employee may opt out by sending the Arbitration Administrator a written statement to that effect, prior to the effective date of the change. In that case, the previous Arbitration Rules shall govern. Failure of an employee to opt out during the thirty day period shall constitute agreement to the changes.

Id. at *3. The Bowers court then held that the sole limitation on defendants’ right to modify the agreement was a requirement that defendants provide “at least thirty days’ notice of the proposed change . . . .” id. at *10, and, consistent with Baker, this limitation did not save the defendants’ promise to arbitrate from being illusory.

On the other hand, in Dotson, the court of appeals reversed the trial court’s order which denied the employer’s motion to compel arbitration with directions to grant the employer’s motion to compel arbitration and dismiss the case.51 Because the arbitration agreement at issue contained a delegation provision which clearly and unmistakably provided that the arbitrator had exclusive authority to decide issues of arbitrability, including specifically issues of “formation,” the trial court had erred in denying the employer’s motion to dismiss and compel arbitration. The Dotson court relied on the FAA and United States Supreme Court precedents to hold, unless the party seeking to avoid arbitration challenges the delegation provision specifically, courts must treat it as valid under Section 2 of the FAA, and must enforce it, leaving any challenge to the validity of the agreement as a whole for the arbitrator.

In Dotson, the court of appeals distinguished the Supreme Court’s decision in Baker which held that the delegation provision failed to expressly delegate authority to the arbitrator to decide issues related to formation of the agreement, as opposed to issues of enforceability and applicability. Unlike the purported agreement in Baker, the agreement in Dotson did expressly delegate to the arbitrator authority to decide issues related to the formation of the agreement. Dotson is also noteworthy because it enforced the arbitration agreement to include claims that plaintiff asserted against her former supervisor, a non-signatory to the arbitration agreement.52

51 2015 Mo. App. LEXIS 787 (Mo. App. Aug. 4, 2015). Similarly, in Johnson v. Rent-A-Center, 2014 Mo. App. LEXIS 1227 (Mo. App. Nov. 4, 2014), the trial court held that, because plaintiff asserted tort claims that were independent of his contract with defendant and did not require reference to the underlying contract (which included an arbitration provision), arbitration should not be compelled. Id. at *4-5. The Missouri Court of Appeals disagreed, finding that the trial court erred in denying the motion to compel arbitration based upon its determination regarding the arbitrability of plaintiff’s claims. Id. at *6. Because the parties’ contract contained a delegation provision, such a determination was for the arbitrator, and not the court, to decide. Id. Following the court’s decision, however, counsel for plaintiff in that case filed a suggestion of death and asked the court to withdraw its November 4, 2014 opinion. On December 9, 2014, the court granted the request and withdrew its opinion.

52 See Hewitt v. St. Louis Rams P’ship, 409 S.W.3d 572, 574 (Mo. App. E.D. 2013) (“we conclude that when arbitration is compelled, the trial court should stay the proceedings in its own forum, not dismiss them. Rather than dismissal, the proper course of action for the trial court, upon finding an agreement to arbitrate, is to stay the action pending arbitration”).
Practice Tips

In drafting arbitration agreements between employers and employees under Missouri law, one should consider the following:

(1) Include a delegation clause which specifically delegates to the arbitrator exclusive authority to decide all questions relating to the enforceability, applicability, validity, and formation of the arbitration agreement. If you wish to include a class action waiver, consider exempting any decision relating to class or collective action certification from the arbitrator;

(2) On a related note, ensure that you raise the delegation clause in your motion to compel arbitration or you could be deemed to have waived the argument;\(^5^3\)

(3) New or continued at-will employment should not be the only form of consideration;

(4) Include mutual promises to arbitrate that are not illusory. Do not include a broad carve-out that allows the employer to assert all of its claims in court. Do not include a unilateral right for the employer to modify the arbitration agreement;

(5) In addition to mutual promises to arbitrate, one may want to include additional forms of consideration such as vacation time that otherwise would not be available to the employee or some other benefit to the employee/detriment to the employer;

(6) Review all documents signed contemporaneously with the arbitration agreement to ensure there are no inconsistencies. For example, if a provision in the employee handbook provides that no contract between the employee and employer can be formed without the signature of the president of the company, either get the president of the company to sign the arbitration agreement or remove the provision from the handbook;

(7) Include a severability clause which will allow the court (or arbitrator) to remove any unconscionable provisions;

(8) Though likely preempted by the FAA in most circumstances, if there is any doubt as to whether the employer engages in interstate commerce, include the notice of arbitration provision required by the MUAA, which provides “THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION

\(^5^3\) See Dotson, 2015 Mo. App. LEXIS 787, *19 n.4 (“To the extent Dotson is now challenging the enforceability of the delegation provision – as opposed to whether it clearly and unmistakably delegates authority to the arbitrator – he is too late. He needed to raise any challenge to the enforceability of the delegation provision with the trial court.”); Katz v. Anheuser-Busch, Inc., 347 S.W.3d 533, 540 (Mo. App. 2011) (“By failing to plead or argue the issue of the delegation clauses before the trial court, A-B has waived this issue in its appeal.”).
WHICH MAY BE ENFORCED BY THE PARTIES” near the space for the employee’s signature; and

(9) Provide specifically that either party may bring an action to compel arbitration under the agreement or to dismiss any lawsuit seeking to resolve disputes covered by the agreement.