Is Your Arbitration Agreement Still Enforceable in Missouri After Baker v. Bristol Care, Inc.?

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This summer, the Missouri Supreme Court issued a decision that will affect arbitration agreements relied on by employers across the state. The decision—one of many in a recent trend of Missouri cases restricting the enforceability of arbitration clauses—serves as a cautionary reminder for employers to continue asking a critical question: We entered into an arbitration agreement with our employees, but would a Missouri court enforce it?

BAKER V. BRISTOL CARE, INC.

In Baker v. Bristol Care, Inc. (Supreme Court of Missouri, No. SC93451, August 19, 2014), the plaintiff was a former employee at a long-term care facility. When the employee was promoted from an hourly position to a salaried managerial position, she also entered into an arbitration agreement with her employer. The agreement stated that she was still an at-will employee, and that the employer could amend the agreement upon 30 days' prior written notice.

In 2011, the employee filed a class action lawsuit alleging that the employer failed to pay employees overtime compensation for hours worked over 40 in one week. The employer moved to compel arbitration, citing the arbitration agreement. The employee opposed arbitration for three years, and the issue eventually went before the Missouri Supreme Court.

In a 4-to-3 decision, the Missouri Supreme Court refused to compel arbitration, holding the employer had not provided sufficient consideration to form a binding contract. In doing so, the court reached several conclusions that will affect the validity of arbitration agreements—and presumably other agreements, such as noncompetes—in future cases between employees and employers.

Who decides whether there is a valid contract: the court, or an arbitrator?

The court first had to decide a threshold issue that arises frequently in arbitration clause disputes: under the parties' agreement, should the court decide whether a valid contract was formed between the parties or did the agreement delegate that issue to the arbitrator? Often, the answer to this initial question will determine whether the parties' dispute is ultimately resolved in arbitration. In Baker, the parties' agreement stated that the arbitrator would resolve disputes "relating to the applicability or enforceability" of the agreement. The court distinguished a similar case, Rent-A-Center, West, Inc. v. Jackson, in which the Supreme Court of the United States held that the arbitrator, not a court, should decide issues of contract formation where the agreement states that the arbitrator "shall have exclusive authority to resolve any
dispute relating to the interpretation, applicability, enforceability or formation of [the] Agreement.” The Missouri Supreme Court held that the agreement’s language did not delegate to the arbitrator issues of contract “formation.” Because the agreement lacked this critical, precise language, the court held that it—not an arbitrator—should be the forum to decide whether the parties had formed a valid contract.

**Was the purported agreement supported by valid consideration?**

In seeking to avoid arbitration, the employee argued that the agreement was not enforceable because the employer had not provided sufficient consideration. The employer, on the other hand, argued that it provided consideration in at least two different forms: (1) the employee’s promotion, continued employment, and attendant benefits; and (2) the employer’s promise to arbitrate any claims that it had against the employee.

Rejecting both of the employer’s arguments, the court held that the parties had not formed a valid agreement to arbitrate, and therefore the court refused to compel arbitration. First, because the plaintiff was still employed at will after her promotion, **her continued employment was not sufficient consideration** to form a contract. The court concluded that continued at-will employment—even when a promotion and other new benefits are also provided—is not valid consideration to create an enforceable contract. Second, the court held that the **employer’s promise to arbitrate disputes** was also not sufficient consideration, because it was possible for the employer to modify the arbitration agreement unilaterally and retroactively. Because the employer did not provide sufficient consideration, the court refused to enforce the arbitration agreement.

Judge Wilson’s dissent explained in detail why he would have enforced the parties’ agreement, and why the employer had provided sufficient consideration to form a valid contract. Ultimately, however, his position failed to garner a majority by a single vote.

**IMPLICATIONS**

The Missouri Supreme Court’s decision in Baker continues a trend against the enforceability of arbitration agreements under Missouri law. Other recent decisions have held: (1) that an employer’s failure to sign an arbitration agreement makes the agreement unenforceable (such as in Frye v. Speedway); and (2) that an agreement in an employee handbook may not be enforceable when the handbook contains contract disclaimers or reserves for the employer the unilateral right to modify or alter its provisions (such as in Johnson v. Vatterott Educational Centers, Inc.).

The decision also raises several new issues for employers. A significant question is whether an employer’s promise to arbitrate disputes can be sufficient consideration, if the employer ensures that its mutual obligations are not illusory and cannot be amended retroactively. It is also likely that the decision will have ramifications on noncompete agreements, and on other contracts between employees and employers. Employers can expect the Missouri Supreme Court to issue additional guidance on this topic in the near future. For example, just a few months before issuing Baker, the Missouri Supreme Court heard oral argument in yet another employment arbitration agreement case, State ex rel. Hewitt v. Kerr.

According to Michael L. Matula, a shareholder in the Kansas City office of Ogletree Deakins, “Based on Baker and other decisions over the last several years, Missouri has to be one of the most difficult jurisdictions—if not the most difficult jurisdiction—to
enforce an arbitration agreement. Lower appellate courts had already ruled that continued at-will employment is insufficient consideration to enforce an arbitration agreement. *Baker* now makes it clear that the lower courts' rule will not change. That said, despite many jurisdiction-specific hurdles, arbitration agreements are enforceable under Missouri law. However, an agreement should, among other things, make clear that the employer is mutually bound to bring claims against the employee in arbitration (not just abide by arbitration if it gets sued) and must expressly state that it cannot be retroactively amended.”

In light of the *Baker* decision, employers should carefully review their contracts with employees to determine whether they are legally enforceable under Missouri law.