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How Level is the Playing Field? Should Employers Be Able to Circumvent State Workers' Compensation Schemes by Creating Their Own Employee Compensation Plans?

Strawn v. AFC Enterprises, d/b/a Church's Chicken[1]

I. INTRODUCTION

Disputes resulting from workplace incidents are consuming increasingly greater proportions of our courts' dockets.[2] In recent years, "[e]mployment litigation has grown at a rate many times greater than litigation in general . . . almost one thousand percent greater than the increase in all other types of civil litigation combined."[3] Due to the unequal bargaining power employers possess over employees in these disputes, states have passed workers' compensation laws to level the playing field.[4] However, employers have chosen not to subscribe to their states' workers' compensation systems, but instead have created their own employee compensation plans.[5] In addition, these employer-created compensation plans demand that employees submit all their disputes to an arbitral forum.[6] The Supreme Court has not set forth a minimum threshold that employer-created compensation plans must meet so as not to violate the public policy underlying the state workers' compensation schemes. In *Strawn*, the United States District Court for the Southern District of Texas faced such an employer-created compensation plan and held it to be void as against Texas public policy.[7]

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1. 70 F. Supp. 2d 717 (S.D. Tex. 1999).
2. Beth M. Primm, *A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMP. L. 151 (1999).
3. *Id.* at 151. "Currently, there are over 25,000 wrongful discharge and discrimination cases pending in state and federal courts nationwide." *Id.* *See* Evan J. Spelfogel, *Mandatory Arbitration vs. Employment Litigation*, DISP. RESOL. J., May 1999 ,at 78. Nearly all of these cases involve jury trials with lengthy delays and unpredictable results. *Id.*
4. *Strawn*, 70 F. Supp. 2d at 723 (citing TEX. LAB. CODE ANN. §§ 401- 406 (West 1999)).
5. *See, e.g.*, Duran v. Intex Aviation Servs., Inc., 98 F.3d 1339 (5th Cir. 1996); Cupit v. Walts, 90 F.3d 107 (5th Cir. 1996); Cline v. H.E. Butt Grocery Co., 79 F. Supp. 2d 730 (S.D. Tex. 1999); *Strawn*, 70 F. Supp. 2d at 717; Gutierrez v. Academy Corp., 967 F. Supp. 945 (S.D. Tex. 1997); Brito v. Intex Aviation Servs., Inc., 879 F. Supp. 650 (N.D. Tex. 1995); Kinnebrew v. Gulf Ins. Co., 1994 WL 803508 (N.D. Tex. 1994); Reyes v. Storage & Processors, Inc., 995 S.W.2d 722 (Tex. App. 1999); Martinez v. IBP, Inc., 961 S.W.2d 678 (Tex. App. 1998).
6. *See, e.g.*, *Cupit*, 90 F.3d at 107; *Cline*, 79 F. Supp. 2d at 731; *Strawn*, 70 F. Supp. 2d at 717; *Gutierrez*, 967 F. Supp. at 945; *Kinnebrew*, 1994 WL 803508, at *1; *Martinez*, 961 S.W.2d at 678.
7. *Strawn*, 70 F. Supp. 2d at 717.

II. FACTS AND HOLDING

Barbara Strawn ("Strawn") was an employee of AFC Enterprises, Inc. ("AFC"), which was doing business as Church's Chicken in Alvin, Texas.[8] Strawn alleged that she was injured when she slipped and fell during the course and scope of her employment with Church's Chicken on January 7, 1998.[9] AFC did not subscribe to the Texas Workers' Compensation Act[10] (the "Act").[11] Instead of offering its employees workers' compensation insurance, AFC created its own employee compensation plan called the America's Favorite Chicken Texas Employee Injury Benefit Plan (the "AFC Plan").[12] The AFC Plan offered employees limited medical, wage-replacement and death benefits for those accidents that occurred during the course and scope of their employment with AFC.[13] In accordance with the AFC Plan, AFC paid Strawn $22,500 in wage-replacement and approximately $24,000 in medical benefits to compensate her for her slip and fall injuries.[14]

Along with the AFC Plan, AFC also required each prospective employee to sign its Value Deal Agreement as a condition precedent to employment.[15] The Value Deal Agreement stated that "all claims and disputes Employee may presently have or may in the future have" against AFC, particularly including "claims for bodily injury or physical, mental or psychological injury," must be submitted to binding arbitration.[16] The Value Deal Agreement and the AFC Plan worked together to provide employees greater benefits if they agreed to submit claims to an arbitral forum and waive their statutory or common law causes of action.[17] On August 14, 1997, Strawn signed AFC's Value Deal Agreement in order to become an employee.[18] Contrary to her commitment under the Value Deal Agreement, Strawn filed suit against AFC in Texas district court seeking redress for her injuries.[19] Strawn claimed that the AFC Plan and the Value Deal Agreement were unilaterally imposed by AFC and effectively forced employees to waive their statutory or common law causes of action in favor of an arbitral forum.[20] Strawn did concede

8. *Id.* at 719.
9. *Id.*
10. TEX. LAB. CODE ANN. §§ 401-406 (West 1999).
11. *Strawn*, 70 F. Supp. 2d at 719.
12. *Id.*
13. *Id.* The difference in the amount of benefits provided under the Texas Workers' Compensation Act (the "Act") as compared to AFC's Plan is considerable. Under the Act, employees received lifetime medical benefits, a percentage of their wages calculated in relation to the nature of their medical impairment, up to 75% of their pre-injury wage for extreme injuries, and lifetime benefits if the employee is killed in the course of employment. *Id.* Under AFC's Plan, an employee received only 26 weeks of benefits, or 104 weeks of benefits, if they signed a Value Deal Agreement; no percentage of their wages pro-rated to fit the nature of their medical impairment; no pre-injury wages; and no death benefits unless the employee signed a Value Deal Agreement, and then the employee only got a maximum of twice their pre-injury annual pay not in excess of $75,000. *Id.* at 719-20.
14. *Id.* at 719.
15. *Id.*
16. *Id.*
17. *Strawn*, 70 F. Supp 2d at 719.
18. *Id.*
19. *Id.*
20. *Id.* at 722.

that it was permissible for an employer to offer benefits equaling Texas workers' compensation benefits while requiring employees to waive their statutory and common law causes of action.[21] However, Strawn argued that the AFC Plan impermissibly offered benefits considerably lower than those of the Texas workers' compensation system, and it also required employees to waive their statutory and common law causes of action because of the Value Deal Agreement.[22] For these reasons, Strawn claimed the AFC Plan and Value Deal Agreement were void as against Texas public policy.[23]

AFC countered by filing a Motion to Stay or Dismiss and to Compel Arbitration pursuant to the Federal Arbitration Act[24] ("FAA").[25] AFC conceded that its employment benefits were inferior to those of the Texas Workers' Compensation Act; however, AFC argued that the AFC Plan was consistent with Texas public policy because it offered limited benefits without regard to fault.[26] Additionally, AFC claimed that it "could have unilaterally imposed the Value Deal Agreement on its employees as a condition of employment without offering any benefits whatsoever."[27]

Ultimately, the Texas district court denied AFC's Motion to Stay or Dismiss the case and to Compel Arbitration.[28] The court held that it violated Texas workers' compensation public policy for employers to offer low-level benefits to their employees and to unilaterally impose an arbitral forum in which the injured employee must seek redress.[29] The court stated that an arbitral forum is "sufficiently dissimilar" to a judicial forum.[30] Therefore, the court found AFC's Value Deal Agreement void as against Texas public policy because it forced AFC employees to resolve their disputes in unsatisfactory arbitral forums while providing only limited benefits.[31]

III. LEGAL BACKGROUND

The Texas Workers' Compensation Act was passed in response to the unequal bargaining power possessed by an employer defending against tort actions brought by employees injured in the course and scope of their employment.[32] The Act attempted to level the playing field between employers and employees in workplace injury actions by guaranteeing those injured employees, who worked for subscribing employers, limited benefits without having to prove fault.[33] At the same time, the Act substantially decreased the subscribing employer's potential risk of paying out

21. *Id.*
22. *Id.*
23. *Id.*
24. FEDERAL ARBITRATION ACT, 9 U.S.C. § 1-16 (1994).
25. *Strawn*, 70 F. Supp. 2d at 719.
26. *Id.* at 720.
27. *Id.*
28. *Id.* at 719.
29. *Id.* at 725-26.
30. *Id.* at 725. *See infra* notes 148-55 and accompanying text.
31. *Id.* at 726.
32. *Id.* at 723 (citing TEX. LAB. CODE ANN. §§ 401- 406).
33. *Id.*

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large tort judgments by requiring employees to waive any statutory or common law causes of action against the employer.[34] Although such a scheme appears to render an effective trade-off, numerous employers have chosen not to subscribe to the Act and to take their chances in defending the tort actions brought by injured employees.[35] The Act was passed primarily to safeguard injured employees from powerful employers and to encourage employers' cooperation; the Act prevents non-subscribing employers from using any previously available common law defenses.[36] Because such defenses are no longer available to non-subscribing employers in tort actions, the possibility of excessive liability increases, which provides the incentive to subscribe to the Act.[37] For those employers who opt not to subscribe, many develop alternative plans designed to serve similar functions.[38] These alternative plans often include provisions mandating that employer-employee disputes be submitted to arbitration.[39]

The FAA was enacted by Congress in 1925 in order to dispell the common law notion that arbitration provisions were against public policy and thus, deemed unenforceable.[40] Under the FAA, if parties decide by written agreement to arbitrate their disputes, courts will stay judicial proceedings until such arbitration has transpired.[41] This deference by courts to an agreed upon arbitration provision reflects the strong federal policy favoring arbitration.[42] Because of this strong federal policy, employers have increasingly included arbitration provisions in their

34. *Id.*

35. *See, e.g.*, Hook v. Morrison Milling Co., 38 F.3d 776 (5th Cir. 1994); J. Garcia v. Home Depot U.S.A., Inc., 1999 WL 362787 (N.D. Tex. 1999); Greenhill v. Merchants Fast Motor Lines, Inc., 886 F. Supp. 9 (N.D. Tex. 1995); Pyle v. Beverly Enters.-Texas, Inc., 826 F. Supp. 206 (N.D. Tex. 1993); Texas Mexican Ry. v. P. Bouchet, 963 S.W.2d 52 (Tex. 1998); Lawrence v. CDB Servs.,16 S.W.3d 35 (Tex. App. 2000); Whole Foods Market Southwest, L.P. v. Tijerina, 979 S.W.2d 768 (Tex. App. 1998).

36. *Strawn*, 70 F. Supp. 2d at 723 (citing Hazelwood v. Mandrell Indus., 596 S.W.2d 204, 206 (Tex. App. 1980).

37. *Id.*

38. *See* cases cited *supra* note 5.

39. *Strawn*, 70 F. Supp. 2d at 723.

40. Thomas A. Diamond, *Choice of Law Clauses and Their Preemptive Effect Upon the Federal Arbitration Act: Reconciling the Supreme Court with Itself*, 39 ARIZ. L. REV. 35, 35-37 (1997).

41. 9 U.S.C. § 3 (2000). Section 3 of the FAA provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id.

42. *See, e.g.*, Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985) and Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("The Arbitration Act thus establishes a federal policy favoring arbitration, requiring that we rigorously enforce agreements to arbitrate.")) (internal quotation marks omitted). *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625-26 (1985).

employment agreements obligating employees to submit all disputes with the employer to binding arbitration.[43]

A recently litigated issue surrounding the Act, in conjunction with the FAA, concerns non-subscribing employers who choose to create and offer their own voluntary employee compensation plans.[44] These employer-created plans often require employees to waive their statutory and common law causes of action and agree to submit all disputes to an arbitral forum.[45] In addition, the plans usually limit the employees' monetary benefits.[46] Because no real guidelines exist to govern these employer-created compensation plans, many employers have been able to frustrate the intent of the Act by using such plans to require all prospective employees to give up their statutory and common law causes of action in exchange for limited benefits (often times, lower than those offered under the Act).[47] Moreover, the plans often force injured employees to seek redress in an arbitral forum.[48] Employees have been seeking to invalidate employer-created plans, which limit their rights, by claiming that these plans violate public policy.[49] Typically, courts facing this public policy challenge have compared the level of benefits provided by the employer's plan to those offered under the Act and have held valid those plans offering benefits equal to or greater than those under the Act.[50] Alternatively, plans offering fewer benefits than the Act have been held invalid.[51] The United States Supreme Court has yet to decide whether non-subscribing employers can create compensation plans offering limited benefits, such as requiring employees to submit all disputes to an arbitral forum, without "thwarting the intent of the [state] Legislature."[52]

A. Case Law Supporting Employer-Created Substitutes for Workers' Compensation Plans

The Fifth Circuit Court of Appeals found a collective bargaining agreement between an employee and a non-subscribing employer to be valid in *Cupit v. Walts.*[53] In *Cupit,* the plaintiff claimed the collective bargaining agreement was void as against public policy because it "create[d] an unregulated self-insuring scheme."[54] However, the court declared that employers had a right to decide whether they were going to subscribe to the Act.[55] The court further stated, "[a]n agreement between a non-subscribing employer and its employees whereby the non-subscribing employer contractually obligates itself to provide benefits to its employees equal to

43. *See Cupit,* 90 F.3d at 107; *Cline,* 79 F. Supp. 2d at 731; *Strawn,* 70 F. Supp. 2d at 717; *Gutierrez,* 967 F. Supp. at 945; *Kinnebrew,* 1994 WL 803508, at *1; *Martinez,* 961 S.W.2d at 678.
44. *See* cases cited *supra* note 5.
45. *See, e.g.,* cases cited *supra* note 43.
46. *See* cases cited *supra* note 43.
47. *See* cases cited *supra* note 43.
48. *See* cases cited *supra* note 43.
49. *See* cases cited *supra* note 43.
50. *See* cases cited *supra* note 43.
51. *See* cases cited *supra* note 43.
52. *Strawn,* 70 F. Supp. 2d at 724.
53. *Cupit,* 90 F.3d at 109.
54. *Id.*
55. *Id.*

or greater than those provided under the Texas Workers' Compensation Act is a valid and enforceable contract."[56]

The Texas court of appeals in Amarillo also considered the enforceability of a non-subscribing employer's substitute plan in *Lambert v. Affiliated Foods, Inc.*[57] Affiliated Foods, Inc. ("Affiliated") elected not to subscribe to the Act but instead offered its employees the "Affiliated Foods, Inc. Employee Disability Benefit Plan" ("AFI Plan") under which Lambert elected to participate.[58] Specifically, the AFI Plan provided employees with no-fault coverage for occupational as well as non-occupational injuries in exchange for a waiver of any and all common law causes of action against Affiliated.[59] Lambert was injured during the course and scope of his employment and he received his scheduled benefits of $57,698.32 under the AFI Plan.[60] Nevertheless, Lambert filed suit alleging that the waiver in the AFI Plan was void as against Texas public policy because the benefits were not "equivalent" to the benefits provided by the Act.[61] The trial court granted summary judgment in favor of Affiliated but failed to detail the rationale upon which the court reached its decision.[62]

The court of appeals in Amarillo affirmed the trial court's summary judgment finding that "public policy [does] not invalidate the employee's election and waiver."[63] The court looked to the Act itself and specifically noted that the Act did not include the defense of waiver in its list of barred common law defenses under § 406.033(a).[64] The court stated that it was for the legislature to set forth policy decisions and since the Act did not specifically state that waiving rights to sue for injuries was an impermissible defense, waivers could not be deemed void as against public policy.[65] The court further declared that the AFI Plan was not a condition to Lambert's employment, but rather was voluntarily entered into by Lambert and provided more expansive coverage than the Act.[66] Finally, the court discussed *Reyes v. Storage & Processors, Inc.*,[67] and declined to follow its rationale, stating that *Reyes* was not binding authority upon the court.[68]

The Amarillo court of appeals again upheld the validity of a self-created employee compensation agreement against a public policy challenge in *Lawrence v. CDB Services, Inc.*[69] When Gary Lawrence was hired as an employee by CDB Services, Inc., ("CDB"), a non-subscribing employer, he voluntarily elected to

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56. *Id.*
57. 20 S.W.3d 1 (Tex. App. 1999).
58. *Id.* at 2.
59. *Id.* at 2-3.
60. *Id.* at 3-4.
61. *Id.* at 5.
62. *Id.* at 4.
63. *Id.* at 6.
64. *Id.* (citing TEX. LAB. CODE ANN. § 406.033(a) (West 1996)). "The Act provides that (i) contributory negligence, (ii) assumed risk, or (iii) injury caused by the negligence of a fellow employee are not defenses to an action." *Id.*
65. *Id.*
66. *Id.* at 6-7.
67. 995 S.W.2d 722 (Tex. App. 1999).
68. *Lambert*, 20 S.W.3d at 7.
69. 16 S.W.3d 35 (Tex. App. 2000).

participate in CDB's Employee Benefit Plan and Trust (the "CDB Plan").[70] The CDB Plan provided that Lawrence would give up any common law right to sue CDB and his only remedy for injuries sustained on the job were those offered by the CDB Plan.[71] Lawrence was injured during the course of his employment when his bulldozer flipped; he was issued benefits under the CDB Plan in excess of $200,000 for the first three and a half years after his injury.[72] Lawrence filed suit against CDB claiming that the CDB Plan was void as against Texas public policy because the agreement was executed prior to his injuries and the CDB Plan did not afford "equivalent" benefits as conferred by the Act.[73] The trial court granted summary judgment in favor of CDB.[74]

The court of appeals went into a lengthy discussion, distinguished prior cases and finally noted that although these agreements have the effect of shifting or releasing a party from "responsibility for future acts of negligence," they do not violate public policy.[75] The court then looked to the Act for guidance and declared the public policy stated in the Act: "in Texas an employee can waive specified common law rights in exchange for some level of fixed benefits to be provided without regard to fault in the event of an injury on the job."[76] Additionally, as in *Lambert*, the court looked at the specific sections of the Act and stated that some defenses are specifically declared void or prohibited by the statute.[77] However, the court said, "we find no part of the Workers' Compensation Act by which the Legislature has expressly nullified, or even limited the scope of, a [substitute] agreement . . . merely because it was executed prior to the employee's injury."[78] Therefore, the court concluded that the Act did not "expressly nor impliedly" set forth a public policy which would govern the enforceability of the CDB Plan.[79] The trial court's summary judgment in favor of CDB was affirmed.[80]

Finally, in *Cline v. H.E. Butt Grocery Co.*,[81] the United States District Court for the Southern District of Texas also upheld the validity of a non-subscribing employer's occupational benefit plan which required employees to submit all disputes with the employer to arbitration.[82] In *Cline*, the non-subscribing employer created HEB's SMART Work Injury Benefit Plan (the "SMART Plan"), which allowed an employee to choose between "Basic coverage" or "Comprehensive

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70. *Id.* at 37.
71. *Id.*
72. *Id.* at 38.
73. *Id.*
74. *Id.*
75. *Id.* at 39-41. *See* Green Int'l., Inc. v. Solis, 951 S.W.2d 384 (Tex. 1997); Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505 (Tex. 1993); Crowell v. Housing Auth. of City of Dallas, 495 S.W.2d 887 (Tex. 1973); Barnhart v. Kansas City, M. & O. Ry. Co. of Texas, 184 S.W. 176 (Tex. 1916); *Reyes*, 995 S.W.2d at 722; Texas Health Enters. v. Kirkgard, 882 S.W.2d 630 (Tex. App. 1994).
76. *Lawrence*, 16 S.W.3d at 41-42.
77. *Id.* at 42.
78. *Id.* at 44.
79. *Id.*
80. *Id.* at 45.
81. 79 F. Supp. 2d 730.
82. *Id.* at 731.

coverage."[83] The court declared that in determining whether a grievance is subject to arbitration, "[f]irst, the Court asks whether there is a valid agreement to arbitrate; if so, the Court then asks whether the issue in question is covered by the valid agreement."[84] The Texas district court found a valid agreement to arbitrate was present "because it is a contractual provision supported by consideration and there are no equitable reasons to invalidate this private contractual agreement to arbitrate."[85] Consequently, the court submitted all arbitrable claims to arbitration.[86]

The court in *Cline* also distinguished its holding from that in *Strawn v. AFC Enterprises*,[87] which was decided by the same court a month and a half prior to *Cline*.[88] The court explained that the non-subscribing employer's agreement in *Strawn* functioned as a condition precedent to employment and "that forcing a worker to waive her right to sue in exchange for miserly benefits was contrary to the public policy of Texas by undermining the 'quid pro quo' exchange between employer and employee envisioned by the Texas Legislature when it enacted the Workers' Compensation system."[89] However, the court stated that the non-subscribing employer's agreement in *Cline* was completely voluntary, did not offer benefits inferior to those offered under the Act and was written in such plain language that all employees would be able to discern their rights from reading the text of the agreement.[90] Based on these differences, the United States District Court for the Southern District of Texas held *Strawn* distinguishable from *Cline* and upheld the validity of the SMART Plan offered by H.E. Butt Grocery Co. against Cline's public policy challenge.[91]

B. Case Law Invalidating Employer-Created Substitutes for Workers' Compensation Plans

The Texas court of appeals in *Reyes v. Storage & Processors, Inc.*,[92] held defendant's Occupational Accident Employee Welfare Benefit Plan's (the "Benefit Plan") requirement that employees "waive any and all other causes of action, claims, rights, and demands" void and unenforceable because it violated the Texas Legislature's intent underlying the Act.[93] Ramon Reyes was employed as a forklift operator by Storage and Processors, Inc. ("Storage"), and upon his employment, he

83. *Id.* According to the SMART Plan, if the employee elects "Basic coverage," then he retains his right to sue for injuries arising in the scope and course of employment; whereas, if the employee chooses the "Comprehensive coverage," he waives his right to sue for an increased amount of benefits and further agrees to submit all claims to binding arbitration. *Id.* The plaintiff chose the latter coverage and therefore agreed to submit all claims into binding arbitration, waiving his right to sue. *Id.*

84. *Id.* at 732 (quoting Webb v. Investacorp, Inc., 89 F.3d 252, 257-58 (5th Cir. 1996)).

85. *Id.*

86. *Id.* at 735.

87. 70 F. Supp. 2d at 717.

88. *Cline*, 79 F. Supp. 2d at 735.

89. *Id.*

90. *Id.*

91. *Id.*

92. 995 S.W.2d 722.

93. *Id.* at 724.

agreed to participate in the Benefit Plan.[94] The Benefit Plan was an employee compensation plan created by Storage because it did not subscribe to the Act; however, the Benefit Plan offered lower benefits to injured employees than the Act.[95] After about eighteen months on the job, Reyes' foot was run over by a forklift.[96] He received $89,891.69 in medical benefits and $16,842.86 in wage replacement benefits under the Benefit Plan over the eighteen month period following his injury.[97] Contrary to the terms of the Benefit Plan, Reyes also brought a negligence suit against Storage, which Storage sought to dismiss.[98] The trial court granted summary judgment in favor of Storage, and Reyes appealed.[99]

The court began its discussion by briefly tracing the history of the Act and by setting forth the relevant portions of the current Act.[100] The court went on to explain the rights and obligations of non-subscribing employers.[101] The court said that it was permissible for a non-subscribing employer to offer benefits "equal to or greater" than those provided under the Act.[102] However, "public policy does not permit an employer to reap the principal benefits of providing workers' compensation coverage — the waiver of an injured employee's common law and statutory claims — without also bestowing on the injured employee the principal benefit for which that waiver is the 'quid quo pro'— the limited but certain benefits guaranteed by workers' compensation insurance coverage."[103] "If the 'balance' between the extent of the waiver and the receipt of benefits is tipped so that the employee's benefits under the statute are substantially reduced, the clear intent of the legislature is thwarted."[104] Under this rationale, the court compared the benefits offered by the Storage Benefit Plan to the benefits under the Act and concluded that the Benefit Plan violated Texas public policy, and therefore, Reyes' waiver of his rights to sue were void and unenforceable.[105]

The United States District Court for the Southern District of Texas followed this logic in *Strawn* by holding AFC's Value Deal Agreement to be void as against Texas

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 724-25.
100. *Id.* at 726-27. The Employers' Liability Act was passed in 1913, which allowed "employees injured in the course and scope of their employment [to] waive their common law and statutory causes of action in exchange for the ability to receive more limited benefits 'without the necessity of proving negligence and without regard to the employer's potential defenses.'" *Id.* at 726 (quoting Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504, 521 (Tex. 1995)).
101. *Reyes*, 995 S.W.2d at 727. "As a general rule, if an employer chooses non-subscriber status, '[v]oluntary work[er]'s compensation is purely a matter of contract and the rights and obligations of the parties are measured by the contract.'" *Id.* (quoting United States Fidelity & Guar. Co. v. Valdez, 390 S.W.2d 485, 489 (Tex. App. 1965).
102. *Reyes*, 995 S.W.2d at 728.
103. *Id.* (quoting *Hazelwood*, 596 S.W.2d at 206).
104. *Id.* at 728 (quoting *Hazelwood*, 596 S.W.2d at 206).
105. *Id.* at 729. The Storage Occupational Accident Employee Welfare Benefit Plan provided 104 weeks of medical benefits, no impairment or long-term wage replacement benefits and the lesser amount of $500,000 or ten times the employee's base salary for death benefits. *Id.* at 728. The Act provides lifetime medical benefits, impairment benefits, long-term wage replacement benefits and death benefits at the same rate as lifetime benefits are calculated. *Id.*

public policy because it offered employees fewer benefits than would be available under the Act, and it also limited employees' rights to seek redress to an arbitral forum.[106]

IV. INSTANT DECISION

In the instant case, the court found it had jurisdiction over the original suit based on diversity of citizenship.[107] The court began by setting forth the two-step *Webb*[108] analytical standard upon which motions to compel arbitration under the FAA are to be evaluated.[109] The first step actually contains two separate inquiries that a court must make: "(a) whether the parties agreed to arbitrate the dispute in question, and (b) whether the dispute in question falls within the scope of the agreement to arbitrate."[110] The second step a court must take under the *Webb* analysis is to decide "whether legal constraints external to the parties['] agreement foreclosed the arbitration of those claims."[111]

The court stated that when looking at the two subparts of the first step in the *Webb* analysis, the presumption went in favor of compelling arbitration.[112] First, arbitration agreements are supported by strong federal policy and as a result of this policy, courts usually compel arbitration under step 1(b).[113] Second, under step 1(a), the presumption also leans in favor of compelling arbitration because parties have the ability to assent to arbitrate a large variety of disputes.[114] The court acknowledged that parties could even agree to arbitrate statutory rights because of the broad types of disputes arbitrated.[115] As a result of this strong federal policy supporting arbitration agreements, courts now submit disputes concerning the enforceability of an arbitration clause to an arbitrator, instead of deciding the question themselves.[116] The court explained that this broad discretion granted to arbitrators has also stemmed from the *Prima Paint*[117] rule that when a complaint attacks the validity of a contract as a whole, enforceability issues surrounding the arbitration clause are decided by an arbitrator.[118] However, if a party bases an attack

106. *Strawn*, 70 F. Supp. 2d at 726.
107. *See id.* at 719.
108. Webb, 89 F.3d 252.
109. *Strawn*, 70 F. Supp. 2d at 720.
110. *Id.* (citing *Webb*, 89 F.3d at 257-58).
111. *Id.* at 720. (citing *Webb*, 89 F.3d at 257-58). *See also Mitsubishi Motors*, 473 U.S. at 628 (1985).
112. *Strawn*, 70 F. Supp. 2d at 720.
113. *Id.* (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 475-76 (1989)). *See Webb*, 89 F.3d at 258.
114. *Strawn*, 70 F. Supp. 2d at 720.
115. *Id.* (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)). The district court based its conclusion that statutory rights may also be arbitrable on the premise that, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 628).
116. *Strawn*, 70 F. Supp. 2d at 720.
117. Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395 (1967).
118. *Strawn*, 70 F. Supp. 2d at 720 (citing *Prima Paint*, 388 U.S. at 402-04).

on the enforceability of the arbitration clause in isolation, courts can properly resolve this issue.[119]

The court cautioned that while federal policy favors arbitration, the FAA puts limits on the enforceability of arbitration agreements based on defenses to the formation of contracts.[120] According to § 2 of the FAA, arbitration agreements are "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract."[121] The court noted that it is the second step of the *Webb* analysis that incorporates the invalidation of arbitration agreements under § 2 of the FAA by considering "legal constraints external to the parties' agreement."[122] Under this second step, a party can set forth more broad-based, theoretical arguments as to why the arbitration agreement should be invalidated.[123] The court commented that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]."[124]

After setting forth the analytical framework, the court considered the various arguments and positions of the parties.[125] AFC bolstered the validity and enforceability of its Value Agreement by relying on case law precedent.[126] AFC claimed that the case law upheld the right of an employee to completely waive any statutory or common law right to sue.[127] On this basis, AFC argued that its Value Deal Agreement was less restrictive because it did not require employees to completely waive their right to sue, but rather permitted them to accept the benefits of the AFC Plan and also allowed them to sue in tort in an arbitral forum.[128] AFC argued that just because the employee had to sue in an arbitral forum pursuant to their agreement, rather than in a judicial forum, should not make the agreement automatically unenforceable.[129] Parties to a contract have the option of completely

119. *Id.* The court gave the following example to clarify the *Prima Paint* rule: "[I]f a party claims that the signature on an employment contract was obtained by fraud, the enforceability of an arbitration clause found within that employment contract is to be decided by the arbitrator, because the attack goes to the contract as a whole." *Id.* at 720-21. "But if the complaint is that the arbitration clause itself was obtained by fraud, then it is for a court, and not an arbitrator, to decide on the enforceability of the arbitration provision." *Id.* at 721 (citing *Prima Paint*, 388 U.S. at 402-04).

120. *Id.* at 721.

121. *Id.* (citing 9 U.S.C. § 2 (1999)). Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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 (1999).

122. *Strawn*, 70 F. Supp. 2d at 721 (citing *Webb*, 89 F.3d at 257-58).

123. *Id.*

124. *Id.* (quoting Doctor's Assocs, Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

125. *Id.*

126. *Id. See, e.g.*, *Duran*, 98 F.3d 1339; *Cupit*, 90 F.3d 107; *Gutierrez*, 967 F. Supp. 945; *Brito*, 879 F. Supp. 650; *Kinnebrew*, 1994 WL 803508; *Martinez*, S.W.2d 678.

127. *Strawn*, 70 F. Supp. 2d at 721-22.

128. *Id.* at 722.

129. *Id. See* cases cited *supra* note 43.

waiving their right to sue without the contract being deemed per se unenforceable.[130] Alternatively, AFC claimed that even if the court found the Value Deal Agreement voidable, Strawn ratified the agreement by accepting $47,000 in benefits.[131] Finally, AFC claimed that the dispute surrounding the enforceability of the Value Deal Agreement should be decided by an arbitrator, not by the court.[132]

Strawn on the other hand, argued that unilaterally forcing employees to waive their statutory and common law right to sue in favor of arbitration, while also providing only feeble benefits when compared to the Act, was void as against Texas public policy.[133] While Strawn did not argue that AFC had the right to require employees to waive their right to sue so long as they offered comparable benefits to the workers' compensation system, the problem arose when AFC imposed the combination of inferior benefits and required employees to waive their right to sue in a judicial forum.[134] Strawn cited two cases in support of her argument.[135]

The court then addressed the parties' arguments in the context of discussing the public policy underlying the Act.[136] The court found that AFC's Plan satisfied both subparts of the first prong of the *Webb* analysis, but it failed to satisfy the second prong because it was "void as contrary to Texas public policy with respect to the workers' compensation system."[137] The court explained that the Texas legislature passed the Act to mitigate the perceived injustices of the old common law system.[138] Subscribers to the Act were provided a trade-off: employers avoided the risk of paying large judgments and employees were guaranteed a set amount of benefits, without having to prove fault.[139] While subscribing to the Act is not mandatory in Texas, the penalty imposed for not subscribing is the loss of the above mentioned common law defenses, which makes the possibility of liability more probable.[140] The Act was seen by the legislature as a trade-off between the employee and employer, but "primarily for the benefit and protection of employees."[141] Based upon the aforementioned reasons, the Texas court of appeals held void, as against public policy, an employee's waiver of common law and statutory claims for benefits below those provided by the workers' compensation system.[142]

130. *Strawn*, 70 F. Supp. 2d at 722. *See* cases cited *supra* note 43.

131. *Strawn*, 70 F. Supp. 2d at 722.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id. See Cupit*, 90 F.3d at 107; *See also Reyes*, 995 S.W.2d 722.

136. *Strawn*, 70 F. Supp. 2d at 722.

137. *Id.*

138. *Id.* at 723. Under the old common law scheme, employees that were injured in the course and scope of their employment could sue their employer in tort and recover if they proved their injury was proximately caused by the employer. *Id.* (citing *Garcia*, 893 S.W.2d at 521. Under this scheme, however, employers usually avoided liability because they could invoke numerous defenses, such as assumption of the risk and contributory negligence. *Id.*

139. *Strawn*, 70 F. Supp. 2d at 723 (citing *Garcia*, 893 S.W.2d at 521). *See also Reyes*, 995 S.W.2d at 726.

140. *Strawn*, 70 F. Supp. 2d at 723 (citing *Garcia*, 893 S.W.2d at 521). *See also Reyes*, 995 S.W.2d at 726.

141. *Strawn*, 70 F. Supp. 2d at 723 (quoting *Hazelwood*, 596 S.W.2d at 206).

142. *Strawn*, 70 F. Supp. 2d at 723 (citing *Reyes*, 995 S.W.2d at 727-28). *See supra* text accompanying note 103. Also, the benefits offered in *Reyes* were higher than those offered to Strawn under the AFC Plan. *Strawn*, 70 F. Supp. 2d at 723.

AFC claimed that the law allowed them to make all employees waive their common law and statutory claims as a condition to gaining employment, while offering them no benefits whatsoever.[143] The court disposed of this argument by saying that "[s]uch a one-sided arrangement would be contrary to Texas public policy with regard to worker's compensation coverage, because it undermines the proper 'quid pro quo' exchange envisioned by the legislature."[144] Furthermore, the court said that the only way an employer could exchange benefits far below those of the workers' compensation system, for an agreement to arbitrate, was if the arbitral forum did not frustrate the Texas legislature's desired "quid pro quo" which exists when an employee seeks a remedy in a judicial forum.[145] If the arbitral forum does not rise to the level of the "quid pro quo exchange," then it should be considered void as violating Texas public policy.[146] This narrowed the court's focus to deciding whether an arbitral forum was similar enough to a judicial forum so as not to frustrate the legislative intent of the Act.[147]

The court held that an arbitral forum was not similar enough to the judicial forum the Texas legislature had in mind, and therefore, the legislative intent behind the passing of the Act was undermined.[148] The court set forth numerous reasons why an arbitral forum was not similar enough to a judicial forum.[149] First, arbitral forums do not allow claims to be heard by a jury, which directly contravenes the Act's theory of crippling an employer by restricting their use of common law defenses in an employee tort action.[150] Second, arbitral forums do not strictly adhere to the rules of evidence like judicial forums.[151] Third, there is a large discrepancy in the legal expertise necessary to become a judge as compared to an arbitrator.[152] After listing these differences, the court concluded that:

> stripping a defendant of common law defenses is not much of a disincentive in practice if the rules of evidence employed in the forum fail to properly protect an injured employee's chances for recovery, or if the legal expertise of those conducting the proceedings are not adequate to allow the employee to vindicate the technical legal advantages the Texas Legislature saw fit to bestow on the employees of a non-subscribing employer.[153]

143. *Id.*
144. *Id.* at 723-24.
145. *Id.* at 724.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* The major way in which the Act attempted to keep employers subscribing was to cripple the non-subscribing employers by taking away all of their common law defenses, therefore, exposing them to the increased probability of liability when an injured employee sued them in a judicial forum. *Id.* The court further stated that "[i]n considering whether a contract is contrary to public policy, the test is whether the tendency of the agreement is injurious to the public good, not whether its application in a particular case results in actual injury." *Id.* (quoting *Hazelwood*, 596 S.W.2d at 206).
151. *Id.*
152. *Id.*
153. *Id.*

This rationale led the court to conclude that, while people are free to choose the forum for dispute resolution, a non-subscribing employer cannot require employees to submit their disputes to arbitral forums while guaranteeing only limited benefits.[154] This would subvert the legislative intent of the Act.[155]

Finally, the court discussed the narrow scope of judicial review regarding arbitral decisions under the FAA.[156] The Fifth Circuit has declined to formulate non-statutory grounds which would increase the scope of judicial review regarding arbitration awards, as is the practice in some states.[157] Due to this lack of judicial review regarding arbitral awards, the court concluded that allowing employers to force their employees into arbitral forums, when the legislature clearly expected some type of appellate review, was contrary to the public policy of the Act.[158] For all the above reasons, the court held that "where employers offer minimal benefits and unilaterally impose an arbitral forum on their injured employees, such a forum is sufficiently dissimilar to a judicial forum as to undermine Texas public policy with respect to the workers' compensation system."[159] Based on this holding, the court invalidated AFC's "Value Deal Agreement" because it violated Texas public policy.[160]

The final section of the court's opinion discussed AFC's arguments and the reasons for their failure.[161] The court addressed each of the cases that AFC cited in support of its arguments and found them all inapplicable or merely persuasive authority.[162] The court then addressed AFC's other miscellaneous arguments.[163] After considering AFC's arguments, the court determined that they did not alter its

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154. *Id.* at 725.

155. *Id.* "[T]he results of arbitration by private and untrained 'judges' are distantly remote from the fair process procedurally followed and application of principled law found in the judicial process." *Id.* (quoting Stroh Container Co. v. Delphi Indus., 783 F.2d 743, 751 (8th Cir. 1986)).

156. *Id.*. Interpretive and application mistakes of the law do not constitute sufficient grounds to vacate awards granted by an arbitral forum. *Id.* (citing United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)). Furthermore, arbitration awards are seldom vacated by courts. *Id.*

157. *Id. See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 936 (2d Cir. 1986).

158. *Strawn*, 70 F. Supp. 2d at 725.

159. *Id.* at 725-26.

160. *Id.* at 726.

161. *Id.*

162. *Id.* at 726-728. First, the court distinguished the holding of *Cupit v. Walts* from its holding in *Strawn*, stating that *Cupit's* holding was limited to cases where the non-subscribing employers offered equal or greater employee benefits when compared to the Act. *Id.* at 726 (citing *Cupit*, 90 F.3d 107). Next, the court stated that *Duran v. Intex Aviation Servs., Inc.* was of little help because that case failed to rule on the waiver issue because it was never raised. *Id.* (citing *Duran*, 98 F.3d 1339). The court then distinguished one of its own opinions, *Gutierrez v. Academy Corp.*, by stating that the issue of public policy was never addressed because no personal injuries were involved. *Id.* (citing *Gutierrez*, 967 F. Supp. 945). The court announced that *Kinnebrew v. Gulf Ins. Co.* and *Brito v. Intex Aviation Servs., Inc.* were merely persuasive authority and declined to follow them. *Id.* (citing *Brito*, 879 F. Supp. 650 and *Kinnebrew*, 1994 WL 803508). *Martinez v. IBP, Inc.*, was the final case that AFC cited as authority, which the court explained was inapplicable because the disputed agreement was entered into after the employee had already been injured. *Id.* at 726-727. (citing *Martinez*, 961 S.W.2d 678).

163. *Id.* at 727.

view on the unenforceability of the Value Deal Agreement.[164] The court denied AFC's Motion to Stay or Dismiss and to Compel Arbitration and ordered each party to pay their own costs and fees.[165]

As this issue continues to be litigated, the United States Supreme Court will likely be faced with the question of whether employer-created worker compensation plans, which allow employers to restrict the rights of prospective employees below those granted by the Act, violate the public policy of the workers' compensation scheme. When the Supreme Court finally addresses this issue, the rationale of *Strawn* will provide a solid analysis upon which the Supreme Court may rely.[166]

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164. *Id.* at 727-728. AFC's ratification argument had no merit because the Value Deal Agreement was found to be void, not voidable. *Id.* (citing Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998)). Voidable contracts can be ratified, but void contracts cannot. *Id.* AFC also tried to argue that an arbitrator should decide whether the Value Deal Agreement was enforceable because Strawn failed to separately attack the arbitration portion. *Id.* at 727. The court declared that *Prima Paint* was not applicable to the second step of the *Webb* analysis. *Id.* (citing R.M. Perez & Assocs., Inc. v. Welch, 960 F.2d 534, 537 (5th Cir. 1992)). The court further addressed this argument as if the *Prima Paint* rule did apply to the second step and concluded that Strawn attacked the Value Deal Agreement separately so that a court was the proper forum in which to address the Texas public policy issue. *Id.* Lastly, the court stated that its holding did not violate the FAA by treating arbitration clauses differently than ordinary contracts. *Id.* at 727-28. The FAA provides that it is unlawful for any state's laws to put arbitration clauses on "lesser footing" when compared to other contracts. *Id.* at 727. Therefore, the FAA is held to preempt contrary state law which has a discriminatory effect on arbitration agreements. *Id.* However, this issue was not raised by AFC. *Id.* at 728.

165. *Id.*

166. *See Id.* at 717-28.

V. COMMENT

Several states have sought to put powerful employers and their employees on a more level playing field by enacting workers' compensation systems to govern workplace injuries.[167] Under most of these schemes, employees are guaranteed certain levels of compensation for particular injuries, while employers are assured that injured employees will not seek further tort actions that could potentially result in excessive employer liability.[168] However, many employers have attempted to circumvent the legislative intent underlying these schemes by choosing not to subscribe to the workers' compensation system and instead, creating their own employee compensation plans.[169] Such employer-created compensation plans vary broadly in their terms as to the rights given up by employees and the guaranteed level of benefits offered by the employer. Furthermore, many of these unregulated plans are imposed as mandatory conditions of employment and often require prospective employees to agree to submit all disputes to an arbitral forum.[170]

In *Strawn*, the United States District Court for the Southern District of Texas found AFC's Value Deal Agreement void as against Texas public policy because it offered employees lower benefits than available under the Texas Workers' Compensation Act and also because it limited the employees' right to seek redress only to an arbitral forum.[171] The United States Supreme Court has yet to decide the validity and enforceability of such non-subscribing employer plans or set forth the minimum requirements so that such plans do not undermine the intent of the states' workers' compensation schemes. As illustrated in *Strawn*, the trend among lower courts considering the validity of such employer-created compensation plans is to compare the benefits offered by the non-subscribing employer's plan to those available under the state's workers' compensation system and any other rights that are restricted by the non-subscribing employer's plan.[172]

The enforcement of these employer-created compensation plans revolves around the basic law of contracts. The general rule is that contracts which are voluntarily entered into by parties to an "arms-length" transaction should be upheld as valid, without considering the equities of the outcome.[173] Exceptions to this general rule exist when the contract appears to be unconscionable or a contract of adhesion.[174] The usual test to determine whether a contract is unconscionable is "whether under

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167. *See, e.g.*, State Compensation Fund v. Symington, 848 P.2d 273 (Ariz. 1993); Masters v. State, 668 P.2d 73, 76 (Idaho 1982); Ramsey v. Morrison, 676 N.E.2d 1304, 1310 (Ill. 1997); Philip Elec. North America v. Wright, 703 A.2d 150 (Md. 1997); Kenny v. AAA Delivery Serv., 216 N.W.2d 760, 762 (Mich. 1974); Ives v. Sunfish Sign Co. 275 N.W.2d 41, 43 (Minn. 1979).

168. *Strawn*, 70 F. Supp. 2d at 723. Plaintiffs win about 70% of employment litigation suits, with an average jury award of about $700,000. Spelfogel, *supra* note 3, at 78.

169. *See* cases cited *supra* note 5.

170. *See* cases cited *supra* note 6.

171. *Strawn*, 70 F. Supp. 2d at 726.

172. *See, e.g.*, *Cupit*, 90 F.3d at 107; *Cline*, 79 F. Supp. 2d 730 (S.D. Tex. 1999); *Strawn*, 70 F. Supp. 2d at 717; *Reyes*, 995 S.W.2d at 722.

173. Hotze v. Schlanser, 102 N.E.2d 131, 133-34 (Ill. 1951). *See* RESTATEMENT (SECOND) OF CONTRACTS § 79(b) cmt. c (1978).

174. Williams v. Walker-Thomas Furniture Co, 350 F.2d 445 (D.C. Cir. 1965). *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1978).

circumstances existing at [the] time of making of [the] contract and in light of general commercial background and commercial needs of a particular trade or case, clauses involved are so one-sided as to oppress or unfairly surprise a party."[175] For contracts of adhesion:

> A lack of voluntariness is demonstrated in contracts of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms, or to refrain from contracting at all.[176]

"[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract, with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."[177]

With these basic contract principles in mind, the Value Deal Agreement in *Strawn* does not appear to be unconscionable or a contract of adhesion.[178] There are no facts to suggest that Strawn did not have knowledge of the arbitration provision or the limited benefits offered under the AFC Plan. As a matter of fact, Strawn argued that the arbitration agreement was mandatory as a condition of employment that was unilaterally imposed by AFC.[179] Further, the agreement contained the following plain language: "'[A]ll claims and disputes Employee may presently have or may in the future have' against Defendant [AFC], expressly including 'claims for bodily injury or physical, mental or psychological injury' must be submitted to binding arbitration."[180] There are no facts suggesting that Strawn was limited to employment with AFC or that there were time restrictions on how long she had to read the AFC Plan.[181] Nothing prevented Strawn from seeking the advice of outside legal counsel regarding the AFC Plan.[182] Finally, just because an agreement contains an arbitral provision does not make it per se unconscionable.[183] Thus, on its face, the AFC Plan should have been enforced according to the general rule that voluntarily entered contracts are valid.

The use of arbitration provisions by employers to govern disputes with their employees have become increasingly popular with both employers and employees.[184] According to a survey of employees, eighty-three percent of American workers favor the use of arbitration. Most employees surveyed felt that arbitration would make it

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175. BLACK'S LAW DICTIONARY 1524 (6th ed. 1990) (citing Division of Triple T Serv., Inc. v. Mobil Oil Corp., 304 N.Y.S.2d 191, 201 (1969)).

176. Bank of Indiana, Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 110 (S.D. Miss. 1979).

177. *Williams*, 350 F.2d at 449.

178. *See Strawn*, 70 F. Supp. 2d 717.

179. *Id.* at 719.

180. *Id.*

181. *See Id.* 717.

182. *Strawn*, 70 F. Supp. 2d 717.

183. *See* Diamond, *supra* note 40.

184. Evan J. Spelfogel, *Pre-Dispute ADR Agreements Can Protect Rights of Parties and Reduce Burden on Judicial System*, N.Y. ST. B.J., Sept.-Oct. 1999, at 16.

easier for ordinary workers to obtain a speedy and fair hearing and that it would be far less costly than hiring a lawyer and going into court.[185]

On the other hand, employers have declared "a mandatory arbitration program speeds up the dispute resolution process, minimizes the expense of discovery, reduces internal and legal costs, ensures the preservation of confidentiality (thereby minimizing the risks of adverse publicity), and avoids the possibility of runaway jury verdicts."[186] These studies indicate that both sides (employers and employees) find advantages to submitting their claims to binding arbitration and that the judicial system would frustrate this effective, increasingly popular tool for resolving disputes if such arbitration provisions were presumed invalid. Moreover, if agreements are made by informed parties who choose to submit their disputes to binding arbitration and the court does not enforce such agreements, then the burden will fall on an already clogged judicial system to remedy the situation.[187] Finally, those who argue that mandatory arbitration provisions will adversely affect low-income employees (usually the ones with the least bargaining power) have failed to consider how difficult it is for such employees to gain access to the judicial process.[188] Due to the fact that "low salaries make large damage awards unlikely," it is very difficult for these individuals to secure "resourceful, competent attorneys" to represent them in court.[189] Realistically, fewer injured employees recover anything from their employers. Under our judicial process, this is truly the unjust result.

In *Strawn*, the resolution of the dispute revolved not around the presence of the mandatory arbitration provision, but around the level of benefits that the AFC Plan provided as compared to the Texas Workers' Compensation Act.[190] While the court used the fact that AFC "unilaterally impose[d] an arbitral forum on their injured employees" as a factor, this was not the pivotal consideration.[191] Rather, the consensus seems to be that those employer-created compensation plans offering "benefits to its employees equal to or greater than those provided under the Texas Workers' Compensation Act [or any state workers' compensation system]" are enforceable as contracts.[192] However, where such plans extend benefits that "while, certain, are far more limited than those provided by [state] workers' compensation" systems, courts will deem these plans to contravene the legislatures' intent in passing the workers' compensation laws and will find them void as against public policy.[193] This is an example of judicial line drawing after the competing interests are weighed. The Texas courts have taken the stance that the Act is frustrated when employers offer lower benefits under employer-created plans than are provided by the Act.[194] Attempts by employers to circumvent the state's workers' compensation system are negatively compounded when the benefits offered under such a plan are inferior to

185. *Id.* at 22.
186. *Id.*
187. *Id.*
188. Primm, *supra* note 2, at 166.
189. Primm, *supra* note 2, at 166.
190. *Strawn*, 70 F. Supp. 2d at 717.
191. *Id.* at 725.
192. *Cupit*, 90 F.3d at 109. *See also Cline*, 79 F. Supp. 2d 735.
193. *Strawn*, 70 F. Supp. 2d at 725-26. *See also Reyes*, 995 S.W.2d at 729.
194. *Strawn*, 70 F. Supp. 2d at 725-26. *See also Reyes*, 995 S.W.2d at 729.

the state's scheme. Even though there are numerous benefits, to both employers and employees, to enforcing an arms-length transaction that requires disputes to be submitted to an arbitral forum, the overriding concern is the inadequate benefits being provided. This overriding concern outweighs the voluntariness promoted by contract principles, and for this reason, the *Strawn* court correctly found the AFC Plan void as against Texas public policy.[195]

VI. CONCLUSION

The *Strawn* case illustrates that courts have the power to enforce laws as intended by the legislature. When employers attempt to circumvent the legislative process, courts must act to prevent such thwarting and ensure that the laws are applied as contemplated. When the legislature deems it necessary to level the playing field regarding the bargaining power of an employer and its employees, courts will not allow employers to nullify the effect of such laws by opting not to participate. Rather, if employers choose not to participate in the states' workers' compensation programs, but instead opt to create their own employee compensation plans, such plans must offer at least equal to or greater benefits than offered under workers' compensation. This appears to be the case even if such employer-created plans include an agreed upon provision submitting all employer-employee disputes to an arbitral forum. While there is a strong federal policy favoring arbitration, courts will not allow employers to manipulate this strong favor to help them tilt the balance back their way. If employers' plans do not offer at least equal benefits to employees as would be received under the state's workers' compensation system, they run the risk of courts voiding their self-created agreements as contrary to the states' public policy underlying workers' compensation programs.

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195. *Strawn*, 70 F. Supp. 2d at 726-28.