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## When Arbitration Agreement Provisions Time Travel: Illusory Promises and Continued At-Will Employment in Baker

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## NOTE

# When Arbitration Agreement Provisions Time Travel: Illusory Promises and Continued At-Will Employment in *Baker*

*Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. 2014) (en banc).

RICHARD C. BYRD\*

### I. INTRODUCTION

Left unrestrained, *Baker v. Bristol Care*<sup>1</sup> may quietly revolutionize Missouri law regarding employment agreements of many kinds. *Baker* is a recent Supreme Court of Missouri case favoring an employee's position for denial of an employer's motion to compel arbitration pursuant to a purported employment and arbitration agreement. The court considered the agreement in question to be unsupported by consideration, as neither continued at-will employment, nor an illusory promise to arbitrate on the part of the employer, were found to be adequate consideration. Of particular note was the court's fatal interpretation of a provision of the purported agreement. This provision would have given the employer, with 30-days' notice to the employee, unilateral power to amend or revoke at least the arbitration portion of the parties' purported agreement. The court interpreted this provision as granting retroactive, and not merely prospective, authority to the employer.

This case is an important development of Missouri employer-employee contract law following the 2008 case of *Morrow v. Hallmark Cards, Inc.*<sup>2</sup> It heals an apparent rift between Missouri's law on this matter and the federal courts' interpretation thereof. Depending on other courts' use of the decision in the future, *Baker* may have sweeping effects on all agreements – not merely arbitration agreements – between at-will employees and employers in the future. These implications, and how employers and employees might act to create arbitration agreements in light of *Baker*, will be explored below.

First, this Note discusses the particular facts of the *Baker* case, including its procedural history and holding. Then, the history of salient cases and law is covered in three main areas related to *Baker*, specifically the concept of arbitrability, at-will employment's status as effective consideration, and when

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\* B.S.B.A., Business Administration, Saint Louis University, 2013; J.D. Candidate, University of Missouri School of Law, 2016. I thank Professor Thom Lambert for his positive outlook and assistance on this Note.

1. *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. 2014) (en banc), *reh'g denied* (Oct. 28, 2014).

2. *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. Ct. App. 2008).

courts find promises to be illusory. Following that, this Note summarizes the court's decision in *Baker* and its lengthy and thorough dissent. Finally, this note discusses the significance of this case in relation to both the history of the topics involved and their application going forward.

## II. FACTS AND HOLDING

The parties involved in *Baker v. Bristol Care, Inc.* were appellants David Furnell ("Furnell") and Bristol Care, Inc. d/b/a Bristol Manor ("Bristol") and respondent Carla Baker ("Baker").<sup>3</sup> Baker was a former employee of Bristol Care, and Furnell was the President of Bristol.<sup>4</sup> After Baker attempted to bring a class action against Bristol, Bristol sought to compel arbitration.<sup>5</sup> Bristol appealed the overruling of this motion to the Supreme Court of Missouri.<sup>6</sup> It made this motion pursuant to Missouri Revised Statutes Sections 435.355<sup>7</sup> and 435.440, which permitted appeal "from an order denying an application to compel arbitration . . . ."<sup>8</sup>

Bristol and Baker had signed employment and arbitration agreements, both of which were prepared by Bristol at the same time that Baker received a promotion from Bristol.<sup>9</sup> This promotion included a change in pay-scheme from hourly to salary, and Baker was given a role as manager in one of Bristol's long-term care-providing locations.<sup>10</sup> Under the employment agreement, Baker's employment was to "continue indefinitely" unless either Baker provided 60 days' notice or Bristol chose to end her employment in any one of four ways.<sup>11</sup> The parties' signed arbitration agreement identified the consideration as "Baker's continued employment and mutual promises to resolve claims through arbitration," however the agreement also said that it would "not alter [Baker]'s status as an at-will employee" and "that Bristol specifically reserves the right to amend, modify, or revoke this agreement upon thirty (30) days' prior written notice to [Baker]."<sup>12</sup> Baker commenced her

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3. *Baker*, 450 S.W.3d at 772.

4. *Id.* at 773.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* The court identified these four ways as

(1) with five days' written notice "at [Bristol's] sole option"; (2) without notice if Bristol paid Baker five days' compensation; (3) without notice if, in Bristol's "sole opinion," Baker violates the employment agreement in a way that "jeopardizes the general operation of the facility or the care, comfort or security of its residents"; or (4) without notice for "dishonesty, insubordination, moral turpitude or incompetence."

*Id.*

12. *Id.*

class action after being removed from her employment with Bristol. The class action sought recovery for purportedly unpaid overtime, and this led Bristol, in turn, to make its motion to compel arbitration.<sup>13</sup>

Bristol argued in favor of enforcing the arbitration clause, pointing to the arbitrator as the one who ought to resolve a dispute over enforceability.<sup>14</sup> For its argument, Bristol relied on the arbitration agreement itself, which stated, “The arbitrator has exclusive authority to resolve any dispute relating to applicability or enforceability of this Agreement.”<sup>15</sup> Bristol advanced, in favor of the arbitration agreement’s validity, that “there are two sources of considerations for the arbitration agreement: (1) Baker’s promotion, continued employment and attendant benefits; and (2) Bristol’s promise to arbitrate its claims arising out of the employment relationship between it and Baker and to assume costs of arbitration.”<sup>16</sup> Baker denied the existence of any consideration needed to find the purported agreement valid and instead argued that she remained an at-will employee despite the promotion.<sup>17</sup>

The Missouri Circuit Court of DeKalb County ruled against Bristol’s attempt to compel arbitration.<sup>18</sup> The circuit court apparently agreed with Baker that the arbitration agreement in question was illusory.<sup>19</sup> The Missouri Court of Appeals for the Western District, in a one paragraph order, affirmed the circuit court’s determination as being without error.<sup>20</sup> After a motion to transfer, the case was transferred to the Supreme Court of Missouri.<sup>21</sup>

The Supreme Court of Missouri affirmed the judgment, consistent with the circuit court’s order, finding the arbitration agreement to be without consideration and therefore invalid.<sup>22</sup> Specifically, the instant court found that “Baker’s continued at-will employment and Bristol’s promise to resolve claims through arbitration d[id] not provide consideration to form a valid arbitration agreement.”<sup>23</sup> Therefore, the court held that when the only candidates for consideration to support a purported arbitration agreement are continued at-will employment and an illusory, “unilaterally and retroactively” alterable promise to engage in arbitration, the purported agreement is without consideration and therefore invalid.<sup>24</sup>

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13. *Id.*

14. *Id.* at 773-74.

15. *Id.*

16. *Id.* at 774.

17. *Id.* at 775.

18. *Id.* at 770.

19. *Id.* at 772-73; Brief for Respondent at 22, *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. 2014) (en banc), *reh’g denied* (Oct. 28, 2014) (No. WD75035), 2012 WL 5971088, at \*22.

20. *Baker v. Bristol Care, Inc.*, 2013 WL 1587882, at \*1 (Mo. Ct. App. 2013).

21. *Baker*, 450 S.W.3d at 770.

22. *Id.* at 772.

23. *Id.* at 777.

24. *Id.* at 776-77.

## III. LEGAL BACKGROUND

## A. Arbitrability

The State of Missouri has maintained the provisions of the Missouri Uniform Arbitration Act since at least 1980.<sup>25</sup> This Act states in relevant part, “A written agreement to submit any existing controversy to arbitration . . . is valid . . . save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>26</sup> This mirrors the Federal Arbitration Act’s (“FAA”) statutory language that “[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid . . . save upon such grounds as exist . . . for the revocation of any contract.”<sup>27</sup> This act supports the Federal government’s “strong . . . policy in favor of arbitration.”<sup>28</sup>

Similarly to the instant case, sometimes a court will be asked to determine a “question of arbitrability,” that is, “gateway matters [like] whether parties have a valid arbitration agreement at all or whether concededly binding arbitration applies to a certain type of controversy.”<sup>29</sup> The Supreme Court of the United States has presumed these gateway issues to be for courts to decide.<sup>30</sup> The Supreme Court of Missouri has not refrained from resolving questions of arbitration agreement formation.<sup>31</sup> The court in *Dunn Industrial Group, Inc. v. City of Sugar Creek*, consistent with the Supreme Court of the United States, held that “doubts as to arbitrability should be resolved in favor of coverage.”<sup>32</sup> Before “parties are forced to submit to arbitration,” the court should determine “whether the parties contractually agreed to arbitration.”<sup>33</sup> In following this “limited inquiry to determine whether a valid agreement to arbitrate exists,” the Missouri courts would be acting consistently with the

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25. MO. REV. STAT. § 435.350 (Cum. Supp. 2013).

26. *Id.*

27. 9 U.S.C. § 2 (2012).

28. *Kenney v. Hallmark Cards, Inc.*, 2009 WL 102682, at \*2 (D. Kan. 2009).

29. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013). *But see Baker*, 450 S.W.3d at 774 (distinguishing a 2010 Supreme Court case in which arbitration was compelled when the party delegated authority to the arbitrator to resolve disputes of contract formation).

30. *Oxford Health Plans LLC*, 133 S. Ct. at 2068 n.2.

31. *See State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858-59 (Mo. 2006) (en banc); *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 429 (Mo. 2003) (en banc); *State ex rel. PaineWebber, Inc. v. Voorhees*, 891 S.W.2d 126, 128 (Mo. 1995) (en banc).

32. *Dunn Indus. Grp., Inc.*, 112 S.W.3d at 429.

33. *Finney v. Nat’l Healthcare Corp.*, 193 S.W.3d 393, 394-95 (Mo. Ct. App. 2006).

Eighth Circuit Court of Appeals and would not be violating the Federal Arbitration Act.<sup>34</sup>

### B. *At-Will Employment as Consideration*

The at-will employment doctrine, in which “an employer may terminate an . . . employee ‘for any reason or for no reason,’” is “well-established Missouri Law.”<sup>35</sup> Along with the ability to terminate an employee’s course of employment without any reason at all, Missouri courts have considered the lack of a contract that states a definite length of employment when determining whether an at-will employment relationship exists.<sup>36</sup> There have nevertheless been some restrictions and exceptions to this broad at-will employment doctrine permitting employee termination.<sup>37</sup>

Missouri courts in the past have held that, at least where non-competition agreements are concerned, “[a]n employer’s continuance of employment, where continuance is not required, supplies adequate consideration . . . .”<sup>38</sup> That this understanding of consideration might have been extended to arbitration agreements was shown by the 2010 case of *Kunzie v. Jack-In-The-Box, Inc.*<sup>39</sup> In that case, the court distinguished a prior case in which “continuance in employment . . . supplie[d] adequate consideration for a non-competition agreement,” not by limiting that case’s applicability only to non-competition agreements, but by identifying that “the dispositive issue [was] not one of consideration, but of . . . mutual agreement and acceptance.”<sup>40</sup>

If the consideration-fulfilling effect of continuance of at-will employment ever could have been so extended, its chances were cut short in 2008 by the hallmark case of *Morrow v. Hallmark Cards, Inc.*,<sup>41</sup> “the seminal case addressing . . . contract elements in the context of enforceability of an arbitra-

34. *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694-95 (8th Cir. 1994); *see Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 436 n.12 (Mo. Ct. App. 2010).

35. *Margiotta v. Christian Hosp. Ne. Nw.*, 315 S.W.3d 342, 345 (Mo. 2010) (en banc).

36. Absent an employment contract with a “definite statement of duration[,] . . . an employment at will is created.” *Luethans v. Wash. Univ.*, 894 S.W.2d 169, 172 (Mo. 1995) (en banc), *abrogated on other grounds by Keveney v. Mo. Military Acad.*, 304 S.W.3d 98 (Mo. 2010) (en banc); *McCoy v. Spelman Mem’l Hosp.*, 845 S.W.2d 727, 729 (Mo. Ct. App. 1993).

37. *Margiotta*, 315 S.W.3d at 346. Some examples include race, religion, and certain public-policy exceptions. *Id.*

38. *Easy Returns Midwest, Inc. v. Schultz*, 964 S.W.2d 450, 454 (Mo. Ct. App. 1998); *see Reed, Roberts Assocs., Inc. v. Bailenson*, 537 S.W.2d 238, 241 (Mo. Ct. App. 1976).

39. 330 S.W.3d 476 (Mo. Ct. App. 2010).

40. *Id.* at 484-85.

41. *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. Ct. App. 2008).

tion provision against at-will employees.”<sup>42</sup> *Morrow* stood for the propositions that, in that court’s evaluation of the enforceability of Hallmark’s arbitration program, “[t]erms and conditions of at-will employment are not enforceable at law as *contractual duties*” and “at-will employment, by its very moment-by-moment nature, is not a legally enforceable contract of employment.”<sup>43</sup> Since *Morrow*, other cases have partially confirmed the *Morrow* court’s take on some of these propositions.<sup>44</sup>

On the issue of the validity of the continuance of at-will employment as consideration, at least a handful of other jurisdictions have held contrary to *Morrow*. The First Circuit Court of Appeals in *Soto v. State Industrial Products, Inc.* collected a variety of these cases and found that, as of the date of *Soto*, at least nine other courts, each applying (or attempting to apply) their respective states’ laws, agreed that “continued employment . . . [is] sufficient consideration to render [an arbitration] agreement enforceable.”<sup>45</sup> This same case identified three other courts that held otherwise, including *Morrow*.<sup>46</sup> Furthermore, *Jostens, Inc. v. National Computer Systems*, a case heard by the Minnesota Supreme Court in 1982, included the issue of continued at-will employment as consideration, and the court there particularly looked for “raises or promotions” before finding an employment contract unenforceable and thus strongly implied that a raise or promotion would have been sufficient consideration to uphold the contract.<sup>47</sup>

### C. Illusory Promises in Arbitration Agreements

An illusory promise, “where ‘[i]n effect, the agreement allows [the employer] to hold its employees to [a] promise . . . while reserving its own escape hatch,’” without restrictions on the employer itself, has generally not been found to be valid consideration for an arbitration agreement.<sup>48</sup> In Missouri, recent cases have shown that arbitration agreements that are otherwise without consideration cannot themselves be considered binding mutual agreements unless the agreement was truly mutual and the employer did not try to “possess[] the unilateral right to modify” or back out of the agree-

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42. *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 436 (Mo. Ct. App. 2010).

43. *Morrow*, 273 S.W.3d at 26-27.

44. See *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 741 (Mo. Ct. App. 2011); *Frye*, 321 S.W.3d at 438 (“On appeal, Speedway has not asserted that the continuation of at-will employment constitutes consideration for Kimberly’s waiver of her right to access to the courts. Such an argument would have been ineffective, in light of *Morrow*.”).

45. *Soto v. State Indus. Prod., Inc.*, 642 F.3d 67, 75 (1st Cir. 2011).

46. *Id.* at 75 n.6.

47. *Jostens, Inc. v. Nat’l Computer Sys., Inc.*, 318 N.W.2d 681, 703-04 (Minn. 1982).

48. *Canales v. Univ. of Phoenix, Inc.*, 854 F. Supp. 2d 119, 124-25 (D. Me. 2012) (quoting *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002)).

ment.<sup>49</sup> *Morrow* has again shown itself to be relevant. In *Morrow*, the court would not play along with an employer's attempt to put substance into its purported promise by averring (during litigation) that its ability to modify an arbitration program can be exercised "only prospectively," so that the employer "could not unilaterally refuse to pay for [or participate in] arbitration."<sup>50</sup> The purported arbitration program language in such a situation may be construed even to the contradiction of these later assertions.<sup>51</sup>

A Missouri appellate court and the United States Court of Appeals for the Fifth Circuit sought express language to construe an arbitration agreement's clause as exclusively prospective but found none.<sup>52</sup> However, the Missouri appellate case of *Frye v. Speedway Chevrolet Cadillac* explicitly did not decide "whether the unilateral right to amend an agreement on mere advance notice . . . comports with settled principles of contract law in Missouri . . ."<sup>53</sup> This was because in *Frye* the alternative dispute resolution program used did not require the employer, Speedway, to give advance notification.<sup>54</sup> The 2012 California case of *Peleg v. Neiman Marcus Group, Inc.* cited the Fifth Circuit decision in *Carey v. 24 Hour Fitness, USA, Inc.*<sup>55</sup> The *Peleg* court followed *Carey* by looking for a "savings clause preventing any changes from having retroactive effect" to determine whether the relevant arbitration provision was illusory, rather than finding that a notice period and requirement "by itself, [would] make the [arbitration] [a]greement enforceable."<sup>56</sup> In *Carey*, which was cited by *Baker*, such a clause was known as a "*Halliburton* type savings clause,"<sup>57</sup> after the Texas case of *In re Halliburton Company*.<sup>58</sup>

The cases mentioned above that would interpret, without explicit and sufficient restrictions, an "escape" clause of an arbitration agreement to apply retroactively seem to be in tension with the Missouri precedent for construing language in favor of enforcing agreements. A Supreme Court of Missouri case from 1968 opined: "Where an agreement is susceptible of two constructions, one of which renders the contract invalid and the other sustains its va-

49. *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 742-43 (Mo. Ct. App. 2011); see *Clemmons v. Kan. City Chiefs Football Club, Inc.*, 397 S.W.3d 503, 506-07 (Mo. Ct. App. 2013).

50. *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 25 (Mo. Ct. App. 2008).

51. *Id.*

52. *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 208-09 (5th Cir. 2012); *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 444-45 (Mo. Ct. App. 2010).

53. *Frye*, 321 S.W.3d at 444.

54. *Id.*

55. *Peleg v. Neiman Marcus Grp., Inc.*, 140 Cal. Rptr. 3d 38, 60-61 (2012); *Carey*, 669 F.3d at 207-09 (finding arbitration agreement provision that permitted employer to amend agreement was retroactively applicable and thus illusory).

56. *Peleg*, 140 Cal. Rptr. 3d at 60-61 (quoting *Carey*, 669 F.3d at 207) (emphasis omitted).

57. *Carey*, 669 F.3d at 206.

58. *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002).



lidity, the latter construction is preferred.”<sup>59</sup> Accordingly, as recently as 2013, a Missouri appellate court cited language that disfavored “the destruction of agreements” and eschewed construction that “render[ed] other terms meaningless or illusory.”<sup>60</sup> Such a beneficent construction must, of course, be “reasonably available.”<sup>61</sup>

*Frye*, decided subsequent to *Morrow*, identified an open question as to the validity of an arbitration agreement agreed to by “a prospective employee and thus prior to the decision to accept employment.”<sup>62</sup> Against the backdrop of this and other open questions left by cases handling illusory promises and at-will employment in an arbitration enforcement context, *Baker v. Bristol Care* has tied up some loose ends.

#### IV. THE INSTANT DECISION

##### A. The Majority

The Supreme Court of Missouri, in an opinion by Judge Richard B. Teitelman, first considered the threshold arbitrability question of whether “the arbitrator should decide any questions of enforceability” rather than the court.<sup>63</sup> *Bristol* pointed to the 2010 Supreme Court of the United States case of *Rent-A-Center, West, Inc. v. Jackson*,<sup>64</sup> where a clause within a party’s arbitration agreement delegated authority to an “arbitrator, not the courts” to “resolve any dispute relating to the interpretation, applicability, enforceability or formation of [that] Agreement.”<sup>65</sup> The instant court distinguished *Bristol*’s proffered case from the present circumstances by indicating that *Baker*’s purported agreement “does not delegate to the arbitrator disputes regarding contract formation,” and that “a contract formation issue rather than an applicability or enforceability issue” was raised here.<sup>66</sup> While not forgetting that “federal law preempts state laws that invalidate arbitration agreements on

59. *Perbal v. Dazor Mfg. Corp.*, 436 S.W.2d 677, 689 (Mo. 1968).

60. *Pub. Commc’ns Servs., Inc. v. Simmons*, 409 S.W.3d 538, 550-51 (Mo. Ct. App. 2013) (citing *Parker v. Pulitzer Pub. Co.*, 882 S.W.2d 245, 250 (Mo. Ct. App. 1994)).

61. *Rabius v. Brandon*, 257 S.W.3d 641, 646 (Mo. Ct. App. 2008) (“There is a presumption in favor of a construction of a contract that will uphold its validity, if reasonably available.”) (citing *Magruder Quarry & Co. v. Briscoe*, 83 S.W.3d 647, 652 (Mo. Ct. App. 2002)); see also *Dickemann v. Millwood Golf & Racquet Club, Inc.*, 67 S.W.3d 724, 728-29 (Mo. Ct. App. 2002).

62. *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 445 n.23 (Mo. Ct. App. 2010).

63. *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 772-73 (Mo. 2014) (en banc), *reh’g denied* (Oct. 28, 2014).

64. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

65. *Baker*, 450 S.W.3d at 774 (quoting *Rent-A-Center, W., Inc.*, 561 U.S. at 130) (emphasis omitted).

66. *Id.* at 774.

public policy grounds,” the instant court identified this to be “a contract formation issue . . . subject to resolution by the Missouri state courts.”<sup>67</sup>

The court found that “Baker’s promotion, continued employment and attendant benefits” did not constitute valid consideration.<sup>68</sup> It characterized many of the parties’ promises as “incidents of Baker’s continued at-will employment” and the provision entitling Baker to severance pay as “a term and condition of [Baker’s] at-will employment.” In other words, these were not viewed as separate and distinct promises that might serve as consideration.<sup>69</sup> The instant court followed the *Morrow* case in holding “that continued at-will employment is not valid consideration to support an agreement requiring the employee to arbitrate . . . claims against the employer.”<sup>70</sup> The court then proceeded to evaluate whether Baker remained an at-will employee of Bristol after the parties’ purported agreements.<sup>71</sup>

To resolve the question of Baker’s employment status, the court accepted the proposition that “[k]ey indicia of at-will employment include indefinite duration o[f] employment and the employer’s option to terminate the employment immediately without cause.”<sup>72</sup> The court found that the parties’ agreement met these indicia when it not only “provide[d] that Baker’s employment would ‘continue indefinitely’” but also allowed the employment’s termination “‘at [Bristol’s] sole option’” with either notice five days prior to termination or no notice but five days’ pay instead.<sup>73</sup> Even more indicative of Baker’s at-will employment was the language from the arbitration agreement, which provided that it did “not alter [Baker]’s status as an at-will employee.”<sup>74</sup> The court further noted that, because “[d]ocuments that are executed contemporaneously are considered together as a single agreement,” to harmonize the various provisions, the arbitration agreement’s acknowledgment of Baker’s at-will employment status would govern.<sup>75</sup> Thus, “Baker’s continued at-will employment” did not “provide consideration supporting an obligation to arbitrate.”<sup>76</sup>

The court went on to deny Bristol’s argument that the parties’ mutual promises to arbitrate were valid consideration.<sup>77</sup> To be consideration under *Morrow*, such promises “must be binding, not illusory,” as is the case when one can “unilateral[ly] . . . amend the agreement and avoid its obligations.”<sup>78</sup> Because Bristol retained the “unilateral ‘right to amend, modify, or revoke

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67. *Id.*

68. *Id.* at 774, 777.

69. *Id.* at 776.

70. *Id.* at 775.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 776.

76. *Id.*

77. *Id.*

78. *Id.*

this [arbitration] agreement upon (30) days' prior written notice to [Baker]” – a claimed right that the court did not find to be restricted even from retroactive modifications or revocations – the purported mutual arbitration promise was found illusory and not a viable option for providing consideration.<sup>79</sup> The court rejected Bristol’s counter-argument, which relied on a case from the Federal Eastern District of Oklahoma,<sup>80</sup> that “the notice requirement in the arbitration agreement renders the promise sufficiently binding” by, *inter alia*, distinguishing the case insofar as it did not involve the threat of retroactive “amendment of the arbitration agreement.”<sup>81</sup>

The court thus decided that the parties’ purported arbitration agreement was invalid due to lack of consideration for two reasons.<sup>82</sup> First, Baker’s continued at-will employment was insufficient for consideration; the arbitration agreement’s overt statement that Baker’s at-will status was left unchanged, the indefinite duration of the employment, and Bristol’s option to terminate Baker’s employment at will made Baker’s status as an at-will employee apparent to the majority.<sup>83</sup> Second, Bristol’s promise was illusory: the illusory nature was shown by Bristol’s reservation of a “unilateral ‘right to . . . modify or revoke’” the agreement even retrospectively and, therefore, did not constitute consideration.<sup>84</sup>

### B. *The Dissent*

The rather thorough dissenting opinion by Judge Paul C. Wilson began by agreeing with the majority that “there was only one agreement between . . . Baker and Bristol Care concerning her employment.”<sup>85</sup> Nevertheless, it went on to disagree with the majority’s decision that the agreement lacked consideration.<sup>86</sup> The dissent noted that under the Federal Arbitration Act, although it “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.”<sup>87</sup> Thus an attempt “to apply special rules for the formation of contracts containing promises to arbitrate,” including on matters of consideration, should fail under the FAA.<sup>88</sup>

The dissent began to ground its opinion by giving an elementary overview of the basic requirements for consideration: (1) that there be a bargained-for exchange with a benefit to the promisor or a detriment to the

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79. *Id.* at 776-77.

80. *Id.* at 777 (citing *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F. Supp. 2d 1212, 1215-16 (E.D. Okla. 2003)).

81. *Baker*, 450 S.W.3d at 777.

82. *Id.* 777.

83. *Id.* at 774-76.

84. *Id.* at 776-77.

85. *Id.* at 777-78 (Wilson, J., dissenting).

86. *Id.* at 778.

87. *Id.*

88. *Id.* at 778-79.

promisee, (2) that “[c]ourts have no authority to attempt to value the bargained-for consideration in an effort to determine whether” the consideration is “adequate,” and (3) “that all contemporaneous promises by one party are deemed to have been given in exchange for the aggregate benefit to that party or the aggregate detriment to the other party.”<sup>89</sup> With this groundwork laid, the dissent then raised the distinction between Baker’s employment before making the agreement that gave rise to this action and her employment after making that agreement.<sup>90</sup> The dissent specified the former as a “simple unilateral contract,” while the latter was based (in the dissent’s view) on a bilateral agreement for, and in exchange of, numerous promises, which the dissenting opinion listed at length.<sup>91</sup>

The dissent denied various arguments against its position that Baker’s arbitration promise was supported by consideration.<sup>92</sup> Countering Baker’s contention “that her promise to arbitrate . . . is not enforceable because that promise was not supported by separate consideration,” the dissent identified that same arbitration promise as “one of the many promises . . . bargained for,” but proceeded to examine how, even if separate consideration were required, such consideration would be met, among other things, by (1) “Bristol Care’s promise to arbitrate [Baker’s] claims . . .” and (2) Bristol’s promise “to arbitrate any specified claims it may wish to assert against her.”<sup>93</sup> The dissent rejected the notion that Bristol’s promises under the arbitration agreement were illusory.<sup>94</sup> Although the agreement permitted “Bristol Care the right to ‘amend, modify, or revoke th[e] agreement upon thirty (30) days’ prior written notice,” the American Arbitration Association rules that the parties agreed to give Bristol “no right to alter the agreement as to any claim pending at the time of . . . any notice from Bristol Care that it was intending to change the agreement.”<sup>95</sup>

The dissent further rejected the construction the majority gave to the agreement, in which Bristol had reserved for itself the ability to retroactively modify the effect of the arbitration agreement.<sup>96</sup> In support of this rejection, the dissent first stated that “[t]here [was] no question that the construction of this provision . . . [was] the one th[e] court would adopt if Bristol Care were trying to realize a retrospective advantage.”<sup>97</sup> Next, the dissent cited to *Perbal v. Dazor Manufacturing Corp.*, which expressed the rule that, of two potential contract constructions, the construction rendering a contract valid “is

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89. *Id.* at 779-82.

90. *Id.* at 784.

91. *Id.* at 784-86.

92. *Id.* at 786.

93. *Id.* at 786-87.

94. *Id.* at 788.

95. *Id.*

96. *Id.*

97. *Id.*

preferred.”<sup>98</sup> Third, the dissent quoted the language of the Baker-Bristol arbitration agreement itself, which provided that the agreement should be modified by the court “to render it enforceable.”<sup>99</sup>

The dissent then argued that the other benefits Bristol gave sufficed as consideration for Baker’s arbitration promise.<sup>100</sup> As to the facts and the legal questions involved, the court distinguished this present case from the case of *Morrow*<sup>101</sup> and found that *Morrow* did not uphold Baker’s claim that she was an at will employee or that the agreement in question in this case was without consideration.<sup>102</sup> “Even if Ms. Baker were an ‘at will’ employee under . . . *Morrow*,” the dissent explained, “this Court has never held that such an arrangement fails to supply consideration . . . .”<sup>103</sup> The dissent further argued that, because of “[d]ecades of decisions rejecting *Morrow*’s holding outside the context of arbitration,” application of the now arbitration-specific rule in *Morrow* would amount to a violation of the FAA’s requirement of applying only a state’s general contract principles in a court’s contract-formation analysis of arbitration provisions.<sup>104</sup> Therefore, for the above reasons, the dissent would have carried out Bristol’s motion to compel arbitration.<sup>105</sup>

## V. COMMENT

As a recently decided case, how *Baker* will be interpreted and used by future courts will be instrumental in determining its effects on Missouri. As of this writing, *Baker* had already been cited by the Eighth Circuit in *Crews v. Monarch Fire Protection District*<sup>106</sup> and in the Missouri Court of Appeals case of *Seay v. Jones*.<sup>107</sup> It was used in *Seay* to bear the proposition that “[a] promise is illusory when one party retains the unilateral right to amend [an] agreement and avoid its obligations.”<sup>108</sup> Hidden behind this tame statement lies a host of issues: a tension between *Baker* and a significant weight of prior Missouri contract doctrine, a future reconciliation between federal courts interpreting Missouri law and the development of Missouri law by the state courts, expressions of both problematic and beneficial policy, and effects and opportunities that wade in *Baker*’s wake. These issues are sifted out below.

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98. 436 S.W.2d 677, 689 (Mo. 1968) (“Where an agreement is susceptible of two constructions, one of which renders the contract invalid and the other sustains its validity, the latter construction is preferred.”).

99. *Baker*, 450 S.W.3d at 788.

100. *Id.* at 788-89.

101. *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. Ct. App. 2008).

102. *Id.* at 789-92.

103. *Id.* at 791.

104. *Id.* at 792.

105. *Id.*

106. *Crews v. Monarch Fire Prot. Dist.*, 771 F.3d 1085, 1091 (8th Cir. 2014).

107. *Seay v. Jones*, 439 S.W.3d 881, 891 (Mo. Ct. App. 2014).

108. *Id.*

### A. Federal Impact

The majority in *Baker* directly answered a question that *Frye* never reached: whether “mere advance notice” in a “unilateral right to amend an agreement” would comport with Missouri law.<sup>109</sup> This question was answered in the negative; *Baker* clearly showed that, at the least, notice alone does not suffice to rescue a unilaterally amendable arbitration agreement from invalidity.<sup>110</sup> *Baker* also openly attempted to heal a rift between Missouri law and its use by the federal courts on the issue of whether continued employment is sufficient for consideration.<sup>111</sup> In *Canterbury v. Parson’s Constructors, Inc.*, cited by *Baker*, the federal court for the Western District of Missouri indicated that continued employment would constitute sufficient consideration for an arbitration agreement.<sup>112</sup> *Canterbury* attempted to distinguish its facts from *Morrow* by pointing out that, while *Morrow* dealt with a prior “existing at-will employment relationship,” *Canterbury* dealt with “a condition of future employment” (which that court thought would suffice for consideration).<sup>113</sup> *Baker* denied, or at least cast serious doubt on, that distinction.<sup>114</sup> Following the *Erie* doctrine<sup>115</sup> and the control of individual states over their substantive contract law, one may expect future federal courts that look to Missouri contract law to refrain from considering continued at-will employment as consideration.

### B. Implications for Missouri Precedent

In answering *Frye*’s question, the majority went far in interpreting the arbitration agreement’s amendment and revocation provision to apply retroactively.<sup>116</sup> As the dissent argued, and as is borne out by an examination of the case law, the majority’s interpretation of the agreement in this way breaks with the substantial precedent in Missouri to interpret agreements in favor of validity.<sup>117</sup> It is evident that reasonable readers of the agreement’s language, which gave Bristol a “right to amend, modify or revoke th[e] agreement upon thirty (30) days’ prior written notice to the Employee,”<sup>118</sup> would be capable

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109. *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 444 (Mo. Ct. App. 2010).

110. *Baker*, 450 S.W.3d at 777.

111. *Id.* at 774-75.

112. *Canterbury v. Parsons Constructors, Inc.*, 2009 WL 899661, at \*1 n.\* (Mo. Ct. App. 2009) (“While plaintiff would equate hiring an employee to an at-will position as meaningless consideration for an agreement to arbitrate disputes, I doubt the Missouri courts will adopt such an unrealistic view.”).

113. *Id.* at \*1.

114. *Baker*, 450 S.W.3d at 775 n.3.

115. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

116. *Baker*, 450 S.W.3d at 776-77.

117. *See supra* Parts III-IV.

118. *Baker*, 450 S.W.3d 770 at 776.

of interpreting this provision as applying prospectively and need not expect to find an express limitation on Bristol's ability to make retroactively effective amendments. Although the agreement itself contained a provision asking the court to construe it so as to make it valid,<sup>119</sup> the court did not appear to take any pains to adhere to this provision.

Although the dissent attempted at length to separate out the different promises, benefits, and detriments exchanged between Baker and Bristol, the majority seemed to have found inklings of consideration for Baker's arbitration promise only in two consideration candidates: an offer of continued at-will employment, and Bristol's arbitration agreement.<sup>120</sup> While following *Morrow's* lead by holding "an offer of continued at-will employment" to fail as consideration, the majority couched the alterations and benefits that accompanied Baker's employment after signing the agreement as mere "incidents of that employment" and her severance pay as "a term and condition of her at-will employment."<sup>121</sup> It is unclear from this opinion how far such a characterization could be extended and at what point an offer of increased wages and other benefits to a present at-will employee might become consideration under *Baker*. The proposition that not even an employee's promotion will qualify as consideration runs directly contrary to the gist of the Minnesota court's reasoning in *Jostens*.<sup>122</sup>

An important potential implication of this decision is that, following the FAA's prohibition on applying unique contract rules that would disfavor the formation of arbitration agreements,<sup>123</sup> it seems that each of the key rules that were fatal to the validity of Baker and Bristol's agreement would apply not only to arbitration agreements and contracts with arbitration provisions, but to all contracts, or at least all employment contracts, under Missouri law. Thus, depending on how Missouri courts act post-*Baker*, Missourians might expect to discover offers of continued at-will employment, even with increased wages, in exchange for non-compete promises, mediation agreements, and perhaps confidentiality agreements to be found without real consideration. Contract provisions that permit one party to unilaterally amend or revoke the agreement or a portion of the agreement, even with extensive notice, will seem to require explicit mention of their solely prospective application, or else they may be interpreted as potentially having a retroactive effect and therefore be considered illusory.

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119. *Id.* at 788 (observing agreement called for the court to "modify . . . it to render it enforceable") (emphasis removed).

120. *Id.* at 774, 784-86.

121. *Id.* at 775-76.

122. *Jostens, Inc. v. Nat'l Computer Sys., Inc.*, 318 N.W.2d 691 (Minn. 1982).

123. *See* 9 U.S.C. § 2 (2012).

### C. Costs, Benefits

Perhaps this potential outcome is for the best in the long run, as “escape” clauses permitting a party to unilaterally amend or revoke an agreement appear disingenuous even with notice, especially in an employment context in which there may be an uneven balance of power. In the meantime, however, *Baker* might give leave to courts within Missouri to look more exactly at employment contracts; to disavow continued at-will employment agreements that might be construed as enforceable, even where the agreement and a line of Missouri case law specifically call out for the court to discretionally construe it as enforceable to the extent that it can reasonably be so construed; and to find a variety of arbitration clauses or agreements imposed on employees to be without consideration.

The cost of uncertainty in both employment law generally and arbitration contract enforceability in particular may also increase the effective risk or cost of maintaining current employment levels in Missouri.<sup>124</sup> The uncertainty caused by this decision may concretely affect employer costs in a variety of ways: an employer’s counsel could hear of this case and take his client’s time and money to create more protective practices in contracting arbitration agreements with employees. Likewise, employees may hear of this decision and (rightfully) fear that an already-signed arbitration agreement will be rendered ineffective, causing them to incur expenses or inconvenience in seeking to modify their arbitration agreement or to negotiate for a new one. Also possible is that, after a claim has arisen, employers and employees may see this decision as encouragement to dispute the arbitrability of a claim under their arbitration agreement if they think litigation would be in their favor. Any disincentive to create arbitration contracts will likely put more strain on the court systems’ already limited resources.<sup>125</sup>

### D. Potential Effects on Arbitration Agreement Drafting

However, these effects are not entirely unavoidable for employers and at-will employees. Following *Baker*, to reduce ambiguity in whether or not the purported consideration for a new or promoted employee’s arbitration (or other) agreement is actually consideration or else merely an “incident of employment,” employers might consider treating the agreement as though it were an entirely distinct bilateral contract. This would require ensuring that the contract is signed distinctly from a new employment contract on a separate day<sup>126</sup> and with an entirely different benefit that is not at all triggered or

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124. Cf. Mark A. Geistfeld, *Legal Ambiguity, Liability Insurance, and Tort Reform*, 60 DEPAUL L. REV. 539 (2011) (remarking on the costs of uncertainty in tort law).

125. See generally Leon Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME L. REV. 182 (1965-1966).

126. Note the element of contemporaneousness in *Baker*. 450 S.W.3d at 773.



received on account of the at-will employee's employment or behavior during employment.

Likewise, to create an arbitration (or other) agreement with a unilateral amendment or revocation provision in accord with *Baker* – while avoiding the “retroactive” construction given to Bristol’s similar provision<sup>127</sup> – it would seem that the addition of a statement explicitly limiting that provision to a prospective effect after notice would accomplish the job. In Part III of this Note, this sort of clause was referred to as a “*Haliburton* type savings clause,”<sup>128</sup> and the specific language of the clause used in the original *Haliburton* case was that “no amendment shall apply to a dispute of which the sponsor had actual notice on the date of the amendment.”<sup>129</sup> Under the reasoning of *Baker*, inclusion of a similar clause in a Missouri employer-employee arbitration agreement may prevent a construction of that agreement as illusory due to retroactivity.

Along with promising a definite term of employment as consideration for an arbitration agreement to increase the likelihood of enforceability,<sup>130</sup> Missouri employers might also resort to the repugnant practice of firing their at-will employees and rehiring them on condition that they sign an arbitration agreement. The purported consideration arguably would then not be continued at-will employment, but rather an offer of new at-will employment. Additionally, when the court distinguished *Baker* from the U.S. Supreme Court case of *Rent-A-Center, West, Inc. v. Jackson*,<sup>131</sup> it implied that, had the arbitration agreement conferred authority on the arbitrator to “resolve any dispute relating to the . . . formation of th[e] [a]greement,” the employee’s case challenging arbitrability would be heard by the arbitrator and not the court.<sup>132</sup>

### *E. Judicial Opportunities the Next Time Around*

Different reasoning in this decision may have evaded some of the potentially negative consequences of *Baker* while still arriving at the same result. One commentator has generally criticized the beneficent but counter-intuitive interpretation of contract language, saying that it “rest[ed] on the admission that the clauses in question [were] permissible in purpose . . . [and] invite[d] the draftsman to recur to the attack” and that it “seriously embarrassed later efforts at true construction . . . .”<sup>133</sup> Arguably the clause permitting Bristol to amend or revoke the arbitration agreement was beneficently construed as

127. *Id.* at 772-73.

128. *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 206 (5th Cir. 2012).

129. *In re Halliburton Co.*, 80 S.W.3d 566, 569-70 (Tex. 2002).

130. *Baker*, 450 S.W.3d at 775 (“Key indicia of at-will employment include indefinite duration of [f] employment.”).

131. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

132. *Baker*, 450 S.W.3d at 774.

133. K. N. Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law* by O. Prausnitz. London: Sweet & Maxwell, 52 HARV. L. REV. 700, 703 (1939) (book review).

applying retroactively, even though this interpretation seems contrary to the apparent prospective reach of that clause; if this is the case, the court's interpretation meets the above commentator's criticism. Instead of using sometimes implicit, counter-intuitive interpretive rules to exclude the matter of Baker's promotion and Bristol's promise to arbitrate from acting as consideration, the court could have used a direct, policy-based contract formation rule to achieve the same effect. Such a rule could take a variety of forms, including a prohibition on quasi-illusory<sup>134</sup> employer promises as consideration for an employee agreement that will outlast the course of the employment relationship, or a requirement of separate consideration, besides continued or terminated-then-renewed employment, in exchange for a promise that will take effect after an employee has left work or has been terminated. Because the FAA<sup>135</sup> and the case-law interpreting it<sup>136</sup> require that the court only apply generally applicable contract rules in evaluating the formation of an arbitration agreement, any policy-based contract formation rule substituting for the reasoning in *Baker* would also need to apply generally and not solely to arbitration agreement formation.

#### F. Political Use, or Lack Thereof

This case might be used inappropriately as fodder for those who oppose the Missouri Court Plan.<sup>137</sup> Opposition to the Missouri Court Plan may see *Baker* as another indicator of the litigiousness and hostility to arbitration that follows from a judicial selection process that makes heavy use of attorneys, rather than a democratic election system, to select its judges.<sup>138</sup> But this view is weakened by the majority's specific mention of "entrenched judicial hostility toward arbitration contracts" as a purpose of the FAA<sup>139</sup> and by the dissent's veiled accusation that the majority might be relying on "lingering judicial hostility toward arbitration."<sup>140</sup> The latter remark is more significant, since it shows how the Missouri Court Plan, rather than imbuing its candidates with the overwhelming propensity to support expansive litigation, has ultimately provided at the very least three Supreme Court of Missouri judges who are sensitive to hostility against arbitration. Ultimately, then, it seems

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134. This term is not a *hapax legomenon* but has been used before. *E.g.* Roger Bernhardt, *The Cost of Free Looks-Ruminations on Steiner v. Thexton*, GOLDEN GATE U. L. REV. (2010), available at <http://digitalcommons.law.ggu.edu/pubs/382>. As used here, this term would encompass promises that are almost illusory, as Bristol's promise would have been, had it not been interpreted as it was in *Baker*.

135. 9 U.S.C. §§1-16 (2012).

136. *Baker*, 450 S.W.3d at 778-79.

137. See generally *Missouri Nonpartisan Court Plan*, MO. CTS., <http://www.courts.mo.gov/page.jsp?id=297> (last visited Apr. 13, 2015).

138. *Id.* However, the Missouri Plan requires judges to stand for a "retention election" after a year so that the democratic process is used. *Id.*

139. *Baker*, 450 S.W.3d at 778 (Wilson, J., dissenting).

140. *Id.* at 787.

unwise for the opposition to the Missouri Court Plan to put this case in its quiver against a Plan that has been spoken well of by at least one former Supreme Court of Missouri judge<sup>141</sup> and has found bipartisan support in the last Missouri gubernatorial election.<sup>142</sup>

## VI. CONCLUSION

*Baker's* holding that mere continued at-will employment and an illusory, unilaterally and retroactively alterable promise to arbitrate are insufficient to support a purported arbitration agreement has simultaneously clarified and obscured Missouri contract law and may leave employers and employees alike on tenterhooks as to whether their next attempt at creating an arbitration (or other) contract will be upheld. Though there may be ways to win greater certainty of the validity of these contracts, *Baker* has given advance notification to makers of employment agreements that the days of courts finding a contract's validity by liberal construction, even when the contract demands it, might be over.

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141. Paul Koepp, *Retired Supreme Court Judge: Preserve Independence of Missouri Judiciary*, KAN. CITY BUS. J. (Oct. 3, 2012, 5:18 PM), <http://www.bizjournals.com/kansascity/blog/2012/10/retired-supreme-court-judge-preserve.html?page=all>.

142. *Missouri Governor Candidates Oppose Court Ballot Measure*, CBS ST. LOUIS (Oct. 15, 2012, 7:06 AM), <http://stlouis.cbslocal.com/2012/10/15/missouri-governor-candidates-oppose-court-ballot-measure/>.