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First District requires two years of continuous employment to enforce employee covenants not to compete: *Fifield v. Premier Dealer Services, Inc.*, 2013 IL App (1st) 120327

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On June 24, 2013, the Illinois Appellate Court, First District, handed down its opinion in *Fifield v. Premier Dealer Services, Inc.*[1] This is one of the first published decisions on the enforcement of employment non-competition clauses following the Supreme Court's decision in *Reliable Fire Equipment Co. v. Arredondo*[2] on December 1, 2011.

In *Reliable Fire* the Supreme Court clarified the test regarding enforceability of non-competition agreements and held that they are enforceable in Illinois only if they are: no greater than required to protect a "legitimate business interest;" do not impose undue hardship on the employee; and do not injure the public.[3] The Court also explained that whether or not an employer has a legitimate business interest depends on the totality of the facts and circumstances in each case.[4]

The *Fifield* Court noted that "before even considering whether a restrictive covenant is reasonable, the court must make two determinations: (1) whether the restrictive covenant is ancillary to a valid contract; and (2) whether the restrictive covenant is supported by adequate consideration. [Citation omitted.] The only issue before the court in *Fifield* was whether there was adequate consideration to support the restrictive covenants in the agreement."[5]

Thus, the question addressed in *Fifield* was: What constitutes adequate consideration for a post-employment covenant not to compete? Specifically, what "substantial period" of continued employment is necessary? The Court answered that two years of continuous employment constituted adequate consideration, regardless of whether the agreement was executed before or during employment.[6]

Facts

Plaintiff Fifield worked for PDS, which was an insurance administrator that marketed finance and insurance products to the automotive industry.[7] PDS was sold to defendant Premier, and plaintiff was offered a job with Premier.[8] As a condition of his new employment, Premier required Fifield to sign an "Employee Confidentiality and Inventions Agreement" (the "Agreement"), which included two year, 50 state non-solicitation and non-competition provisions.[9]

However, Fifield was able to negotiate a change to the Agreement, which provided that if he was terminated without cause during his first year of employment, the non-solicitation and non-competition provisions would not apply (the "first-year provision").[10] Fifield signed the Agreement the day before he began his employment at Premier.[11]

Three months after he began his employment, Fifield resigned. A few weeks later he began to work for a competitor.[12]

Trial Court Proceedings

Fifield and his new employer filed an anticipatory declaratory complaint seeking a declaration that Fifield had no access to confidential information and that certain provisions of the Agreement were invalid and unenforceable.[13]

The trial court held that the "the non-solicitation and non-interference provisions found within [the Agreement were] unenforceable as a matter of law for lack of adequate consideration."[14] The remaining issues were voluntarily dismissed and the validity of the non-solicitation and non-competition clauses was the only issue on appeal.[15]

Appellate Court Holdings

On appeal, Premier argued that there was adequate consideration because the Agreement was signed before Fifield began his employment, and that Fifield's employment was the consideration offered. Premier also contended that the non-solicitation and non-competition restrictive covenants were not *post-employment* restrictive covenants for the same reason. Finally, Premier claimed that, due to the first-year provision, the illusory benefit of at-will employment was not an issue.[16]

The Appellate Court made three holdings of significance here:

First, it held that there is no distinction between a noncompetition covenant signed before or during employment.[17] This is the first Illinois Appellate Court decision to specifically eliminate any distinction between covenants that were signed before or during employment. Prior decisions had assumed there were different standards, without any

real discussion.[18]

Second, relying on Illinois and federal precedent, it held that Fifield's employment itself was not the consideration he received in exchange for the non-solicitation and non-competition provisions.[19] This is because the promise of continued employment in the at-will context may be an illusory benefit.[20] Instead, there must be adequate consideration before a court will enforce these provisions.[21]

The *Fifield* court relied upon the holding in *Brown & Brown, Inc. v. Mudron*, that seven months of employment was insufficient consideration.[22] It also cited *Curtis 1000, Inc.*,[23] where the Seventh Circuit held that:

> The courts' willingness to depart in this area from the traditional refusal to inquire into the adequacy of consideration displays a sensitivity to the argument which Suess makes that continued employment is an illusory benefit when employment is at will. The minute after he signed the covenant not to compete, Curtis could have fired him and then he would have had received nothing in exchange for the fresh promise represented by his signing of a new covenant. The new covenant was the modification of an existing contract and hence required consideration to be enforceable.

Thus, given *Fifield*'s holding that in at-will employment, a person's employment cannot serve as consideration, as that benefit is illusory,[24] an employer needs to establish adequate consideration relying on something other than the employment itself.

Finally, it held that "there must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant. [Citations omitted.] This rule is maintained even if the employee resigns on his own instead of being terminated."[25]

Moreover, it found that the first-year provision "does not affect the application of the two-year standard for adequate consideration. At most, Fifield's employment was only protected for one year, which is still inadequate under Illinois law."[26]

This final holding is consistent with prior Illinois law regarding covenants signed *after* employment had already commenced.[27] Thus, four of the five appellate districts have explicitly adopted a two-year continuous employment requirement for adequate consideration.

However, in *Woodfield Group v. DeLisle*,[28] which was neither cited nor discussed by *Fifield*, the Court, in remanding the case to the trial court when there was seventeen months of post-covenant employment, held that: "We do not believe case law limits the courts' review to a numerical formula for determining what constitutes substantial continued employment. Factors other than the time period of the continued employment, such as whether the employee or the employer terminated employment, may need to be considered to properly review the issue of consideration."

Further, in *McRand, Inc. v. Van Beelen*,[29] the restrictive covenants were executed two years before the employees resigned. In finding adequate consideration, the Court considered the employees' regular raises and bonuses, their voluntary resignation, and their increased responsibilities they received after signing the restrictive covenant.[30] "To hold that consideration is insufficient here would force the employer to discharge these employees one day and rehire them the next day after the covenant had been signed."[31]

Recently, in *LKQ Corp. v. Thrasher*,[32] a Judge in U.S. District Court for the Northern District of Illinois analyzed the adequacy of consideration where an employee had voluntarily resigned after one year. After discussing and summarizing Illinois law, it concluded that there was adequate consideration, holding:

> Despite Thrasher's arguments to the contrary, the Court concludes that the "substantial period" requirement has been satisfied. In doing so, the Court refuses to apply a bright-line test. As mentioned above, it is unclear where the relevant line should be drawn. While Thrasher suggests that Illinois law establishes that at least two years of employment satisfies the "substantial period" of employment requirement, the Court's reading of Illinois law undermines this contention. Without a stronger foundation in law and logic, the Court cannot mechanically apply a bright-line test that, in certain situations, may have pernicious consequences. The more prudent course of action is to take the more fact-specific approach that some Illinois courts have suggested.

The *LKQ* Court did not consider whether a $5,000 signing bonus also served as consideration to support the Non-Competition Agreement.[33]

Given *Reliable Fire*'s rejection of an inflexible formula and affirmation of the totality of the circumstances test in determining the reasonableness of a restrictive covenant,[34] a bright-line two year employment test for consideration may likely also be rejected by our Supreme Court.

Future enforcement of covenants

Fifield may make it more difficult for employers to enforce non-solicitation and non-competition provisions prior to the two (2) year employment anniversary. A trial court may find that such provisions provide an illusory benefit to an at-will employee and refuse to enforce them where the employee has not yet been employed for two years.

However, one obvious deficiency in the *Fifled* opinion is that the Court never compared the terms of the covenant with the consideration. For example, would the Court have required two years continuous employment if the covenant lasted six months or one year after employment ended, or had a very limited geographic scope? Based on *Reliable Fire*'s totality of the circumstances test for determining reasonableness, and the same test previously adopted for consideration in *Woodfield Group*, it seems likely that it would not.

Next, this case does *not* touch upon a cause of action based upon a breach of the Illinois Trade Secrets Act.[35] Thus, to the extent that independent claims for the disclosure or misappropriation (actual or inevitable) of "trade secrets" exist, the holding in *Fifield* will not affect them. Employers can still protect their trade secrets regardless of the how long an employee was employed.

Finally, it is possible that a Court may find adequate consideration if a signing bonus, salary raise, promotion, increased responsibilities, or other perquisites were given in exchange for the covenant.[36] Unfortunately, no Illinois Court has given any guidance as to the adequacy of this type of consideration. Thus, if an employer relies on this type of consideration, it must be able to demonstrate the new benefits and their value to the employee.[37] Given the Court's careful scrutiny of these covenants,[38] and the lack of any prior precedent, any such alternative consideration should be substantial. ■

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1. 2013 IL App (1st) 120327.

2. 2011 IL 111871.

3. 2011 IL 111871, ¶ 17.

4. 2011 IL 111871, ¶¶ 42-43. (In *Zabaneh Franchises, LLC v. Walker*, 2012 IL App (4th) 110215, ¶ 20, July 17, 2012, the 4th District held that *Reliable Fire* should be applied retroactively. Similarly, in *Hafferkamp v. Llorca*, 2011 IL App (2d) 100353-U, ¶¶ 17-21, February 2, 2012, the Second District held, in an unpublished opinion, that *Reliable Fire* should be applied "retroactively and proactively" to both future noncompetition cases as well as pending noncompetition cases that were filed before the date that *Reliable Fire* was decided.).

5. 2013 IL App (1st) 120327, ¶ 13.

6. 2013 IL App (1st) 120327, ¶ 19. Usually the question of sufficiency of consideration is a fact-based determination. *Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill.App.3d 63, 71 (1st Dist. 1993) ("Whether Gowen received adequate consideration is a question of fact in this case.").

7. 2013 IL App (1st) 120327, ¶ 3.

8. *Id*.

9. *Id*.

10. 2013 IL App (1st) 120327, ¶ 4.

11. *Id*.

12. *Id*.

13. 2013 IL App (1st) 120327, ¶ 5.

14. 2013 IL App (1st) 120327, ¶ 6.

15. *Id*.

16. 2013 IL App (1st) 120327, ¶ 9.

17. 2013 IL App (1st) 120327, ¶ 18 ("We also disagree with Premier's argument that the nonsolicitation and noncompetition provisions in the agreement were not postemployment restrictive covenants because Fifield signed the agreement before he was employed by Premier. Premier cites no authority for its novel definition of postemployment restrictive covenants.").

18. *See Diederich Ins. Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶ 13 ("Here, as in *Curtis 1000, Inc.*[, 24 F.3d 941 (7th Cir. 1994)], the new covenant was a modification of an existing contract and, therefore, required consideration in order to be enforceable."); *Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc.*, 292 Ill.App.3d 131, 134, 138 (2nd Dist. 1997) (finding sufficient consideration when the at-will employee signed the post-employment covenant "under the threat of termination" even though there was no "change to his job title, responsibilities, or salary" and was subsequently employed for over two years); *Millard Maint. Serv. Co. v. Bernero*, 207 Ill.App.3d 736, 745 (1st Dist. 1990), *citing Corroon & Black of Illinois, Inc. v. Magner*, 145 Ill.App.3d 151, 163 (1st Dist. 1986); *McRand, Inc. v. Van Beelen*, 138 Ill.App. 3d 1045, 1055 (1st Dist. 1985) ("Although not directly addressing the issue of consideration, other Illinois courts have enforced restrictive covenants entered into after employment began where the employee continued in the job for a substantial period. *Cockerill v. Wilson* (1972), 51 Ill.2d 179, 281 N.E.2d 433; *Canfield v. Spear* (1969), 44 Ill.2d 49, 254 N.E.2d 433; *Shorr Paper Products, Inc. v. Frary* (1979), 74 Ill.App.3d 498, 392 N.E.2d 1148."); *see also* John F. Kennedy, Suzanne L. Sias, Roger Kile, *Chancery & Special Remedies, Chapter 12 — Restrictive Covenants, Trade Secrets, and Fiduciary Duties: The Foundation To Safeguard Competitive Business Advantage*, § 12.4 Consideration in At-Will Employment Agreements (IICLE 2011) ("The courts have recognized several ways to find consideration in the at-will employment context. First, consideration may arise from the fact that the employer initially provided employment to the employee. When the employee signs the restrictive covenant upon being hired, the employment itself for any period of time constitutes the consideration necessary to support the restrictive covenant."); Susan Poll-Klaessy, John F. Kennedy, *Business Law (Illinois): Miscellaneous Operating Issues, Chapter 6 — Employment Agreements Involving Restrictive Covenants and Trade Secrets*, § 6.12 Consideration (IICLE 2011) (same); and *Sufficiency of Consideration for Employee's Covenant not to Compete, Entered Into After Inception of Employment*, 51 A.L.R.3d 825 (1973).

19. 2013 IL App (1st) 120327, ¶ 17, *citing Bires v. WalTom, LLC*, 662 F. Supp. 2d 1019, 1030 (N.D. Ill. 2009).

20. 2013 IL App (1st) 120327, ¶ 14.

21. *Id*.

22. 379 Ill.App.3d 724, 728-29 (3rd Dist. 2008) ("In the context of postemployment restrictive covenants, Illinois courts depart from the traditional rule that the law does not inquire into the adequacy of consideration, only its existence. *See Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 945-46 (7th Cir. 1994). This departure results from the courts' recognition that a promise of continued employment may be an illusory benefit where the employment is at will.")

23. 24 F.3d 941, 946 (7th Cir. 1994)

24. 2013 IL App (1st) 120327, ¶ 17; *see also Diederich Insurance Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶ 13, *citing Curtis 1000, Inc.*, 24 F.3d 946.

25. 2013 IL App (1st) 120327, ¶ 19, *citing Diederich Insurance Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶ 15; *see also Lawrence & Allen*, 292 Ill. App.3d 138; *Brown*, 379 Ill.App.3d 728 - 29.

26. 2013 IL App (1st) 120327, ¶ 19.

27. *See Diederich Ins. Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶ 15 (5th Dist. 2011)("… in general, there must be at least two years or more of continued employment to constitute adequate consideration." Three months employment was insufficient consideration); *Brown & Brown*, 379 Ill.App.3d at 728-29 (seven months employment was inadequate consideration); *Lawrence & Allen v. Cambridge Human Resource Group*, 292 Ill.App.3d 131, 138 (2nd Dist. 1998)(two years, five months employment was adequate consideration); *Lyle R. Jager Agency v. Steward*, 253 Ill.App.3d 631, 635 (3rd Dist. 1993)(two years, two months employment was adequate consideration); *Mid-town Petroleum, Inc. v. Gowen*, 243 Ill.App.3d 63, 64, 70-71 (1st Dist. 1993)(seven months employment plus a promotion from sales representative to sales manager was inadequate to consideration); *Agrimerica, Inc. v. Mathes*, 199 Ill.App.3d 435, 442 (1st Dist. 1990)(two years, three months employment was adequate consideration).

28. 295 Ill.App.3d 935, 943 (1st Dist. 1998).

29. 138 Ill.App.3d 1045, 1055 (1st Dist. 1985).

30. 138 Ill.App.3d 1055.

31. 138 Ill.App.3d 1056.

32. 785 F.Supp.2d 737, 744 (N.D. Ill. 2011).

33. 785 F.Supp.2d at 744, n. 1.

34. 2011 IL 111871, ¶¶ 33, 40, 42-43.

35. 765 ILCS 1065/1, *et seq*.

36. *See Brown & Brown*, 379 Ill.App.3d 729 ("Furthermore, although Brown claims that Gunderson received additional employee benefits as consideration for the restrictive covenant, no evidence was presented to establish with specificity what those benefits were or how they differed from the benefits Gunderson was already receiving as an employee of WI."); and *Sufficiency of Consideration for Employee's Covenant not to Compete, Entered Into After Inception of Employment*, 51 A.L.R.3d 825 (1973).

37. *See White v. Village of Homewood*, 256 Ill. App.3d 354, 356-57 (1st Dist. 1993), *appeal denied*, 155 Ill.2d 577 (1994)("Valuable consideration for a contract consists either of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other. [Citation omitted]. The preexisting duty rule provides that where a party does what it is already legally obligated to do, there is no consideration as there is no detriment.").

38. *Fifield*, 2013 IL App (1st) 120327, ¶ 13, *George S. May International Co. v. International Profit Associates*, 256 Ill.App.3d 779, 787 (1st Dist. 1993), *appeal denied*, 156 Ill.2d 557 (1994).