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NON-COMPETE AGREEMENTS-- *Fifield v Premier Dealer Services, Inc.*, 2013 IL App (1st) 120327 (2013).

The Illinois Appellate Court held that at least two years of continued employment is required to constitute adequate consideration in support of a restrictive covenant, whether employee resigns or is terminated. Thus, employee who resigned after three months' employment is not bound by non-solicitation and non-interference provisions in employment contract, and first-year provision in contract does not affect application of requisite two-year standard for adequate consideration.

In *Fifield*, prior to October 2009, Fifield was employed by Great American Insurance Company (Great American). As an employee of Great American, Fifield was assigned to work exclusively for Premier Dealership Services (PDS), a subsidiary of Great American. PDS was an insurance administrator that marketed finance and insurance products to the automotive industry. In October 2009, Great American sold PDS to Premier. Premier is an Illinois corporation engaged in the business of developing, marketing and administering a variety of vehicle after-market products and programs. When Premier offered Fifield a job, they required as condition of his employment, that Fifield to sign an employment agreement. The "Employee Confidentiality and Inventions Agreement" included a two-year, post-employment noncompetition and non-solicitation provision. The agreement stated that Fifield would not solicit, interfere, or compete with Premier for two years after his employment ended and this included both a non-solicitation and noncompetition provision that lasted two years and covered all 50 states.

Before signing the agreement, Fifield negotiated with Premier and the parties agreed to add to the agreement a provision which stated that the non-solicitation and noncompetition provisions would not apply if Fifield was terminated without cause during the first year of his employment (the first-year provision). Fifield accepted Premier's offer of employment, and signed the agreement on October 30, 2009. Fifield began his employment at Premier on November 1, 2009. On February 1, 2010, Fifield informed Premier that he was resigning and that his employment would end in two weeks. On February 12, 2010, Fifield resigned from his position with Premier. Shortly thereafter, Fifield began working for Enterprise Financial Group, Inc. (EFG), a competing insurance firm.

On March 5, 2010, Fifield and EFG filed a complaint in the circuit court of Cook County for declaratory relief. The complaint for declaratory relief requested that the trial court declare that Fifield at no time had access to confidential and proprietary information while employed at Premier and that

certain provisions of the agreement are invalid and unenforceable. On August 6, 2010, Premier filed an answer and affirmative defenses to Fifield and EFG's complaint, and a counterclaim for injunctive relief. Premier's counterclaim, in pertinent part, sought to enforce the non-solicitation and noncompetition provisions in the agreement, and requested that the trial court enter a permanent injunction preventing Fifield from using Premier's proprietary information.

On December 20, 2010, the trial court entered an order which granted Fifield and EFG's motion for declaratory relief. The trial court's order stated that "the non-solicitation and non-interference provisions found within [the agreement] are unenforceable as a matter of law for lack of adequate consideration." Premier appealed the trial court's decision.

On appeal the court stated that when a trial court's decision in a declaratory judgment is based on questions of law rather than factual determinations, the court reviews the trial court's decision under the *de novo* standard of review. Premier argued that the non-solicitation and noncompetition provisions in the agreement are enforceable because there was adequate consideration to support the provisions. Premier also argued that unlike in other Illinois cases relied on by Fifield & EFG, Fifield was not employed when he was asked to sign the agreement. Thus, the consideration offered to Fifield in this case was employment itself.

Premier asserted that it gave Fifield ample consideration in exchange for his promise to abide by the non-solicitation and noncompetition provisions because Fifield was able to avoid unemployment by accepting Premier's offer. Additionally, Premier argues that although the non-solicitation and noncompetition agreements are restrictive covenants, they are not postemployment restrictive covenants because Fifield signed the agreement before he became an employee of Premier. Furthermore, Premier points out that the purpose of Illinois law regarding restrictive covenants is to protect against the illusory benefit of at-will employment. However, Premier contends that the illusory benefit of at-will employment is not at issue in this case because it was nullified by the inclusion of the first-year provision in the agreement. Therefore, Premier argues that the nondsolicitation and noncompetition provisions in the agreement are enforceable.

In response, Fifield and EFG argued that the trial court did not err in granting their motion for declaratory relief. Specifically, Fifield and EFG argued that the non-solicitation and noncompetition provisions in the agreement are unenforceable because there was not adequate consideration to support the provisions. Fifield and EFG contended that under Illinois law, in order for a restrictive covenant to be enforceable, employment must continue for a substantial period of time. Fifield and EFG pointed out that Illinois courts have repeatedly held that two years of continued employment is adequate consideration to support a restrictive covenant. Illinois courts have also stated that the length of time required for adequate consideration is the same regardless of whether an employee is terminated or decides to resign on his own. Thus, Fifield and EFG asserted that in this case, Fifield was only employed by Premier for slightly longer than three months, which is far less time than is needed to establish adequate consideration.

Fifield and EFG also asserted that multiple federal court cases have refused to make a distinction between restrictive covenants that are signed before an individual is employed and restrictive covenants that are signed after an individual is employed. Fifield and EFG argued that the non-solicitation and noncompetition provisions were postemployment restrictive covenants, and that it

is irrelevant whether Fifield signed the agreement before employment or during employment. Lastly, Fifield and EFG argued that the first-year provision in the agreement does not remove the illusory benefit of at-will employment. Fifield and EFG contended that at most, Fifield's employment was only protected for one year which is far less than the two-year Illinois standard for adequate consideration. Thus, Fifield and EFG argued that the non-solicitation and noncompetition provisions in the agreement are unenforceable and the trial court did not err in granting their motion for declaratory relief.

The appellate panel began by noting that post-employment restrictive covenants are carefully scrutinized by Illinois courts because they operate as partial restrictions on trade. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc*., 378 Ill. App. 3d 437, 447, 879 N.E.2d 512, 316 Ill. Dec. 445 (2007). In order for a restrictive covenant to be valid and enforceable, the terms of the covenant must be reasonable. Id. However, 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. *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 137, 685 N.E.2d 434, 226 Ill. Dec. 331 (1997). (Employee signed the postemployment restrictive covenant on June 27, 1989, but continued his employment with plaintiff until November 12, 1991. This period of continued employment served as adequate consideration to support the post-employment restrictive covenant). The only issue before this court in this case is whether there was adequate consideration to support the restrictive covenants in the agreement

The court stated that under Illinois law, continued employment for a substantial period of time beyond the threat of discharge is sufficient consideration to support a restrictive covenant in an employment agreement." *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 728, 887 N.E.2d 437, 320 Ill. Dec. 293 (2008) (7 months of employment insufficient consideration). The court stated, Illinois courts analyze the adequacy of consideration in the context of postemployment restrictive covenants because it has been recognized that a promise of continued employment may be an illusory benefit where the employment is at-will. Id. Generally, Illinois courts have held that continued employment for two years or more constitutes adequate consideration. Id. at 728-29. The restrictive covenant will not be enforced unless there is adequate consideration given. Id.

Premier argued that the holding in *Brown* was not applicable to this case because, unlike the defendant in *Brown*, Fifield was not employed by Premier when he signed the agreement. Thus, Premier argues that Fifield's employment was the consideration he received in exchange for the non-solicitation and noncompetition provisions within the agreement. Relying on *Bires v. WalTom*, LLC, 662 F. Supp. 2d 1019, 1030 (2009), the court disagreed stating, "the United States District Court for the Northern District of Illinois explicitly rejected the argument that *Brown* only applies to situations where an employer amends an existing employment relationship to incorporate a restrictive covenant. While we are not bound by the ruling of the court in *Bires*, we find its reasoning and analysis instructive. The district court reasoned that "the Seventh Circuit has rejected the distinction between pre and post-hire covenants." Id. (citing *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 947 (7th Cir. 1994))." In *Curtis 1000*, the new covenant was a modification of an existing contract and, therefore, required consideration in order to be enforceable; eight years of continued employment was sufficient consideration.

The court also disagreed with Premier's argument that the non-solicitation and noncompetition provisions in the agreement were not postemployment restrictive covenants because Fifield signed the agreement before he was employed by Premier. The court noted that Illinois courts have treated restrictive covenants signed by individuals in situations similar to Fifield's, as postemployment restrictive covenants. The court stated," in this case, the non-solicitation and noncompetition provisions in the agreement restricted Fifield's ability to seek further employment after his employment with Premier ended. Therefore, we find that the non-solicitation and noncompetition provisions in the agreement were postemployment restrictive covenants."

The court stated, "Illinois courts have repeatedly held that there must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant. *Diederich Insurance Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶ 15, 952 N.E.2d 165, 351 Ill. Dec. 792; see also *Lawrence & Allen*, 292 Ill. App. 3d at 138; *Brown*, 379 Ill. App. 3d at 728-29. This rule is maintained even if the employee resigns on his own instead of being terminated. *Diederich*, 2011 IL App (5th) 100048, ¶ 15; *Brown*, 379 Ill. App. 3d at 729. In this case, Fifield resigned from Premier after being employed for slightly longer than three months. This period of time is far short of the two years required for adequate consideration under Illinois law. Additionally, the first-year provision in the agreement 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."

Based on the court's ruling, *Fifield* provides that: 1) continued employment is only sufficient consideration for restrictive covenants if the employee remains employed for at least two years; 2) the rule applies regardless of whether the employee resigns or is terminated; and 3) the rule appears to apply to all restrictive covenants that restrict the individual's job opportunities post-employment, regardless of whether they were executed before or after employment commenced.

On September 25, 2013, the Illinois Supreme Court denied the employers petition for leave to appeal.

Implications of *Fifield*-*Other than continued employment for 2 years-what is adequate consideration to support a Non-Compete/Non-Solicitation Agreement?*

Interestingly, in *Fifield*, the parties negotiated the agreement before it was executed and the court still found consideration lacking. To avoid the issue that an at-will employee might not remain employed long enough for their agreement to be enforceable, employers need to consider offering additional consideration to support the enforcement of the restrictive covenants.

Other than two years of continued employment, the issue of what is sufficient additional consideration is open to question. Such various forms of adequate consideration might include increased salary, signing bonus, stock options, additional vacation and other fringe benefits and/or a promotion, a promise to of notice (or pay in lieu of notice) in the event of a certain type of termination. A severance package or salary increase and/or a promotion or enhancement of responsibilities for current employees may also be deemed adequate consideration. How much additional compensation is adequate is questionable.

Under *Fifield* is it clear that at-will employment is an "illusory benefit" that unless for a sufficient period of time cannot be used to show consideration. *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 728, 887 N.E.2d 437, 320 Ill. Dec. 293 (2008). In *Brown*, the plaintiff argued that it provided additional benefits as consideration for the restrictive covenant but no evidence was presented to establish with specificity what those benefits were or how they differed from the benefits defendant was already receiving as an employee.

In *Curtis 1000*, the court also used the language 'illusory benefit" with regard to at will employment. The *Curtis 1000* court stated, With regard to contracts, in Illinois and elsewhere, the rule of law does not inquire into the adequacy of the consideration to support a promise, only its existence. *White v. Village of Homewood*, 256 Ill. App. 3d 354, 195 Ill. Dec. 152, 628 N.E.2d 616, 619 (Ill. App. 1993); *Goodwine State Bank v. Mullins*, 253 Ill. App. 3d 980, 625 N.E.2d 1056, 1079, 192 Ill. Dec. 901 (Ill. App. 1993). The traditional rule is not followed, however, in the Illinois cases dealing with covenants by employees not to compete with their employer when they leave his employ. The cases we cited earlier require that for continued employment to count as consideration it must be for a "substantial period." E.g., *Millard Maintenance Service Co. v. Bernero*, 207 Ill. App. 3d 736, 566 N.E.2d 379, 384-85, 152 Ill. Dec. 692 (Ill. App. 1990)."

It is open to question whether the traditional rule regarding contacts as stated in *Curtis 1000* can be used to show adequate consideration where the parties enter into a contract for a non-compete/non-solicitation agreement when "something of value is provided?" Interestingly, in considering the issue of whether there was sufficient consideration to support a release of all claims, the court in *Wagner v. NutraSweet Co*., 95 F.3d 527, 534 (7th Cir. 1996) (The benefits plaintiff received were enough to satisfy the consideration requirement under Illinois law), citing the *Curtis 1000* decision stated: "The law of contracts, consideration is relatively easy to show. As long as the person receives something of value in exchange for her own promise or detriment, the courts will not inquire into the adequacy of the consideration. *Scholes v. Lehmann*, 56 F.3d 750, 756 (7th Cir.), cert. denied, 116 S. Ct. 673, 133 L. Ed. 2d 522 (1995); *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 945 (7th Cir. 1994) ("the traditional rule, in Illinois and elsewhere, is that the law does not inquire into the adequacy of the consideration to support a promise, only its existence."); *White v. Village of Homewood*, 256 Ill. App. 3d 354, 628 N.E.2d 616, 619, 195 Ill. Dec. 152 (Ill.App.3d 1993); *Goodwine State Bank v. Mullins*, 253 Ill. App. 3d 980, 625 N.E.2d 1056, 1079, 192 Ill. Dec. 901 (Ill.App.3d 1993).

Other Issues Raised by *Fifield*:

Choice of Law Provisions: If located in multiple states an employer may consider adding a choice of law provision to their agreement and select a more favorable state law to govern their agreement. State laws must be carefully examined. *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 947-48 (7th Cir. 1994) (affirming denial of preliminary injunction; refusing to honor covenant's selection of governing state law where chosen state had minimal connection to parties' relationship). In *Curtis 1000*, the company argued that Delaware law should apply based on place of incorporation. Disagreeing, court stated, "An Illinois court would not honor the parties' designation of Delaware law for a different reason: there is insufficient connection between the contract and the State of Delaware." The court stated, "Curtis and Suess are operating in Illinois, so Illinois has an interest in applying its law to their relations. If the

choice of law provision in the covenant not to compete had designated Georgia law (the corporate headquarters) we assume the Illinois courts would defer to that designation, recognizing that Georgia has as much interest in regulating the out of state operations of "its" firm as Illinois does in protecting its citizen, Mr. Suess."

Confidential Information: While the *Fifield* decision does not appear to limit the validity or enforceability of confidentiality agreements it does not address whether and to what measure confidential information can provide consideration for an at-will employee restrictive covenant. It is also questionable whether other tangible employment benefits, including promotions or access to confidential information, may be a valid consideration. Employers should consider limiting access to sensitive business information to only employees who need the access to do their work.

Business Sale: In light of *Fifield*, buyers should carefully consider which of the seller's employees have trade secrets or other information such that it is important to restrict that employee from working for a competitor. If that is the case, a buyer should consider offering a fixed-term employment agreement or other consideration such as a signing bonus to avoid the result in *Fifield*. Alternatively, the buyer may consider structuring the deal so that key employees of the seller are bound by non-compete agreements with the seller that are transferred upon the closing of the transaction.

Issues for Discussion: Assume less than two years of continued employment--

In an employment at-will situation, what kind and/or amount of consideration is necessary to enforce a non-compete/non-solicitation agreement?

In a termination situation, either voluntary or involuntary, how much severance or other consideration does the employer need to offer in order to have consideration?

What if the employer wants a two year restrictive agreement but offers only two weeks of severance, is that sufficient consideration?

If the employer also wants to gain a release of all claims, should the consideration for the restrictive covenants be delineated separately from the consideration for the restrictive provisions?

What if the employer comingles the consideration and the employee claims they had a valid claim for discrimination so actually no consideration was offered for the restrictive agreement?

Employee works for company only 6 months, but signs a non-compete saying that the company can "choose" to continue paying him his base salary for up to 18 months after termination as consideration for the non-compete. Employee finds a better opportunity, resigns (after 6 months), and company says they "choose" to enforce the non-compete and proceed to direct-deposit the first couple of payments into his bank account. Under the *Fifield* decision the 6 months is clearly not enough consideration, is continuing payments sufficient? Can employer "force" consideration in this manner in order to make the otherwise unenforceable non-compete enforceable? How to advise the employee?

What if you are not in the First District, does any of this matter? Will other jurisdictions follow? Is the IL Supreme Court waiting for a conflict between two districts to decide this issue?