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IN THIS ISSUE

Mark Hansen and Brett Mares discuss several recent Illinois decisions that analyze the sufficiency of consideration for a restrictive covenant in an employment agreement.

Consideration and Non-Compete Agreements: The State of the Law in Illinois

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For those who find themselves embroiled in disputes involving non-compete and non-solicitation clauses, cases are often decided on the fundamentals of contract law. Any valid and enforceable contract requires three things. First, there must be an offer manifesting an intent to enter into a contract. Second, that offer must be accepted. Third, the element of consideration requires the parties to incur a detriment—to either do something they are not legally obligated to do or to refrain from doing something they otherwise could.

It is this third element of a contract that is often glossed over by businesses, lawyers, and sometimes even judges. In most contract disputes, Illinois courts do not inquire as to the adequacy of consideration, confirming only that some consideration exists and ending the examination there. But in non-compete cases, consideration can take center stage. Though this area of law is unsettled in Illinois, some measure of predictability as to how an Illinois court will assess consideration can be gained by looking at recent key decisions.

Fifield v. Premier Dealer Servs., 2013 IL App (1st) 120327, a 2013 case out of the Illinois First District Court of Appeals, pops up in numerous subsequent court decisions, and therefore warrants a close look. In it, an employee signed a contract preventing him from soliciting any of his employer's customers or competing with his employer for business for a period of two years following his departure from the company, provided that his departure was not due to his own resignation. Three months later he resigned and went to work for a competitor. He and his new employer argued that the non-solicitation and non-competition provisions were unenforceable because there was not adequate consideration.

The court agreed. Noting that "[p]ost-employment restrictive covenants are carefully scrutinized by Illinois courts because they operate as partial restrictions on trade," *Fifield*, 2013 IL App (1st) 120327, ¶13, the court felt that it had to determine "whether the restrictive covenant is supported by adequate consideration." *Id*. While continued employment could constitute adequate consideration, the court was wary of situations in which continued employment could be illusory, specifically under conditions of at-will employment. If an employer could dismiss an employee at any time without cause, what was to stop them from forcing an employee to sign a post-employment restrictive covenant and then dismissing the employee shortly thereafter? To prevent this, "continued employment for a substantial period of time beyond the threat of discharge is sufficient to support a restrictive covenant in an employment agreement." *Id*. ¶14. The First District even put a two year time frame on this. "This rule is maintained even if the employee resigns on his own instead of being terminated." *Id*. ¶19.

Fifield was not, as it turns out, the last word in sufficiency of consideration. The next year

the Illinois Third District Appellate Court took up the issue in *Prairie Rheumatology Associates, S.C. v. Francis,* 2014 IL App (3d) 140338. There, a doctor resigned from a medical practice after nineteen months of employment, and her employer argued that the consideration she received was not solely limited to continued employment, and therefore the two year requirement would not apply. The Third District examined the alleged consideration before finding that the practice's assistance in obtaining a hospital membership and staff privileges; access to referral sources; and opportunities for expedited advancement fell short of the mark. "Here Dr. Francis received little or no additional benefit from [the medical practice] in exchange for her agreement not to compete." *Prairie Rheumatology,* 2014 IL App (3d) 140338, ¶18. Therefore, the restrictive covenant was held to be unenforceable.

The Illinois First District Court of Appeals has since revisited the adequacy of consideration, building on the Third District's decision in *Prairie Rheumatology.* Though *Fifield* used a two year benchmark, it "did not abolish a fact-specific approach to determining adequacy of consideration," and "other additional consideration can lessen that two-year continued employment requirement," the court wrote in *McInnis v. OAG Motorcycle Ventures, Inc.* 2015 IL App (1st) 142644, ¶¶ 25, 35. Like *Prairie Rheumatology*, however, the court in *McInnis* examined the employee's re-hiring to determine if it was sufficient additional consideration. Again, this was found to be lacking. The court also refused to make any distinction between a resignation and a termination for purposes of the adequacy of consideration.

Federal courts located in Illinois have attempted to pin down Illinois law, as well. In 2015, the United States District Court for the Northern District of Illinois twice considered the sufficiency of consideration in regard to post-employment covenants. In *Montel Aetnastak, Inc. v. Miessen*, the court lamented Illinois' lack of "a clear rule to apply in this instance," "contradictory holdings of the lower Illinois courts[,] and the lack of a clear direction from the Illinois Supreme Court…." 998 F. Supp. 2d 694, 716 (N.D. Ill. 2014). Because "Illinois courts have unequivocally stated their refusal to 'limit[] the courts' review to a numerical formula for determining what constitutes [the requisite] substantial continued employment[,]"*Montel Aetnastak,* 998 F. Supp. 2d at 716, it declined to apply a bright line rule. Turning instead to a fact-specific analysis, the court in *Miessen* held that the employee's fifteen months of employment, coupled with her voluntary resignation, provided adequate consideration.

Less than four months after *Miessen*, a Northern District judge predicted that the Illinois Supreme Court "would not alter the doctrine established by the recent Illinois appellate opinions, which clearly define a 'substantial period' as two years or more of continued employment." *Instant Technology, LLC v. Defazio*, 40 F. Supp. 3d 989, 1010 (N.D. Ill. 2014). The court went on

to make its decision based strictly on the duration of employment. Shortly thereafter, the District Court for the Northern District of Illinois again revisited this topic in *Bankers Life & Cas. Co. v. Miller*., No. 14 CV 3165, 2015 U.S. Dist. LEXIS 14337 (N.D. Ill. Feb. 6, 2015). "[T]he Illinois Supreme Court cautioned against creating bright-line rules that turn sufficient facts into necessary ones," *Miller*., 2015 U.S. Dist. LEXIS 14337 at *10, the court wrote, rejecting the numerical analysis espoused by *Fifield* and *Defazio* in favor of a fact-based analysis.

The United States District Court for the Central District of Illinois has also added its voice to this debate. In 2015, the court wrote that it "does not believe that the Illinois Supreme Court would adopt the bright-line test announced in *Fifield*. Such a rule is overprotective of employees, and risks making post-employment restrictive covenants illusory for employers" because the employee would be free to resign at his or her pleasure. *Cumulus Radio Corp. v. Olson*, 80 F. Supp. 3d 900, 906 (C.D. Ill. 2015). The Central District opted instead for a "case-by-case, fact-specific determination" in order to "ensure that employees and employers alike are protected from the risks inherent in basing consideration on something as potentially fleeting as at-will employment." *Olson*, 80 F. Supp. 3d at 906. Among the concerns cited by the court was the bright-line approach's failure to give weight to whether the employee resigned or was terminated.

So where do these inconsistent Illinois decisions leave us? In light of the unsettled nature of this issue, caution is appropriate. Employers should very specifically set out what they have provided to the employee, beyond continued employment, in exchange for the agreement to not compete. They should also refrain from overreaching as to the duration and geographic scope of the non-compete agreement. Courts are generally quick to strike down limitations on one's ability to work, so non-compete clauses must be tailored as narrowly as possible in order to achieve the employer's legitimate goals.

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