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Nonsolicitation and Noncompetition Agreements[1]

Case Law Standards in Illinois

It has become more and more common for employers to require employees to sign restrictive agreements to "protect" their business, regardless of whether the business is protectable or the restrictive agreement is actually legally enforceable. This area of the law is so contentious that major law firms have created departments to help employers create and enforce these restrictive covenants. The uncertainties of the area drives lively expedited litigation.

Under Illinois law, "continued employment for a substantial period of time beyond the threat of discharge [was considered] sufficient consideration to support a restrictive covenant in an employment agreement."[2] With regard to postemployment restrictive covenants, courts recognized that a promise of continued employment might be an illusory benefit where the employment is at-will.[3] Many Illinois courts held that two years of continued employment is adequate consideration to support a restrictive covenant.[4]

Last year, the Illinois Supreme Court declined to review a landmark appellate court decision, setting the standard for determining whether a restrictive covenant is supported by adequate consideration.[5] This article discusses the background of Illinois law on covenants not to compete in employment contracts, the *Fifield* appellate decision, its interpretation in lower courts, and finally the practical implications of this standard for employees.

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[1] Tatyana L. Ruderman, a third year Kent Law School student, helped write this paper.

[2] *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 728 (2008).

[3] *Id.*

[4] *Id.* at 729-29.

[5] *Fifield v. Premier Dealer Services, Inc.*, 993 N.E. 2d 938, 943-44 (1st Dist. 2013), *app. denied*, 996 N.E. 2d 12 (2013).

1. Illinois courts' standard on nonsolicitation and noncompetition agreements

A. Background of Illinois law on restrictive covenants

Prior to *Reliable Fire*, Illinois courts employed a three-prong test of reasonableness.[6] Courts held that a restrictive covenant, ancillary to a valid employment relationship, is reasonable only if the covenant: (1) is not greater than required to protect the legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor; and (3) is not injurious to the public.[7] The employer's legitimate business interest is also limited by the type of activity, geographical area, and time.[8] In *Sunbelt Rentals, Inc. v. Ehlers*,[9] the court rejected the legitimate business interest test, holding that a court should evaluate the reasonableness of a restrictive covenant based only on its time and territory restrictions.[10]

In *Reliable Fire*, the Illinois Supreme Court expressly overruled the *Sunbelt Rentals* decision and held that Illinois "continue[s] to recognize the legitimate business interest of the promisee as a long-established component in the three-prong rule of reason."[11] The court noted that although multiple courts listed factors for determining whether there is a legitimate business interest, those examples are "nonconclusive aids" and do not establish "rules beyond the general and established three-prong rule of reason."[12] The court held that "whether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. Factors to be considered in this analysis include, but are not limited to, the near-permanence of

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[6] *Linn v. Sigsbee*, 67 Ill. 75, 80 (1873); *Hursen v. Gavin*, 162 Ill. 377, 379-80 (1896); *Bauer v. Sawyer*, 8 Ill. 2d 351, 355 (1956); *House of Vision, Inc. v. Hiyane*, 37 Ill. 2d 32, 37-38 (1967); *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 76 (2006).

[7] RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. b, § 188(1) & cmts. a, b, c (1981).

[8] RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d (1981).

[9] 394 Ill. App. 3d 421 (2009).

[10] *Id.* at 431.

[11] 965 N.E. 2d 393, 399-400 (2011).

[12] *Id.* at 403.

customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions. No factor carries any more weight than any other, but rather its importance will depend on specific facts and circumstances of the individual case."[13]

B. Reaction to *Reliable Fire Equipment Co. v. Arredondo*

The decision in *Reliable Fire* has both positive and negative implications for employees. On one hand, by requiring courts to evaluate employers' actual interests, courts can limit the scope of covenants and thus protect employees' economic freedom.[14] In the long term, allowing courts to consider a broader range of factors relevant to the employers' purported legitimate business interest will help develop modern case law on Illinois noncompete agreements.

However, the *Reliable Fire* decision also expands the categories of legitimate business interests beyond confidential information and near-permanent customer relationships, allowing employers to argue broader protectable interests.[15] Moreover, requiring courts to evaluate the totality of circumstances might make district judges less likely to grant employees' motions to dismiss, resulting in burdensome discovery and prolonged litigation.[16] For example, in *Instant Technology, LLC v. Defazio*,[17] Judge Holderman of the Northern District of Illinois denied defendant's motion to dismiss, reasoning that to consider the totality of the circumstances requires a "highly-fact specific and intensive" inquiry, considering "all the relevant facts," once have the facts have been "flushed out through litigation."[18]

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[13] *Id.*
[14] Kelly M. Greco, David J. Fish, & Shannon Barnaby, *Enforcing Non-Compete Clauses in Illinois after Reliable Fire*, 100 ILL. B.J. 199 (2012).
[15] *Id.*
[16] *Id.*
[17] No. 12 C 491, slip op. at *1 (N.D. Ill. 2012).
[18] *Id.*

2. Summary of Legal Standard Set Forth in *Fifield v. Premier Dealer Services, Inc.*

As discussed in the previous section, *Reliable Fire* led to uncertainty regarding the enforceability of covenants not to compete.[19] However in *Fifield v. Premier Dealer Services, Inc.* the First District of Illinois adopted a bright-line rule governing what constitutes adequate consideration to support a postemployment restrictive covenant, reducing uncertainty for both employers and employees.

Facts

In *Fifield*, a former employee and his new employer brought a declaratory judgment action against his former employer, claiming that certain provisions of a nonsolicitation and noncompetition agreement were invalid and unenforceable. The former employer counterclaimed seeking injunctive relief. The plaintiff and counterdefendant ("Fifield") was employed by a subsidiary of Great American Insurance Company ("Great American").[20] In October 2009, Great American sold the subsidiary to the defendant and counterplaintiff, Premier Dealer Services, Inc. ("Premier").[21] Premier initially wanted to end Fifield's employment on October 31, 2009, but in late October, Premier made an offer of employment to Fifield.[22] As a condition, Premier asked Fifield to sign an "Employee Confidentiality and Inventions Agreement," which included nonsolicitation and noncompetition provisions.[23]

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[19] John M. Fitzgerald, *After Reliable Fire, Uncertainty Exists over Legitimate Business Interest Test*, CHI. DAILY L. BULL., Sept. 10, 2012, at 5.
[20] *Fifield v. Premier Dealer Services, Inc.*, 993 N.E. 2d 938, 939 (1st Dist. 2013), *app. denied*, 996 N.E. 2d 12 (2013).
[21] *Id.*
[22] *Id.*
[23] *Id.*

Argument

On appeal, Premier argued that there was adequate consideration to support the restrictive covenants because 1) Fifield was not employed by Premier when signing the agreement, and thus, the consideration offered to Fifield was employment itself; 2) the agreements are restrictive covenants, but not *postrestrictive* covenants, because Fifield signed them prior to employment; 3) the "illusory benefit of at-will employment" is nullified by the inclusion of the stipulation that the restrictive covenants would not apply if Fifield was terminated without cause during the first year of his employment.[24] In response, Fifield argued that the nonsolicitation and noncompetition provisions were unenforceable because there was not adequate consideration.[25] In support of this argument, Fifield asserted that Illinois courts repeatedly insist on two years of continued employment as the minimum for adequate consideration.[26] Fifield also argued that many federal courts refuse to distinguish between covenants signed prior to employment and those signed following employment.[27]

Ruling

Reviewing the trial court's judgment *de novo*,[28] the appellate court set forth the appropriate standard for reviewing postemployment restrictive covenants.[29] With regard to restrictive covenants, the court must first determine: 1) whether the restrictive covenant is ancillary to a valid contract, and 2) whether the restrictive covenant is supported by adequate consideration.[30] Moreover, in order for a restrictive covenant to be enforceable in Illinois, the

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[24] *Id.* at 941.
[25] *Id.*
[26] *Id.*
[27] *Id.*; *see Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 947 (7th Cir. 1994).
[28] *Id.* at 942.
[29] *Id.*
[30] *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 137 (1997).

terms of the covenant must be reasonable.[31] The court concluded Fifield's agreements were postemployment restrictive covenants because they "restricted Fifield's ability to seek further employment *after his employment with Premier ended*."[32] The court restated the Illinois standard that there must be at least two or more years of continued employment to constitute adequate consideration in support of a restrictive covenant.[33] The court relied on *Brown & Brown, Inc. v. Mudron*,[34] stating that it is irrelevant whether the covenant was signed before or after Fifield was hired because the agreement governs his postemployment conduct. Moreover, the court acknowledged that this rule applies regardless of whether the employee resigns on their own instead of being terminated.[35] In this case, Fifield left Premier's employment after only three months; moreover, the first-year provision would only protect his employment for at most one year. The court determined that either period of time is "far short" of the two years required for adequate consideration in Illinois.[36] Although the decision was appealed, the Illinois Supreme Court denied review.[37]

A. Interpretation of *Fifield* in Chancery Court's *Novas v. Keith* Opinion

Facts

In *Novas v. Keith*,[38] the court discussed *Fifield* but distinguished the facts of the case from Illinois precedent regarding the two-year requirement. In *Novas*, the defendant-employee Duffy worked as an Advanced Practice Nurse/Certified Nurse Practitioner ("APN/CNP"), and

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[31] *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 447 (2007).
[32] *Fifield v. Premier Dealer Services, Inc.*, 993 N.E. 2d 938, 943 (1st Dist. 2013), *app. denied*, 996 N.E. 2d 12 (2013).
[33] *Diederich Insurance Agency, LLC v. Smith*, 952 N.E. 2d 165, 169 (2011); *see also Lawrence & Allen*, 292 Ill. App. at 138; *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 728-29 (2008).
[34] 379 Ill. App. 3d 724, 728 (2008).
[35] *Diederich*, 952 N.E. at 169; *Brown*, 379 Ill. App. at 729.
[36] *Fifield*, 993 N.E. at 943-44.
[37] *Fifield v. Premier Dealer Services, Inc.*, 996 N.E. 2d 12 (2013).
[38] 2013 WL 5409730 (Ill. Cir. Ct. Ch. Div. 2013).

defendant-employee Keith worked as a physician for the plaintiff-employer Dohr & Coll OB/GYN Associates, S.C.[39] Plaintiffs brought an action Duffy and Keith for breach of contract by entering to a contractually-defined "competitive practice."[40]

Argument

Among other legal issues, the defendants maintained that because Keith worked for plaintiff for less than two consecutive years, that the restrictive covenant was not supported by adequate consideration.[41] In opposition, the plaintiff argued that the covenant was supported by adequate consideration in the form of increased compensation and additional benefits that were not afforded in the previous contract.[42] The court discusses *Brown*, *Diederich*, and *Fifield* in analyzing this case.[43] Although the court acknowledged that Keith was an at-will employee, and that her employment ended less than two years after the effective date of the contract, the court nevertheless distinguished this case from Illinois precedent.[44]

Ruling

The court concluded that because Keith signed a contract with the plaintiff effective on July 18, 2005, and that the original contract included the same restrictive covenant as the new agreement, that when the parties entered into the new contract, Keith was already bound by the restrictive covenant.[45] Even though the most recent contract amended the parties' original agreement, the employment relationship between Keith and the plaintiff spanned over six years—well over the Illinois two-year requirement.[46] Accordingly, the *Novas* court found

[39] *Id.* at *2.
[40] *Id.* at *3.
[41] *Id.* at *6.
[42] *Id.*
[43] *Id.*
[44] *Id.* at *7.
[45] *Id.*
[46] *Id.*

adequate consideration.[47] In sum, the holding of the *Novas* court suggests that the Illinois two-year requirement might be met even under a contract younger than two years, so long as the same restrictive covenant exists in the parties' original agreement.

B. Interpretation of *Fifield* in Chancery Court's *Vapor 4 Life, Inc. v. Nicks* Opinion

Facts

In *Vapor 4 Life, Inc. v. Nicks*,[48] the court discussed *Fifield* but denied the defendants' motion to dismiss for lack of support. The plaintiff, Vapor 4 Life, Inc. ("Vapor"), filed an action against defendants Nicks, Gonzalez, Winfrey, Raymond, and Vaportek, Inc. for breach of employment agreements containing restrictive covenants and breach of fiduciary duty.[49] In response, defendants filed a motion to dismiss, claiming that the restrictive covenants were unenforceable for inadequate consideration because they were not employed by the plaintiff for more than two years.[50]

Ruling

Although the court recognized the holding of *Fifield* as "correct, contrary to [p]laintiff's position" in dicta, the court nevertheless denied defendants' motion to dismiss because of inadequate support; the complaint failed to allege how long the defendants were employed, and defendants failed to submit any affidavits establishing the length of their employment.[51] In sum, even though the court acknowledged the validity of defendants' position that less than two years of continued employment fails to constitute adequate consideration for a restrictive covenant,

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[47] *Id.*
[48] 2013 WL 6631082 (Ill. Cir. Ct. Ch. Div. 2013).
[49] *Id.* at *1.
[50] *Id.*
[51] *Id.*

defendants' motion failed because they did not provide the court with any evidence to support their position under that legal standard.[52]

C. Interpretation of *Fifield* in *Klein Tools, Inc. v. Stanley Black & Decker, Inc.*

Facts

In *Klein Tools*, the court cited *Fifield* in holding that the nonsolicitation and noncompetition provisions in the defendant's employment agreement with plaintiff were unenforceable, and accordingly, granting defendant's motion to dismiss.[53] For 11 months, defendant was employed by the plaintiff-employer as a Regional Sales Manager and the complaint alleged that defendant was involved with new product strategies, development and launch of new products, and that defendant was overall privy to confidential information critical to a successful launch.[54] Moreover, the complaint alleged that defendant copied work documents to an external drive and repeatedly accessed sensitive files in days leading up to his resignation.[55]

Ruling

Despite those allegations, the Chancery court restated the bright-line rule articulated in *Fifield*, and concluded that because defendant's employment only lasted 11 months—less than the two-years of continued employment necessary to constitute adequate consideration in Illinois—that "this fact renders the restrictive covenants of the Employment Agreement unenforceable."[56]

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[52] *Id.* at *2.
[53] 2013 WL 6149305, at *3 (Ill. Cir. Ct. Ch. Div. 2013).
[54] *Id.* at *1.
[55] *Id.*
[56] *Id.* at *2.

D. Interpretation of *Fifield* in *Montel Aetnastak, Inc. v. Miessen*

Facts

In *Montel Aetnastak v. Miessen*,[57] the plaintiff-shelving system manufacturer and subsidiary brought action against a former employee and competitors, alleging breach of its non-compete provision in their employment agreement. The defendant was employed as a Regional Sales Manager for the Midwest and a portion of the southeast United States, responsible for traveling throughout the sales territory, promoting MAI and Montel products, and also working extensively with a department stores to modify one of Montel's shelving products to accommodate the store's needs ["Project at Issue"].[58] The defendant's employment agreement "prohibited her from engaging in any business substantially related to the business of MAI for two years after the termination of the agreement."[59] The defendant was recruited by a competitor and plaintiffs allege that defendant worked in a leading role on the Project at Issue, using plaintiffs' proprietary information, pricing, and trade secrets in direct competition with plaintiffs.[60]

Argument

The plaintiffs argued that the former employee's 15-month employee constitutes sufficient consideration.[61] On the other hand, defendant maintains that the restrictive covenant is unenforceable because Illinois requires two years, or twenty-four months, of employment for adequate consideration.[62]

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[57] 2014 WL 702322, *15 (N.D. Ill. 2014).
[58] *Id.* at *1.
[59] *Id.*
[60] *Id.* at *2.
[61] *Id.* at *15.
[62] *Id.*

Analysis

Judge Castillo of the Northern District of Illinois acknowledged the *Fifield* holding, but also emphasized that in other cases, one year was considered a "substantial period" of employment.[63] The court also cited *Woodfield Group, Inc. v. DeLisle*[64] for the proposition that "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."[65]

Ruling

The court concluded that, in light of the "contradictory holdings of the lower Illinois courts and the lack of a clear direction from the Illinois Supreme Court," it was not appropriate to apply the bright-line rule articulated in *Fifield*, instead employing the fact-specific approach used by other Illinois courts. The court determined that adequate consideration existed because the defendant worked under the employment agreement for at least 15 months and voluntarily resigned.[66]

Although plaintiffs met the "substantial period of employment" requirement of enforceability, the court nevertheless concluded that the restrictive covenant was unenforceable because it was not reasonably necessary to protect the employers' interests. The court's decision relied on the facts that, according to the covenant's terms, the defendant was barred from working for any competitor, even in a noncompetitive capacity, and that the covenant had an

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[63] *See Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill. App. 3d 63 (1st Dist. 1993) (noting that the issue of consideration was not directly addressed, but citing two cases involving approximately a year of employment).
[64] 295 Ill. App. 3d 935, 942 (1st Dist. 1998).
[65] *Id.*; *see McRand, Inc. v. van Beelen*, 486 N.E. 2d 1306, 1314 (1st Dist. 1985) (refusing to apply bright-line test in determining what constituted a "substantial period" of employment for rendering restrictive covenant enforceable, instead considering raises and bonuses received by defendants, defendants' voluntary resignation, and defendants' increased responsibilities following signing of the covenant).
[66] 2014 WL 702322, at *16.

"almost limitless" geographic scope covering the entire United States and Canada.[67] The court further declined to "blue-pencil" the restrictive covenant, concluding that "significant modification would be necessary to make it comport with the law."[68]

3. Implication for Employees of Current Standard as Set Forth by *Fifield*

Although most Illinois trial courts have long maintained that two years of continued employment is necessary for adequate consideration for a restrictive covenant, the *Fifield* appellate decision establishes a clear precedent.

Nevertheless, employees should be wary that Illinois courts interpreted wrinkles in *Fifield*. For instance, in *Novas*, the court determined that less than two years might be adequate where the parties' old contract included the same restrictive covenant. Further, the most recent interpretation of *Fifield* refused to apply the bright-line two-year requirement and instead employed a fact-specific approach, considering other factors, such as the nature by which the employment relationship ended.

In the final analysis, the bright-line created in *Fifield* has been partially erased by subsequent court decisions. There are plenty of other issues for companies to at least try to outspend the former employee into submission, regardless of the ultimate merits.

[67] *Id.* at *17.
[68] *Id.* at *18.