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IDC Monograph

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For Your Consideration: The Current State of Post-Employment Restrictive Covenants in Illinois and National Trends Beyond Continued Employment as Adequate Consideration

Post-employment restrictive covenants, which may include non-compete and non-solicitation agreements, are tools that many employers use to restrict the future employment of a former employee. In a non-compete agreement, the employee agrees not to perform certain actions related to his or her prior position of employment, or to engage in work that competes with his or her prior employer. Non-solicitation provisions generally restrict an employee's ability to poach customers or other business that the employer maintains during the employee's tenure of employment.

Increasingly, employers are utilizing restrictive covenants as a tool to protect business interests. Typically, such agreements can be drafted to protect an existing customer base and to protect confidential information. Employers are seeking to enforce restrictive covenants more often through litigation, as well. Over the past decade, the frequency of such suits has increased more than 60%.[1] According to a research study conducted for the *Wall Street Journal*, published court opinions involving covenants not to compete have increased 61% since 2002.[2] Of course, this increase does not take into account cases that settle outside of court.[3] Therefore, the actual number of suits involving covenants not to compete is likely much higher.

This Monograph will explore national trends in the handling and enforcement of restrictive covenants among the states, with an emphasis on Illinois' history and recent developments regarding the law on restrictive covenants. Specifically, this Monograph explores the recent decisions of *Reliable Fire Equipment*

Co. v. Arredondo[4] and *Fifield v. Premier Dealer Services, Inc.*[5] and how those decisions have changed the law in Illinois regarding legitimate business interests and the consideration needed to have an enforceable covenant not to compete.

Whether an employer may successfully enforce a restrictive covenant depends upon the particular jurisdiction. In many states, employers are required to show that the restrictive covenant is reasonably limited in time and territory.[6] Many states also require the employer to show that the agreement protects a legitimate business interest.[7] For example, in Florida, a broad restrictive covenant generally will be enforced, so long as the provisions protect a legitimate business interest.[8] In the states requiring employers to prove that a restrictive covenant protects a legitimate business interest, the courts generally will consider trade secrets, confidential business information, and customer lists as protectable interests.[9]

Even among these states, however, courts deal differently with such agreements where a particular aspect of a restrictive covenant clause is deemed unreasonable. For example, some states abide by the "blue pencil" doctrine. Under the blue pencil doctrine, the court will strike those portions of the covenant that are deemed unreasonable but will uphold the remaining portions of the agreement.[10] Other jurisdictions apply the "red pencil" doctrine. Under the red pencil doctrine, if any term of the restrictive covenant is unreasonable, then the entire contract will be deemed void.[11] Between the "blue pencil" and "red pencil" states are the so-called "purple pencil"—or "reformation"—states. In these states, courts will allow for reformation of the contract to make unreasonable terms reasonable.[12] For example, if a contract states that the employee cannot work in county A, but he previously worked in county B, the court would edit the contract to refer to county B.

Employers in a jurisdiction that strictly interprets restrictive covenants could attempt to evade that jurisdiction's laws by including a choice of law provision in the employment agreement. If the chosen state law is drastically different from the law of the employer's home state, however, the court might refuse to enforce the choice of law provision, finding that it violates public policy.[13] Employers, therefore, should never assume that restrictive covenants are iron clad. Even if a more favorable choice of law provision is added to the contract, practitioners would be remiss not to temper their clients' expectations accordingly.

States like California and North Dakota strongly disfavor non-compete agreements.[14] In these states, non-compete clauses are void, except as to equity stakeholders in a company.[15] There have been pushes in other states to join California's and North Dakota's stance on restrictive covenants either by limiting covenants not to compete or by abolishing them altogether.[16] Those who favor eliminating or limiting restrictive covenants claim that such agreements inhibit economic development because they hinder entrepreneurship.[17] Proponents of restrictive covenants argue that such covenants boost economies and foster competition because companies invest more heavily in their employees when the employers can reduce the opportunity for their employees to use employer-provided training to compete with them.[18] They also argue that restrictive covenants prevent employees from leaving jobs after obtaining confidential information gleaned from their employers, which is a desirable policy goal.[19]

Massachusetts is an example of a state that recently attempted to abolish restrictive covenants. In April 2014, Massachusetts Governor Deval Patrick introduced legislation to abolish the validity of restrictive covenants with a few exceptions, due to economic concerns regarding the enforceability of restrictive covenants.[20] The state legislature responded with a compromise bill that passed the state senate.[21] The compromise bill set out parameters meant to allow such an agreement to pass judicial muster. Under the bill, restrictive covenants are enforceable only for a duration of six months or less. In addition, such agreements cannot apply to hourly workers.[22] The compromise bill, however, did not pass the state legislature at the end of the legislative session.[23]

Massachusetts is not the only state that has recently attempted to limit the impact of restrictive covenants. In 2013, legislation was introduced in Minnesota to essentially ban such provisions, with the exception that restrictive covenants would be enforceable as to equity stakeholders in a company.[24] Likewise, New Jersey

recently proposed limits to restrictive covenants. New Jersey's proposed change would invalidate any restrictive covenants entered into by a worker entitled to unemployment benefits from his or her former employer.[25] Like the Massachusetts bill, neither the Minnesota nor the New Jersey bills have passed.[26]

In 2012, New Hampshire succeeded in changing its laws regarding the validity of non-compete clauses. Under the amendment, in order for a non-compete agreement to be valid in New Hampshire, the employer must provide a copy of the agreement to the prospective employee either before a job offer is given or at the time the job offer is made.[27] If a non-compete agreement is entered into during an employee's employment, the agreement will be valid only if the agreement coincided with a position change by the employee.[28]

States are showing more interest in limiting the effect of restrictive covenants. Given these developments, it appears that the growing trend across the United States is toward restricting the enforceability of restrictive covenants.

A Brief History of Restrictive Covenants in Illinois: The Law Prior to *Reliable Fire Equipment* and *Fifield*

The longstanding rule in Illinois has been that contracts in total restraint of trade contradict public policy and are therefore void.[29] The Illinois Supreme Court recognized very early on, however, that a contract which is only a *partial* restraint of trade is valid, provided it is reasonable and is supported by adequate consideration.[30]

A modern formulation of this framework was expressed in *Mohanty v. St. John Heart Clinic*.[31] In *Mohanty*, the Illinois Supreme Court noted that private contracts are not void unless it is clearly shown that the contract is contrary to public policy, or that the contract is manifestly injurious to the public welfare.[32] As an example, the *Mohanty* court acknowledged that, in Illinois, restrictive covenants in attorney employment contracts are void as a matter of public policy.[33] In contrast, the *Mohanty* opinion itself examined whether restrictive covenants in physician employment contracts violate public policy. The majority held that physician restrictive covenants are not clearly against public policy.[34] As noted in the *Mohanty* opinion, "[the Illinois Supreme Court] has a long tradition of upholding covenants not to compete in employment contracts involving performance of professional services when the limitations as to time and territory are not unreasonable."[35]

The issue of what constitutes reasonable limitations on a prior employer's activities was specifically addressed in the *Mohanty* decision. The Illinois Supreme Court articulated a two-prong test to be applied when assessing the reasonableness of a restrictive covenant. The test provides:

> "In determining whether a restraint is reasonable it is necessary to consider whether enforcement will be injurious to the public or cause undue hardship to the promisor, and whether the restraint imposed is greater than is necessary to protect the promise."[36]

Two subsequent opinions from the Illinois appellate court brought some confusion to the otherwise straightforward *Mohanty* analysis. The first was *Sunbelt Rentals, Inc. v. Ehlers*,[37] a decision from the Illinois Appellate Court Fourth District. In *Sunbelt Rentals*, an employee was a sales representative for Sunbelt Rentals, a company that rented and sold industrial equipment. The employee, Ehlers, was responsible for developing and maintaining the company's customer base. Ehlers was also responsible for other aspects of customer relations.[38]

Ehlers entered into a written employment contract with Sunbelt Rentals. The agreement provided that while he was employed by Sunbelt Rentals, and for one year afterward, Ehlers would not directly or indirectly provide (or solicit the provision of) products or services similar to those provided by Sunbelt Rentals.[39] The contract also limited this restriction to a geographic region of a 50-mile radius from Sunbelt Rentals's store.[40]

After leaving Sunbelt Rentals, Ehlers accepted a position as a sales representative with Midwest Aerials & Equipment, Inc. (Midwest), which Sunbelt Rentals considered a direct competitor. Midwest sold aerial work platforms to industrial and construction companies.[41] Soon after Ehlers took this position, Sunbelt Rentals sent a cease-and-desist letter to Ehlers and Midwest, demanding that Ehlers stop working for Midwest.[42]

The trial court granted Sunbelt Rentals's request for a preliminary injunction, enjoining Ehlers and Midwest from violating the restrictive covenants of Ehlers's employment agreement.[43] On appeal, the reviewing court observed that traditionally Illinois case law has evaluated the reasonableness of restrictive covenants by looking to the "limitations as to time and territory" imposed by the agreement.[44] The court also noted that over the past few decades, each of the state's five appellate districts had imposed the so-called "legitimate-business-interest" test when evaluating whether restrictive covenants were enforceable.[45] The *Sunbelt Rentals* court believed that this test had been created "out of whole cloth" and had no basis in Illinois law.[46]

Under the Fourth District's analysis, the first reference to the "legitimate-business-interest" test in Illinois occurred in 1975 in *Nationwide Advertising Service, Inc. v. Kolar*.[47] In *Kolar*, the plaintiff advertising company sought to enjoin its former employee and his new employer from soliciting business from the plaintiff's customers.[48] On appeal, the Illinois Appellate Court First District discussed an employer's interests, and whether they may be protected by contract. The court made the following observation:

> Our review of the cases relied on by plaintiff established that an employer's business interest in customers is not always subject to protection through enforcement of an employee's covenant not to compete. Such interest is deemed proprietary and protectable only if certain factors are shown. A covenant not to compete will be enforced if the employee acquired confidential information through his employment and subsequently attempted to use it for his own benefit. [Citation omitted.] An employer's interest in its customers also is deemed proprietary if, by the nature of the business, the customer relationship is near-permanent and but for his association with plaintiff, defendant would never have had contact with the clients in question. [Citations omitted.] Conversely, a protectable interest in customers is not recognized where the customer relationship is short-term and no specialized knowledge or trade secrets are involved. [Citation omitted.] Under these circumstances the restrictive covenant is deemed an attempt to prevent competition per se and will not be enforced.[49]

The *Sunbelt Rentals* court outlined how opinions subsequent to *Kolar* built from this analysis and created a "legitimate-business-interest" test.[50] The *Sunbelt Rentals* opinion further observed that the Illinois Supreme Court has never embraced the legitimate-business-interest test in the context of restrictive covenants.[51] Reviewing the Illinois Supreme Court's restrictive covenant jurisprudence, the *Sunbelt Rentals* court concluded that application of the test is inconsistent with the Illinois Supreme Court's jurisprudence governing restrictive covenant cases.[52]

The year after the *Sunbelt Rentals* decision, the Illinois Appellate Court Second District decided *Steam Sales Corp. v. Summers*.[53] In that case, the employee Brian Summers worked for Steam Sales Corporation (Steam Sales), a company selling boiler room equipment to industrial and commercial companies.[54] Summers's duties included soliciting and servicing customer accounts.[55] After one of Steam Sales's larger clients, Johnston Boiler, did not renew its contract with Steam Sales, Summers resigned from Steam Sales.[56] A few months later, he formed his own company, BEC Equipment. It was announced that two of Steam Sales's largest customers would end their relationship with Steam Sales and enter into contract with BEC Equipment to provide them exclusive representation.[57]

Summers's employment contract included the following provision:

> "*Restrictive Covenant* For a period of two (2) years following the termination of Summers' employment with Steam Sales, Summers shall not solicit, offer to provide, provide, sell or offer to sell any service or product identical to or similar to those which Steam Sales sells to any customer to whom Summers or Steam Sales has made sales during the immediately preceding two (2) year period prior to the date the employment relationship ends."[58]

Steam Sales sought a temporary restraining order against Summers.[59] The trial court granted the preliminary injunction, finding that Steam Sales's customer list and the established client relationships were rights in need of protection.[60] The court found a likelihood of success on the merits of Steam Sales's claims, and enjoined Summers from "soliciting, offering to provide, providing, selling or offering to sell any service or product identical to or similar to those which Steam Sales sells to any customer to whom Summers or Steam Sales made sales [for a period of two years]."[61]

On appeal, Summers argued that the restrictive covenant was unenforceable because Steam Sales failed to satisfy the legitimate-business-interest test.[62] Summers also argued that the restrictive covenant was unreasonable in terms of time and geographic territory.[63]

Affirming the trial court, the appellate court in *Steam Sales* held that the restrictive covenant was enforceable. That court reiterated its own formulation of the legitimate-business-interest test:

> "Courts will not enforce a covenant not to compete unless the terms of the agreement are reasonable and necessary to protect an employer's legitimate business interests. [Citation.] A legitimate business interest exists where: (1) because of the nature of the business, the customers' relationships with the employer are near-permanent and the employee would not have had contact with the customers absent the employee's employment; or (2) the employee gained confidential information through his employment that he attempted to use for his own benefit."[64]

One question addressed by the *Steam Sales* court was whether the recent *Sunbelt Rentals* opinion had impacted the viability of the legitimate-business-interest test.[65] The Second District noted that the *Sunbelt Rentals* opinion rejected the legitimate-business-interest test in favor of the two-prong reasonableness test set out in *Mohanty*.[66] At the time, *Mohanty* was the most recent Illinois Supreme Court case addressing restrictive covenants.[67]

In its analysis, the *Steam Sales* court observed that application of the *Mohanty* reasonableness test versus the legitimate-business-interest test could lead to different results. The legitimate-business-interest test is outcome determinative in cases where the employer is unable to establish either a near-permanent relationship with the customer or the attainment of confidential information by the employee.[68] Thus, the legitimate-business-interest test presents a greater hurdle for employers to overcome than the reasonableness test. The court reasoned, however, that eliminating the legitimate-business-interest test does not completely relieve an employer of the burden of demonstrating a protectable interest.[69] In that sense, the *Steam Sales* court noted that there may be some merit to the *Sunbelt Rentals* analysis, rejecting the legitimate-business-interest test.[70]

Despite finding merit in the *Sunbelt Rentals* holding, the *Steam Sales* court ultimately declined to formally reject the legitimate-business-interest test.[71] The court noted that under the facts of that case, the employer did establish a near-permanent relationship with the customers at issue.[72] The *Steam Sales* court upheld the non-compete agreement, concluding that the geographic limitation (half of northern Illinois, four counties in northwest Indiana, a portion of southern Wisconsin, and a small area in Iowa) was reasonable. The court also found that the two-year period was reasonable.[73]

In the wake of *Sunbelt Rentals* and *Steam Sales*, two Illinois appellate courts had either suggested or directly held that the legitimate-business-interest test should be abandoned. *Mohanty*—at the time, the most recent Illinois Supreme Court decision to speak on the issue—had confirmed that Illinois courts apply the two-prong reasonableness test when evaluating the limitations of a covenant not to compete. Illinois Supreme Court opinions, however, had not addressed the role, if any, of the legitimate-business-interest test, so clarification was needed.

Recent Developments: *Reliable Fire Equipment Co. v. Arredondo* and *Fifield v. Premier Dealer Services*

In the years following *Sunbelt Rentals* and *Steam Sales*, Illinois courts have shaken up the landscape of restrictive covenant law in a major way. The courts also have provided much-needed clarity with respect to the applicability of the legitimate-business-interest test. Specifically, the Illinois Supreme Court has announced that the enforceability of restrictive covenants depends upon whether the entity seeking enforcement has a legitimate business interest to be protected. The court also held that the business interest, in turn, is assessed based upon the totality of circumstances presented by a given case. In addition, the Illinois Appellate Court First District has narrowed the scope of consideration that it will find adequate to support an enforceable restrictive covenant. Although it can be argued that the reach of the First District's opinion might be limited, both developments have long-ranging implications for Illinois employers that seek to protect their business interests from competition by former employees.

A. Reliable Fire Equipment: Assessing the Legitimate Business Interest

In 2011, the Illinois Supreme Court reviewed the state of Illinois law regarding restrictive covenants. The court noted that, prior to that time, Illinois courts determined the reasonableness of a restrictive covenant by applying a three-prong test that considered whether the covenant: (1) is no greater than required for the protection of a 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.[74] Courts also considered whether the extent of an employer's legitimate business interest could be limited by type of activity, geographical area, and time.[75] The supreme court acknowledged the lower courts' disagreement about application of the legitimate-business-interest test.[76] The court reconciled these divergent approaches to enforcing restrictive covenants in its 2011 opinion, *Reliable Fire Equipment Co. v. Arredondo*.[77]

In *Reliable Fire Equipment*, the plaintiff, a fire system designer and installer, sued two former employees who had joined a start-up business supplying fire-alarm systems in the Chicago area. As employees of the plaintiff, the two defendants had signed agreements not to compete with Reliable Fire Equipment Co. (Reliable Fire) in Illinois, Indiana, or Wisconsin for one year after their employment ended.[78] The circuit court ruled that Reliable Fire failed to prove the existence of a legitimate business interest that justified enforcement of the covenants.[79] A divided appellate court affirmed. The Illinois Supreme Court considered whether the circuit court applied the correct legal test to the evidence presented, and held that it had not.[80]

The supreme court made clear that the legitimate business interest of the employer is a long-established component of the three-part reasonableness test.[81] The court stated that the common law has recognized several factors and subfactors within the component of a promisee's legitimate-business-interest test, but held that "such factors are only nonconclusive aids in determining the promisee's legitimate business interest, which in turn is but one component in the three-prong rule of reason, grounded in the totality of the circumstances."[82] The court explained that its earlier decision in *Mohanty* "expressly recited the legitimate interest of the

promisee as a component of the three-prong rule of reason."[83] Consequently, the court overruled the two recent appellate court decisions—*Sunbelt Rentals* and *Steam Sales*—for misreading the court's decision in *Mohanty*.[84]

The court also acknowledged, but ultimately declined to adopt, the two-factor test advanced by the Illinois Appellate Court First District in *Kolar*, which states that a near-permanent customer relationship and an employee's acquisition of confidential information through his employment are determinative of whether a non-compete agreement will be enforced.[85] The supreme court held that enforceability should turn upon the totality of the circumstances and not upon an inflexible two-prong standard.[86]

After conducting its analysis, the *Reliable Fire Equipment* court articulated the standard for assessing an employer's legitimate business interest as follows:

> [W]hether 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 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 the specific facts and circumstances of the individual case.[87]

Under this standard, Illinois trial courts have more flexibility to enforce restrictive covenants. As a result, employers considering prospective candidates who have entered into restrictive covenants with former employers must consider this fact. Those employers must evaluate, with aid of counsel, the nature of the restrictive covenant within the context of the work to be performed by the prospective employee. Such an evaluation will assist the employer in determining how to proceed with the possible hire, as well as the defense against any possible litigation brought by the employee's former employer for an alleged breach of the non-compete agreement.

B. Fifield v. Premier Dealer Services, Inc.: Providing Adequate Consideration

Over and above the legitimate-business-interest test, a second aspect of the enforceability of a restrictive covenant is whether it is supported by adequate consideration. Employers must be mindful of the consideration they provide their employees for entering into restrictive covenants. Before the reasonableness of a restrictive covenant may be analyzed, it must be supported by adequate consideration. Employers conducting business in the First District (*i.e.*, Cook County, including Chicago) must analyze the consideration they provide for their restrictive covenants to ensure they pass muster under the First District's 2013 decision in *Fifield v. Premier Dealer Services, Inc*.[88] Although the *Fifield* court did not provide instruction about what constitutes adequate consideration, the court held that employment of less than two years was not sufficient consideration to enforce the restrictive covenants at issue in that case.

In *Fifield*, the plaintiff was employed by an insurance company that was acquired by Premier Dealer Services, Inc. That company developed, marketed, and administered a variety of vehicle after-market products.[89] As a result of the sale, the plaintiff's prior employer informed him that his employment would end on a certain date.[90] Prior to that date, the defendant offered employment to the plaintiff.[91] As a condition of employment, the defendant required the plaintiff to sign an "Employee Confidentiality and Inventions Agreement" (Agreement).[92] The Agreement contained nonsolicitation and noncompetition provisions that prohibited the plaintiff from competing with the defendant for two years following the termination of his employment.[93] Before signing the agreement, the plaintiff negotiated with the defendant to add a provision in the agreement that provided that the restrictive covenants would not apply if the plaintiff was terminated without cause during the first year of his employment.[94] The plaintiff accepted the offer of employment, signed

the agreement, and began working for the defendant, but resigned three-and-a-half months later.[95] Shortly thereafter, he began working for Enterprise Financial Group (EFG).[96]

The plaintiff and EFG filed a complaint for declaratory relief in the Circuit Court of Cook County, requesting that the trial court declare that certain provisions of the Agreement were invalid and unenforceable.[97] The plaintiff and EFG later filed a motion for declaratory relief pursuant to 735 ILCS 5/2-701(b).[98] The trial court entered an order granting the motion, stating that the nonsolicitation and noncompetition provisions in the Agreement were unenforceable as a matter of law for lack of adequate consideration.[99]

The First District affirmed. Even though the plaintiff signed the Agreement before his employment with the defendant began, the appellate court held that the provisions in the Agreement were postemployment restrictive covenants because the provisions restricted the plaintiff's ability to seek work after his employment with the defendant ended.[100] The court found instructive the reasoning and analysis of *Bires v. WalTom, LLC*,[101] in which the U.S. District Court for the Northern District of Illinois observed that the U.S. Court of Appeals for the Seventh Circuit has rejected the distinction between pre- and post-hire covenants.[102] The appellate court also pointed out that Illinois courts have treated restrictive covenants signed by individuals in situations similar to the plaintiff's situation as postemployment restrictive covenants.[103] The appellate court also held that the plaintiff's employment with the defendant, which lasted slightly longer than three months, fell far short of the two years required for adequate consideration under Illinois law.[104] The court noted that Illinois courts have held repeatedly that there must be at least two years of continued employment to constitute adequate consideration in support of a restrictive covenant.[105] This rule applies even if the employee resigns from his position on his own.[106]

The defendant petitioned the Illinois Supreme Court for leave to appeal, but the court denied the petition. Consequently, as discussed below, Illinois employers do not have clear guidance for what consideration they must offer employees to ensure enforceability of restrictive covenants. Illinois state and federal courts presented with this issue in the wake of *Fifield* have taken different approaches.

Behind the *Fifield* Curtain: Does Illinois Case Law Really Require Two Years of Continued Employment as a Bright-Line Rule?

Commentators have described the holding in *Fifield* as a bright-line rule that a two-year period of continued employment following execution of an employment agreement is now required for the consideration for an enforceable restrictive covenant to be adequate.[107] That line might be a bit blurry, however, to the extent that the *Fifield* holding is meant to apply to all restrictive covenants. Instead, an argument can be made that the holding is limited to those restrictive covenants where the *only* consideration is continued employment. The more important take-away from the *Fifield* decision might be that employers should ensure that the consideration for a restrictive covenant is not illusory, in addition to being adequate. The next section will deconstruct the *Fifield* holding and evaluate its progeny in order to explore the basis for the conclusions reached by the courts and to explore whether a bright-line rule really is the appropriate draw from the *Fifield* decision.

A. The Case Law Relied Upon by the Court in Fifield

The court in *Fifield* primarily relied on three cases for the proposition that Illinois courts have held repeatedly that at least two or more years of continued employment constitutes adequate consideration in support of a restrictive covenant: *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*,[108] *Brown and Brown, Inc. v. Mudron*,[109] and *Diederich Insurance Agency, LLC v. Smith*.[110]

In *Lawrence and Allen, Inc. v. Cambridge Human Resource Group, Inc.*, the Illinois Appellate Court Second District held that a nearly two-and-a-half year period of continued employment, after agreeing to a postemployment restrictive covenant, was adequate consideration for the agreement.[111] In that case, John Sheets began his at-will employment with the plaintiff on January 4, 1988, and on June 27, 1989, he signed a postemployment restrictive covenant under the threat of termination. No change in job title, responsibilities, or salary corresponded to the signing of the restrictive covenant, which included a covenant not to compete that precluded Sheets from competing directly or indirectly with the plaintiff within the territorial United States for two years in the event that he quit his employment with the plaintiff. The restrictive covenant also prevented Sheets from performing directly or indirectly any similar services for the plaintiff's clients or soliciting any of the plaintiff's clients during the same two-year period after termination. Other than the restrictive covenant, there was no written employment contract. On November 12, 1991, Sheets ended his employment with the plaintiff and began working for the defendant, a rival of the plaintiff in the highly competitive corporate employee outplacement industry.[112]

The plaintiff sued the defendant for tortious interference with contract.[113] At the close of discovery, the defendant moved for summary judgment, in part, on the issue of whether the covenant was supported by consideration. The trial court granted the motion.[114] On appeal, the Illinois Appellate Court Second District noted that continued employment for a substantial period of time is sufficient consideration to support an employment agreement.[115] The appellate court considered the nearly two-and-a-half year period during which Sheets worked to constitute a substantial period of time, thereby serving as adequate consideration to support the postemployment restrictive covenant.[116] Nevertheless, the appellate court ultimately found the terms of the restrictive covenant unreasonable and affirmed the trial court's grant of summary judgment in favor of the defendant.[117]

In *Brown and Brown, Inc. v. Mudron*, the Illinois Appellate Court Third District held that seven months of continued employment after signing a restrictive covenant was not sufficient consideration for the restriction.[118] In that case, customer service representative Diane Gunderson was an at-will employee of a company that was purchased by the plaintiff. As part of the purchase, the plaintiff required Gunderson and her co-workers from the company being acquired to sign an employment agreement with the plaintiff. One co-worker who refused to sign the agreement was terminated. The agreement stated that the employee could be terminated at any time, with or without cause. It contained a postemployment restrictive covenant that prohibited the employee from soliciting or servicing any of the plaintiff's customers for two years after employment with the plaintiff had ended and from disclosing any of the plaintiff's confidential information for the same post-employment period. Gunderson signed the agreement and worked for the plaintiff after the purchase of her former employer. After approximately seven months, Gunderson quit and joined one of the plaintiff's competitors.[119]

The plaintiff filed suit against Gunderson and her new employer, alleging that Gunderson had breached the employment agreement by soliciting and servicing the plaintiff's customers, as well as by taking and utilizing the plaintiff's confidential information. After extensive discovery, Gunderson moved for summary judgment, which was granted.[120]

On the plaintiff's appeal, the court addressed the issue of whether there was adequate consideration for the restrictive covenant. The court explicated: "Under Illinois law, continued employment for a substantial period of time beyond the threat of discharge is sufficient to support a restrictive covenant in an employment agreement."[121] The court noted that Illinois courts generally have held that two or more years of continued employment constitutes adequate consideration.[122] Gunderson, however, continued to work for the plaintiff for only seven months after signing the employment agreement containing the restrictive covenant. Notably, the court declared that the fact that Gunderson quit her job did not change the analysis.[123] Furthermore, even though the plaintiff claimed that Gunderson received other employee benefits as consideration for the restrictive covenant, the court had no evidence before it to establish specifically what those benefits were or

how they differed from the benefits Gunderson was receiving as an employee of the acquired company. Accordingly, the court held that there was not adequate consideration to support the employment agreement and that the restrictive covenant was unenforceable.[124]

In *Diederich Insurance Agency, LLC v. Smith*, the Illinois Appellate Court Fifth District held that a three-month period of continued employment after signing a postemployment non-solicitation agreement was not sufficient consideration for the restrictive covenant. In that case, the defendant, Chad Smith, signed an employment agreement when he began working for the plaintiff. The employment agreement included a non-solicitation provision that prohibited Smith from soliciting insurance business from the plaintiff's customers for a two-year period after he stopped working for the plaintiff.[125] Five-and-a-half months after he started, Smith signed an employee confidentiality agreement that reduced the term of the non-solicitation agreement from the two-year period set forth in the original agreement to a 12-month period.[126] Three months after signing the employee confidentiality agreement, Smith quit his job with the plaintiff. Eleven months later, the plaintiff received notification from one of its long-standing clients that the client would no longer be using the plaintiff's broker services. Smith had arranged the transfer of that client's business to another broker.[127] The plaintiff then sued Smith for breaching the second non-solicitation agreement with the plaintiff, and Smith moved to dismiss. The circuit court granted Smith's motion, finding insufficient consideration as a matter of law for the non-solicitation agreement.[128]

The appellate court agreed with Smith's position. Addressing only whether the consideration was adequate for the non-solicitation agreement, which was signed during Smith's employment,[129] the appellate court held that it was not. The plaintiff argued that the reduction of the non-solicitation period from two years to 12 months was a benefit to Smith, and thus was adequate consideration for the non-solicitation agreement. Alternatively, the plaintiff argued that Smith's continued employment for three months after signing the non-solicitation agreement provided adequate consideration.[130]

The court rejected the plaintiff's arguments, concluding that the new non-solicitation agreement was a modification of an existing contract, requiring consideration in order to be enforceable.[131] First, the court turned around the plaintiff's argument that the reduction in the non-solicitation period to 12 months was a benefit to Smith. The court did not view the 12-month period as a benefit to Smith in the form of a reduction of a prior, lengthier restriction on him. Instead, the court viewed the restriction as a renewed promise by Smith to not compete for 12 months. Because Smith already had agreed to a 24-month non-solicitation period when he signed the employment agreement at the time that he started working for the plaintiff, the court reasoned that he already had a pre-existing duty not to compete against the plaintiff. The court, therefore, "failed to see" how a promise not to compete for 12 months could be new, valid consideration.[132]

Second, the court held that Smith's continued employment for three months after signing the non-solicitation agreement was not sufficient consideration for the restriction.[133] The court reasoned that continued employment for an at-will employee is an illusory benefit, because immediately after an at-will employee signs the non-solicitation agreement the employer can fire the employee, leaving the employee with nothing in exchange for a fresh promise not to compete.[134] The court recognized that continued employment for "a substantial period" is sufficient consideration for an employment agreement and surveyed several other cases to reveal that four years had been found to qualify as a "substantial period," but seven months had not been considered substantial.[135] Citing to *Lawrence & Allen*, however, the court pointed to a two-year period of continued employment as adequate consideration for an employment agreement containing a restrictive covenant.[136] Therefore, the court held that Smith's three-month period of continued employment was insufficient consideration, and as a result the restrictive covenant signed by Smith was unenforceable as a matter of law.[137]

B. Judicial Interpretations of the Fifield Decision: Is the Jury Still Out on the Issue of Consideration?

There is very little case law addressing the adequacy of consideration in the wake of *Fifield*. In fact, before December 2014, the only cases that cited to *Fifield* were Illinois circuit court cases and two cases from the U.S. District Court for the Northern District of Illinois. The federal cases are split on whether to apply the *Fifield* decision as requiring a bright-line two-year requirement for employment after an employee signs a restrictive covenant. On December 11, 2014, the Illinois Appellate Court Third District looked to the *Fifield* decision as providing a general rule of thumb on the issue of adequate consideration. Notably, that decision also suggests that the issue of adequate consideration is a threshold issue that must be addressed before the three-pronged reasonableness test may be considered.

1. Illinois Circuit Court Cases

The first case to cite to *Fifield* acknowledged that, in general, two years or more of continued employment constitutes adequate consideration to support a restrictive covenant, even if the employee resigns voluntarily instead of being terminated, and in taking a view similar to the reasoning of the *Diederich Insurance* case, found a period of employment that exceeded the two-year "requirement" of *Fifield* and held that such period of time constituted adequate consideration for the restrictive covenant at issue. In *Novas, Dohr & Coll OB/Gyn Associates, S.C. v. Keith*,[138] the plaintiff and its at-will employee, Dr. Rebecca Keith, entered into an employment agreement, which contained a two-year non-compete agreement, when she began working for the plaintiff on July 18, 2005.[139] Later, they entered into an "Amended and Restated Physician Agreement" effective January 1, 2010.[140] The agreement provided that Dr. Keith would not enter into a practice that competed with the plaintiff for a two-year period after her employment with the plaintiff terminated.[141] Dr. Keith resigned her employment with the plaintiff effective November 24, 2011, and immediately joined practices that competed with the plaintiff.[142] The plaintiff sued Dr. Keith for breach of contract and moved for a preliminary injunction against her in the Chancery Division of the Circuit Court of Cook County.[143] Dr. Keith moved to strike the motion for preliminary injunction and to dismiss the plaintiff's complaint.[144]

Dr. Keith argued there was not adequate consideration to support the restrictive covenant because she did not work for the plaintiff for two years or more after she signed the amended agreement. The plaintiff argued that the restrictive covenant was supported by consideration in the form of increased compensation and additional benefits that were not afforded to Dr. Keith under her previous contract. Citing to *Fifield*, the circuit court acknowledged that, in general, two years or more of continued employment constitutes adequate consideration to support a restrictive covenant, even if the employee resigns voluntarily instead of being terminated.[145] The circuit court, however, noted that there were portions of the original agreement signed by Dr. Keith that were not modified by the amended agreement, including the restrictive covenant, which was to continue in full force and effect. Citing to *Diederich Insurance*, the court reasoned that when the parties entered into the amended agreement, Dr. Keith already was bound by the restrictive covenant and thus did not make a "fresh promise" not to compete.[146] Accordingly, the court concluded that the employment relationship between Dr. Keith and the plaintiff lasted more than six years, which was adequate consideration to support the restrictive covenant that was signed at the beginning of her employment and was not modified by the agreement signed during her employment.[147]

In *Klein Tools, Inc. v. Stanley Black & Decker, Inc.*,[148] the Illinois Circuit Court of Cook County, Chancery Division, held that 11 months of continued employment after signing a restrictive covenant was not adequate consideration.[149] In that case, regional sales manager Charles Smith had worked for the defendant for an unspecified period before being employed by the plaintiff.[150] On June 16, 2012, as part of his at-will

employment with the plaintiff, Smith signed an employment agreement, which contained a provision that he would not, for a period of two years, "'in any capacity in which any Confidential Information of the Company that Employee acquired during Employee's Employment would reasonably be considered useful, directly or indirectly engage in, assist in or be connected in any manner with any activity on behalf of any Company Competitor.'"[151] As regional sales manager, Smith was responsible for all sales activities within his region, was heavily involved in efforts to solicit business, and was granted access to the plaintiff's confidential information, including the development of a new product line and the closely guarded strategies for its launch. On May 21, 2013, however, Smith quit his employment with the plaintiff after only 11 months and informed the plaintiff that he was going to work for the defendant—a competitor—in the same region as the one that he oversaw for the plaintiff. The plaintiff alleged that, before his separation from the plaintiff, Smith made phone calls to officers at Stanley that corresponded with the plaintiff's key internal meetings and strategy discussions in which Smith participated, that Smith copied digital documents, and that he repeatedly accessed sensitive files on the plaintiff's servers and on his computer, including confidential pricing information.[152] The plaintiff filed suit for, among other things, breach of contract against Smith.[153]

Smith argued that the breach of contract count should be dismissed because the employment agreement was unenforceable. Citing to *Fifield*, the circuit court stated: "Smith was employed for only 11 months. This fact renders the restrictive covenants of the Employment Agreement unenforceable."[154] The court summarily dismissed as irrelevant the plaintiff's assertion that *Fifield* would have a harmful effect on Illinois businesses.[155]

The plaintiff also argued, in the alternative, that Smith negotiated for an additional week of vacation, which should serve as sufficient consideration for the restrictive covenants. The court, however, found the additional vacation time to be as illusory as continued employment of less than two years. Smith and the plaintiff had negotiated that Smith would accrue vacation time faster than other new employees and as a result would earn an extra week of vacation. The court reasoned that, because Smith was an at-will employee and could be terminated at any time, the extra week of vacation might never fully or even partially accrue and thus was not substantial consideration for the restrictive covenants within the employment agreement. Therefore, the court held that the restrictive covenants were not enforceable under Illinois law.[156]

In *Vapor 4 Life, Inc. v. Nicks*,[157] the plaintiff filed suit against several former employees for breach of contract in the Illinois Circuit Court of Cook County, Chancery Division.[158] The defendants had signed employment agreements with the plaintiff that contained restrictive covenants, the duration of which was not stated by the court. The defendants argued that the restrictive covenants were unenforceable because the defendants were not employed by the plaintiff for at least two years, and so the complaint should be dismissed. The court noted that the defendants were correct, because as observed by the court in *Fifield*: "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."[159] The court, however, did not grant the defendants' motion to dismiss because the defendants failed to establish the length of their employment.[160]

2. Cases from the Northern District of Illinois

The two cases from the U.S. District Court, Northern District of Illinois, are split on the application of *Fifield* as implementing a bright-line two-year requirement for continued employment after signing a restrictive covenant. In *Montel Aetnastak, Inc. v. Miessen*,[161] the federal court refused to apply a bright-line rule regarding the period of time during which an employee is required to work in order for there to be adequate consideration for a restrictive covenant. On November 23, 2010, Kristine Miessen signed an employment agreement with the plaintiff as a regional sales manager that included a non-compete clause that prohibited her from performing any work substantially related to the business of the plaintiff for two years after

the termination of the agreement.[162] During her employment with the plaintiff, Miessen had direct knowledge of a unique shelving system designed for one of the plaintiff's clients, the modifications for which the plaintiff took steps to keep secret from its competitors.[163] Miessen informed the plaintiff on February 28, 2012, that she would be resigning from her position; she resigned two weeks later and went to work for a competitor.[164] After the plaintiff failed to win a bid to install the shelving unit at one of the client's stores, the plaintiff learned that another company had won the bid allegedly with the help of Miessen.[165] The plaintiff filed suit, alleging among other things that Miessen had breached the non-compete provision of her employment agreement, and Miessen moved to dismiss the complaint based on inadequate consideration for the non-compete clause in the employment agreement.[166] The plaintiff argued that Miessen's 15-month employment was sufficient consideration, which rendered the employment agreement enforceable.[167]

After surveying Illinois case law, however, the federal court concluded that Illinois law does not provide a clear rule concerning how to determine whether the consideration for an employment agreement is adequate.[168] The federal court recognized that the *Fifield* and *Brown and Brown* opinions held that two years of continued employment were necessary to constitute a "substantial period" of employment, but noted that other Illinois cases (though not directly addressing the issue of consideration) enforced restrictive covenants where the continued employment lasted for only a year.[169] The federal court also noted that, in determining whether consideration was adequate for a restrictive covenant, other Illinois cases had suggested that factors other than the period of continued employment, including whether the employee or the employer terminated the employment relationship, should be weighed when determining whether adequate consideration was provided to enforce a restrictive covenant.[170] The federal court further noted that the Illinois appellate court had not previously constrained itself by applying a bright-line test with regard to what constitutes a "substantial period" of employment after signing a restrictive covenant. Citing to *McRand, Inc. v. van Beelen*,[171] the federal court noted that, when determining whether there was adequate consideration in that case, the Illinois appellate court factored in that the employee received raises and bonuses, that the employee voluntarily resigned, and that the employee received increased responsibilities after signing the restrictive covenant, as well as the fact that the period of the employee's continued employment was two years.[172]

Accordingly, the federal court refused to apply a bright-line rule regarding continued employment. Instead, the court employed a fact-specific approach to determine whether the consideration was adequate for the restrictive covenant. The court concluded that Miessen's 15 months of employment, coupled with her voluntary resignation, provided a "substantial period" of employment. Therefore, the court held that Miessen was provided adequate consideration and that the two-year non-compete clause within the employment agreement was enforceable.[173]

The U.S. District Court, Northern District of Illinois in *Instant Technology, LLC v. DeFazio*[174] considered the fact-specific approach applied in *Montel Aetnastak* with respect to what constitutes a "substantial period" of continued employment and rejected that approach in favor of following the more rigid approach that defines a "substantial period" as two years or more of continued employment.[175] In *Instant Technology*, the defendant employees signed employment agreements that contained clauses prohibiting them from soliciting business from or performing services for any of the plaintiff's clients for a two-year period following termination.[176] The defendants received nothing but their employment in exchange for their agreement to be bound by the restrictive covenant.[177] Less than two years after they signed their respective employment agreements, the plaintiff terminated the defendants.[178] The defendants were then employed by one of the plaintiff's competitors, and the plaintiff sued them for breach of contract.[179] The parties proceeded through a bench trial.[180]

With respect to the issue of whether the consideration for the restrictive covenant was adequate, the federal court, citing *Fifield, Diederich Insurance,* and *Brown and Brown*, concluded that the Illinois Supreme Court would not alter the doctrine that defines a "substantial period" as two years or more of continued

employment.[181] The court, however, noted that there was no evidence at trial that the defendant received any consideration other than their employment in exchange for their agreement to be bound by the restrictive covenant. Accordingly, the court held that, because the defendants' continued employment did not last at least two years, the restrictive covenant was not enforceable under Illinois law.[182]

3. The Third District's Decision

In *Prairie Rheumatology Associates, S.C. v. Francis*,[183] the Illinois Appellate Court Third District cited to the *Fifield* decision for the proposition that in Illinois there is a "general 2-year rule of thumb [of continued employment] that supports adequate consideration."[184] The court, however, did not limit its analysis to the length of employment, recognizing the possibility that other forms of consideration could be adequate as well, despite the fact that the defendant former employee did not work for the plaintiff employer for at least two years.

In that case, the plaintiff employer sought to enforce a non-compete agreement against the defendant former employee that was found within the parties' employment agreement.[185] On January 7, 2012, the defendant, a licensed rheumatologist, signed a "Physician Agreement" with the plaintiff prior to joining the plaintiff's medical practice, which offered rheumatology services within a limited geographical scope and within two specific hospitals.[186] Although the defendant began her employment with the plaintiff on April 16, 2012, the Physician Agreement was effective April 9, 2012.[187]

The plaintiff's practice relied primarily on referrals from physicians, including those on staff at the two hospitals.[188] The Physician Agreement provided the defendant with an annual salary, promised that the defendant would be considered for shareholder status after 18 months, provided that the plaintiff would assist the defendant in getting staff privileges at the two hospitals from which the plaintiff received referrals, and provided that the plaintiff would pay the defendant's hospital dues. Under the Physician Agreement, the plaintiff was to introduce the defendant to its patients and referral sources, including those physicians on staff at the hospitals with which the plaintiff was affiliated. The agreement also included a non-compete agreement, under which the defendant could not enter into the full-time or part-time practice of rheumatology in any capacity within a 14-mile radius of the plaintiff's practice for a period of two years after the date of the defendant's termination, regardless whether the termination was voluntary or involuntary.[189]

In July 2013, the defendant notified the plaintiff that she would be voluntarily terminating her employment with the plaintiff effective November 22, 2013, and that she would honor the non-compete agreement.[190] On January 3, 2014, the defendant began serving rheumatology patients within nine miles of the plaintiff's principal office.[191]

The plaintiff filed a complaint for injunctive relief, seeking to enforce the non-compete agreement within the Physician Agreement.[192] The trial court granted a preliminary injunction in favor of the employer as to its current patients only. The trial court denied the request for injunctive relief as to former and future patients.[193] The trial court first found that the non-compete agreement was ancillary to the Physician Agreement and was supported by adequate consideration. Next, it held that the non-compete agreement was reasonable as to the plaintiff's current patients but not as to its future patients and the public at large, based on the three-pronged reasonableness test discussed in *Reliable Fire Equipment*.[194] The plaintiff filed an appeal arguing that the trial court misapplied the reasonableness test as to its past and future patients, and the defendant cross-appealed arguing that the trial court's decision should be reversed because the non-compete agreement lacked adequate consideration.[195]

The Third District stated that two determinations must be made before any further analysis of a restrictive covenant is warranted. First, the restrictive covenant must be found to be ancillary to a valid transaction or relationship. Second, adequate consideration must be found to support the covenant.[196]

The appellate court found that there was not adequate consideration to support the restrictive covenant. The court recognized that, in Illinois, continued employment for "a substantial period of time beyond the threat of discharge" constitutes adequate consideration to support a restrictive covenant ancillary to an employment agreement.[197] The court further recognized that the promise of continued at-will employment could be an illusory benefit, and (citing *Fifield*) that Illinois courts "have generally held that two years or more of continued employment constitutes adequate consideration," even if the employee voluntarily resigns or is terminated.[198] The court (again citing *Fifield*) acknowledged that the defendant "tendered her resignation 15 months after the start of her employment with [the plaintiff] and officially left the practice after being employed for 19 months, 5 months less than the general 2-year rule of thumb that supports adequate consideration."[199]

Nevertheless, the court considered the plaintiff's argument that additional consideration provided for in the Physician's Agreement constituted adequate consideration for the non-compete agreement. Specifically, the plaintiff claimed that the defendant also received the plaintiff's assistance in obtaining membership and staff privileges at hospitals, access to new referral sources, and an opportunity to expedite her advancement.[200] The court, however, concluded that, based on the evidence presented at the hearing on the preliminary injunction, the defendant actually received little or no additional benefits from the plaintiff in exchange for the non-compete agreement. The evidence showed that the plaintiff did not assist the defendant in securing her hospital credentials, neglected to introduce her to referral sources, and did not pay the entirety of the defendant's credential fee. Instead, the defendant conducted her own marketing and developed her own programs to increase her visibility. The court also found the promise of expedited advancement and partnership opportunities to be illusory benefits at best, because although the Physician's Agreement provided that the plaintiff would be considered for partnership after 18 months, there was no guarantee that she would be provided with that benefit.[201] Accordingly, the appellate court held that there was not adequate consideration to support the non-compete agreement, which was unenforceable.[202]

C. What to Consider when Interpreting Fifield: Is There Leeway Beyond a Two-Year Requirement?

As this line of cases demonstrates, Illinois courts will not enforce a restrictive covenant for any period of time where the proffered consideration is viewed as illusory. The actions of the employee, including deliberate theft of secrets and voluntary resignation, tend not to factor into the courts' determination. Likewise, whether the agreement is signed at the beginning of the employment relationship or at any subsequent point is irrelevant. The courts' position should make employers wary, as a weak employment agreement containing a restrictive covenant that is found to be unsupported by adequate consideration provides neither a sword nor a shield against an employee who steals secrets for his or her own gain or for the benefit of a rival company. As the *Klein Tools* case illustrates, employers cannot rely on the courts to factor in the reality of corporate espionage when determining whether or not to enforce a restrictive covenant.[203] Employers also should not rely on the courts to factor in whether the employee was sophisticated enough to negotiate the employment agreement to determine whether the consideration adequately supports a restrictive covenant. Nevertheless, for employers and practitioners, there is an approach to consideration that they can take when trying to draft and to enforce a restrictive covenant in Illinois: provide adequate consideration that is not illusory. Absent clear directives from the courts, however, this approach is easier said than done.

Despite commentators' and lower courts' declarations that there is now a bright-line rule that two years of continued employment is *required* for an enforceable restrictive covenant, a careful review of the cases before and after the *Fifield* decision—as well as the *Fifield* decision itself—reveals that the line might not be so bright after all, at least not in every situation. Certainly, it is clear that courts will find that two years or more of

continued employment will constitute adequate consideration for a restrictive covenant. But is the two-year period necessarily *required*? Are there other forms of consideration besides continued employment that could be adequate to support a restrictive covenant? As with many questions in the law, the answers to both questions might be: "It depends."

Worth noting is the fact that no Illinois appellate court prior to *Fifield* had actually held that there is a two-year requirement for continued employment as adequate consideration for a restrictive covenant. To the extent that the decisions relied upon by *Fifield* for the proposition of a requirement of continued employment lasting two years commented on two years of continued employment, the *Brown and Brown* and *Diederich Insurance* decisions did so as a *general* observation of the holding in *Lawrence & Allen*.[204] In fact, the court in *Fifield* initially made the same general observation, citing to *Brown and Brown* and stating: "*Generally*, Illinois courts have held that continued employment for two years or more constitutes adequate consideration."[205] In the next sentence, the *Fifield* court stated, "The restrictive covenant will not be enforced unless there is adequate consideration given."[206]

Notably, the Illinois Supreme Court in *Melena v. Anheuser-Busch, Inc.*[207] recognized that continued employment is sufficient consideration for the enforcement of employment agreements. For that proposition, the supreme court in *Melena* cited to *Lawrence & Allen* and a case decided by the First District, *Woodfield Group, Inc. v. DeLisle*,[208] both of which dealt with the enforceability of restrictive covenants.[209] As discussed above, the court in *Lawrence & Allen* did not make any sweeping declarations concerning how many years of continued employment constitutes adequate consideration to support a postemployment restrictive covenant; rather, it held that two-and-a-half years of continued employment was adequate consideration to support a two-year postemployment restriction under the facts of that case.[210] The First District in *Woodfield Group* remanded the question of whether the defendant employee's 17 months of continued employment was adequate consideration for the 18-month non-solicitation period by which she agreed to be bound after she had already begun her employment.[211] After surveying the decisions in *Lawrence & Allen* and other cases involving the adequacy of consideration for restrictive covenants, the First District stated:

> 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.[210]

Instead, the court noted the standard is "that substantial continued employment may constitute sufficient consideration to support a restrictive covenant agreement."[213]

Remarkably, the First District in *Fifield* did not cite to its earlier decision in *Woodfield Group*, much less comment on the *Woodfield Group* court's understanding of the factors to consider regarding what constitutes substantial continued employment. Instead, the court in *Fifield*, despite its earlier general observation that Illinois courts have held that continued employment for two years or more constitutes adequate consideration, shifted its position to a more rigid one: "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."[214] In support of this statement of the law, the court in *Fifield* cited *Diederich Insurance*, *Lawrence & Allen*, and *Brown and Brown*.[215] Again, those cases spoke in general terms regarding two years of continued employment constituting adequate consideration for a postemployment restrictive covenant, and did not hold in absolute terms that two years of continued employment is necessarily required.

The elimination of the word "generally" from the statement of law made by the court in *Fifield* and the inclusion of the word "must" are subtle but significant changes that have given rise to the rigid interpretations of *Fifield* as holding that there is a two-year requirement of continued employment. It can be argued that the

Fifield court's statement that "there must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant" is a misstatement of the law. Although it is true that Illinois courts have held that two years of continued employment has constituted adequate consideration in support of the restrictive covenants involved in those cases, a survey of cases reveals that the proposition is not absolute.

In particular, the duration of the postemployment restrictions in the cases dealing with this issue is significant. In most cases, including *Lawrence & Allen*, *Brown and Brown*, and the cases that have cited to *Fifield* for this proposition, the restrictive covenants at issue were for a period of two years or more; and in those cases, where the period of employment lasted two years or more, there was adequate consideration to enforce the restrictive covenant,[216] but where the period of employment lasted less than two years, there was not.[217] The notable exception to this pattern is the *Montel Aetnastak* case from the Northern District of Illinois, more fully discussed above.[218] In that case, the federal court, rejecting the rigid approach of *Fifield* and applying a fact-specific approach instead, found that a 15-month period of continuous employment constituted adequate consideration for a two-year restrictive covenant.[219] The *Montel Aetnastak* case aside, other courts, such as the court in the *Woodfield Group* case, have appeared willing to consider continued employment of less than two years to be adequate consideration where the period of the restrictive covenant is also less than two years, especially where the duration of employment is nearly equivalent to the length of the restrictive covenant.[220] No Illinois court has addressed the issue directly, however.[221]

Given the facts and holdings of these cases, it is clear that, to the extent that continued employment alone is the proffered consideration for a restrictive covenant that covers a time period of two or more years, the length of continued employment must be at least two years. To the extent that the restrictive covenant covers a period of less than two years, however, there might be some leeway to argue that less than two years of employment constitutes adequate consideration, even when continued employment alone is the proffered consideration. Although it appears unlikely that Illinois courts will adopt the purely fact-specific approach championed by the federal court in *Montel Aetnastak*, it remains to be seen whether the two-year black-line approach will be implemented for restrictive covenants with durations that are less than two years. As illustrated above, courts appear to be willing to find adequate consideration through continued employment of less than two years where the duration of that employment is at least equal to the period of the restrictive covenant. Therefore, perhaps an employer willing to test the limits of the court's rulings on adequate consideration could do so by drafting the terms of its restrictive covenant with language to the effect that the duration of the restrictive covenant is to be equivalent to the length of the employee's employment after signing the agreement, but the restrictive covenant is not to exceed two years.

A more cautious employer, however, might consider providing additional consideration for an employee's agreement to be bound by a restrictive covenant. Unfortunately, there appears to be no guidance from Illinois courts as to what precisely constitutes adequate consideration, other than two years of continued employment. Fortunately, some courts have hinted at a willingness to consider the adequacy of other consideration. For example, in *Prairie Rheumatology Associates, S.C.*, the court considered the employer's argument that the employee was entitled to benefits beyond continued employment for the restrictive covenant, such as receiving the employer's assistance in obtaining membership and staff privileges at hospitals, access to new referral sources, and an opportunity to expedite her advancement, but ultimately found that those benefits never came to fruition.[222] Similarly, in *Brown and Brown*, the court was willing to address the employer's argument that the employee had received additional benefits as consideration for the restrictive covenant, but the court found that there was no evidence as to what those benefits were specifically or how they differed from the benefits that the employee already had been receiving prior to agreeing to the restrictive covenant.[223] In *Klein Tools*, the court considered the employer's argument that there was adequate consideration for the restrictive covenant because the employee negotiated for an additional week of vacation that was to accrue at a faster rate than

vacation time accrued for other new employees, but the court found no evidence that the extra vacation time was to be the consideration for the restrictive covenant and, regardless, the vacation time was an illusory benefit because it might never accrue.[224] Indicating a willingness to consider other forms of consideration, the court in *Instant Technology* noted that the employer did not prove (or even argue) that the employees received anything other than their employment as consideration in exchange for agreeing to the restrictive covenants.[225]

The take away from these cases is that Illinois courts likely will consider something other than two years of continued employment as adequate consideration for a restrictive covenant, so long as the proffered consideration is neither illusory nor essentially the same as a benefit that the employee is receiving already. What remains unclear in Illinois, however, is what form the proffered consideration must take and the value it must have before it can be considered to be adequate consideration for the restrictive covenant. A survey of the consideration found to be adequate by courts in other states might provide some guidance to employers in Illinois.

What Constitutes Adequate Consideration: A Survey of Other Jurisdictions

In all cases, restrictive covenants require adequate consideration to be enforceable. Lack of consideration is an affirmative defense.[226] Illinois's definition of "consideration" is quite onerous, seemingly requiring two years of continuous employment even if the employee voluntarily leaves. Although some states have rejected continued employment altogether as consideration for restrictive covenants,[227] other states' definitions of "consideration" vary from as little as the employment itself (or continued employment if the agreement is signed while employed), to monetary payment of varying amounts, to almost everything in between. This section explores examples of the types of consideration that other states have found adequate in support of non-compete agreements. This survey is not intended to be all-inclusive of other states, but rather is intended to illustrate other creative types of consideration aside from a specific period of employment (or beyond simply employment or continued employment in those states that allow it) that have been found adequate to support restrictive covenants.

A. Monetary Consideration

Not surprisingly, several states accept a monetary amount as adequate consideration in support of a restrictive covenant. What is unclear, however, is the amount that a court will consider adequate. Examples of the variables affecting the adequacy of the amount of monetary consideration appear to include the facts of the case, the particular job at issue, the interests to be protected, and the value of the information that the employer seeks to keep confidential. In *Pocatello Dental Group, P.C. v. Interdent Service Corp.*,[228] a dentist in Idaho joined a dental group and received $400,000 cash in the transaction. The U.S. District Court, District of Idaho, held that this amount was adequate consideration, although the court did not discuss other contexts or amounts constituting adequate consideration.[229]

Delaware courts also have found monetary consideration paid in severance agreements in exchange for a covenant-not-to-compete to be adequate.[230] In *Weichert Co. of Pennsylvania v. Young*,[231] involving an at-will management employee of a real estate sales business, there were two restrictive covenants at issue: one signed during the defendant's employment and one signed at termination as part of a severance agreement. The terms of the restrictive covenants in both agreements were identical. The court held the covenant signed at termination to be valid because as part of the severance agreement the employee received a total of $29,533.69, which included a $10,000 bonus, $7,341.39 in severance pay, $4,500 for a recruiting bonus, and $7,692.32 for three weeks' salary and two weeks' vacation.[232] Similarly, in *Reiman Associates, Inc. v. R/A*

Advertising, Inc.,[233] a Wisconsin appellate court held that payment of $180,000 constituted adequate consideration for a covenant not to compete in the advertising business.[234]

B. Job Benefits

A raise in salary, a longer lunch break, time off of work, and permission to stop using the time clock to record the employees' work hours also may constitute adequate consideration.[235] For example, in *Stephen L. LaFrance Pharmacy, Inc. v. Tallant*,[236] the U.S. District Court, Northern District of Mississippi, held that a $400 increase in monthly base pay constituted adequate consideration for a restrictive covenant.[237]

In *Central Adjustment Bureau, Inc. v. Ingram*,[238] the Supreme Court of Tennessee held that a change in the terms and conditions of employment or receipt of additional benefits (such as raises and promotions) may constitute sufficient consideration to support a non-compete agreement.[239] Likewise, the Court of Appeals of Wisconsin, in its unpublished opinion of *Medrehab of Wisconsin, Inc. v. Johnson*,[240] held that there was adequate consideration to support a non-compete agreement where the employee signed the agreement after being promised an increase in bonuses and being told that he would not have received the increased bonuses if he refused to sign the agreement.[241]

In Hawaii, a promotion and salary increase may constitute sufficient consideration for a restrictive covenant.[242] Likewise, a Delaware court has held that a beneficial change in an employee's status, such as a promotion, constitutes sufficient consideration to support a covenant not to compete agreed to after initiation of employment.[243] In Delaware, an increase in salary also may be sufficient consideration to support a restrictive covenant entered into when a company acquires an employee's employer.[244]

In *Puritan-Bennett v. Richter*,[245] an employee was given consistent promotions, increased responsibilities, and greater importance in company operations after signing a covenant not to compete. Moreover, the employee had been advised that his continued employment was conditioned upon execution of a non-compete agreement when he signed it. The Kansas Court of Appeals found these benefits to be adequate consideration.[246] In Kansas, an increase in salary may also constitute adequate consideration for the restrictive covenant.[247] The Court of Appeals of North Carolina also has indicated that changes in pay structure, the rate of compensation, the reimbursement of employee expenses, and vacation and sick leave may be adequate consideration for a restrictive covenant, so long as the benefits are not illusory.[248]

C. Stock Options

In Ohio, the acceptance of stock options in exchange for an executed covenant not to compete has been held to constitute sufficient consideration for a restrictive covenant.[249] Stock options were also found to be adequate consideration by the Texas Supreme Court in *Marsh USA Inc. v. Cook*.[250] The court stated that Texas law requires there to be a nexus—that the non-compete agreement be "ancillary to" or "part of" the otherwise enforceable agreement—between the business interest being protected (goodwill, in that case) and the consideration given (stock options).[251]

D. Miscellaneous Forms of Consideration

The Kentucky Court of Appeals in *Hodges v. Todd* [252] enforced a covenant not to compete where the value of a business's goodwill was a significant portion of the sale of the business and the party bound by the restrictive covenant was the seller of the business who stayed on as an employee of the company that was sold. In that case, the employee agreed to not compete with the employer's business for a period of five years from the date of sale of the business. In less than seven months from the date of sale, and before the

termination of the employment relationship, the employee opened a competing business about 100 feet from the employer's business location.[253] The court of appeals held that the trial court had the authority to enforce the non-compete agreement.[254] In *Calhoun v. Everman*,[255] the Kentucky Court of Appeals noted that an employer's detrimental reliance on an employee's promise not to compete at the time the employer bought out a competitor was sufficient consideration to support the restrictive covenant.[256]

Other states have found support for restrictive covenants in unconventional forms of consideration as well. For example, the Kansas Court of Appeals has considered forbearance from suing to recover damages to be good consideration for a covenant not to compete.[257]

In *Wior v. Anchor Industries, Inc.*,[258] an Indiana court noted that an employee's giving up a competing business with good future prospects, along with incurring the expense of relocating to another town, could constitute adequate consideration for an employment contract that could be terminated for cause only.[259] The business that the employee gave up, however, must have been one that the employee relied upon and planned to continue to rely upon for income.[260]

Moving Forward with Restrictive Covenants

There is little question that employers and those practitioners who advise employers regarding restrictive covenants should be mindful of *Fifield* and the subsequent decisions that have interpreted Illinois law to require two years of continued employment as a bright-line rule. Creative draftsmanship, however, might allow employers to continue to use restrictive covenants to protect their legitimate business interests, customer base, and confidential information. Illinois courts seem willing to consider something other than two years of continued employment as consideration, under the right circumstances. The key seems to be to craft the agreement to make clear that the proffered consideration is neither illusory nor essentially the same as a benefit that the employee is receiving already. As it appears that the burden of proof will be on the employer, employers should ensure that the proffered consideration is stated explicitly in the employment agreement, that it is a benefit that will accrue regardless of the length of employment, and that the existence of the benefit and the fact that it has accrued can be proven.

(Endnotes)

1 Ruth Simon & Angus Loten, *Litigation Over Noncompete Clauses is Rising*, WALL ST. J., Aug. 14, 2013, http://online.wsj.com/news/articles/SB10001424127887323446404579011501388418552.

2 *Id.*

3 *Id.*

4 *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871.

5 *Fifield v. Premier Dealer Servs., Inc.*, 2013 IL App (1st) 120327.

6 *See* La. Rev. Stat. Ann. § 23:921 (2010); Or. Rev. Stat. § 653.295 (2008); S.D. Codified Laws § 53-9-11; Tex. Bus. & Com. Code Ann. § 15.50 (West 2009); Wis. Stat. § 103.465 (1998); *Olsten Corp. v. Sommers*, 534 F. Supp. 395 (D. Ore. 1982); *Nobles-Hamilton v. Thompson*, 883 So. 2d 1247 (Ala. Civ. App. 2003); *Optical Partners, Inc. v. Dang*, 381 S.W.3d 46 (Ark. 2011); *Singh v. Batta Envtl. Assoc., Inc.*, No. Civ. A. 19627, 2003 WL 21309115 (Del. Ch. May 21, 2003) (unpublished opinion); *Atlanta Bread Co. Int'l, Inc. v. Lupton-Smith*, 679 S.E.2d 722 (Ga. 2009); *Ackermann v. Kimball Int'l, Inc.*, 652 N.E.2d 507 (Ind. 1995); *Varney Bus. Servs., Inc. v. Pottroff*, 59 P.3d 1003 (Kan. 2002); *Mendell v. Golden-*

Farley of Hopkinsville, Inc., 573 S.W.2d 346 (Ky. Ct. App. 1978); *Ecology Servs., Inc. v. Clym Envtl. Servs., LLC*, 952 A.2d 999 (Md. Ct. Spec. App. 2008); *Timber Lake Foods, Inc. v. Estess*, 72 So. 3d 521 (Miss. Ct. App. 2011); *A.B. Chance Co. v. Schmidt*, 719 S.W.2d 854 (Mo. Ct. App. 1986); *Mont. Mountain Prods. v. Curl*, 112 P.3d 979 (Mont. 2005); *Ellis v. McDaniel*, 596 P.2d 222 (Nev. 1979); *B.O. Tech., L.L.C. v. Dray*, 970 N.Y.S.2d 668 (Sup. Ct. 2013); *Phelps Staffing LLC v. S.C. Phelps, Inc.*, 720 S.E.2d 785 (N.C. Ct. App. 2011); *WellSpan Health v. Bayliss*, 869 A.2d 990 (Pa. Super. Ct. 2005); *Baugh v. Columbia Heart Clinic, P.A.*, 738 S.E.2d 480 (S.C. Ct. App. 2013); *Columbus Med. Servs., LLC v. Thomas*, 308 S.W.3d 369 (Tenn. Ct. App. 2009); *Simmons v. Miller*, 544 S.E.2d 666 (Va. 2001).

[7] *See* Or. Rev. Stat. § 653.295 (2008); Tex. Bus. & Com. Code Ann. § 15.50 (2009); Wis. Stat. § 103.465 (1998); *Nobles-Hamilton*, 883 So. 2d at 1249; *Optical Partners, Inc.*, 381 S.W.3d at 53; *Singh*, 2003 WL 21309115, at *7; *Atlanta Bread Co. Int'l, Inc.*, 679 S.E.2d at 724; *Varney Bus. Servs., Inc.*, 59 P.3d at 1017; *A.B. Chance Co*, 719 S.W.2d at 857; *B.O. Tech., L.L.C.*, 970 N.Y.S.2d at 673; *Phelps Staffing LLC*, 720 S.E.2d at 792; *WellSpan Health*, 869 A.2d at 999; *Baugh*, 738 S.E.2d at 486; *Columbus Med. Servs., LLC*, 308 S.W.3d at 384; *Simmons*, 544 S.E.2d at 678.

[8] Fla. Stat. § 542.335 (1996).

[9] *See* Fla. Stat. § 542.335 (1996); *Farm Credit Servs. of N. Cent. Wis., ACA v. Wysocki*, 627 N.W.2d 444 (Wis. 2001); *Clark v. Liberty Nat'l Life Ins. Co.*, 592 So. 2d 564 (Ala. 1992); *Devnew v. Flagship Grp., Ltd.*, 75 Va. Cir. 436 (2006); *Mercy Health Sys. of Nw. Ark., Inc. v. Bicak*, 383 S.W.3d 869 (Ark. App. 2011); *Beard Research, Inc. v. Kates*, 8 A.3d 573 (Del. Ch. 2010); *Wichita Clinic, P.A. v. Louis*, 185 P.3d 946 (Kan. Ct. App. 2008); *Liberty Ashes, Inc. v. Taormina*, 43 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2014) (unreported disposition); *Market Am., Inc. v. Christman-Orth*, 520 S.E.2d 570 (N.C. Ct. App. 1999); *N. Pac. Lumber Co. v. Moore*, 551 P.2d 431 (Or. 1976); *Wolfe v. Colonial Life & Accident Ins. Co.*, 420 S.E.2d 217 (S.C. Ct. App. 1992).

[10] See *Unisource Worldwide, Inc. v. Swope*, 964 F. Supp. 2d 1050 (D. Ariz. 2013); *Clark's Sales & Serv., Inc. v. Smith*, 4 N.E.3d 772 (Ind. Ct. App. 2014); *Beverage Sys. of the Carolinas, LLC v. Ass'n Beverage Repair, LLC*, No. COA14-185, 2014 WL 3823714 (N.C. Ct. App. Aug. 5, 2014).

[11] See *CAE Vanguard, Inc. v. Newman*, 518 N.W.2d 652 (Neb. 1994); see also *Brainware, Inc. v. Mahan*, 808 F. Supp. 2d 820, 829 n.2 (E.D. Va. 2011).

[12] See *Sentinel Integrity Solutions, Inc. v. Mistras Grp., Inc.*, 414 S.W.3d 911 (Tex. Ct. App. 2013); see also *Brown & Brown, Inc. v. Ali*, 592 F. Supp. 2d 1009 (N.D. Ill. 2009); *L & B Transp., LLC v. Beech*, 568 F. Supp. 2d 689 (M.D. La. 2008).

[13] See *Lapolla Indus., Inc. v. Hess*, 750 S.E.2d 467 (Ga. Ct. App. 2013); *Brown & Brown, Inc. v. Johnson*, 980 N.Y.S.2d 631 (App. Div. 2014); see also *Tradesman Int'l, Inc. v. Black*, 724 F.3d 1004, 1007 (7th Cir. 2013).

[14] Cal. Bus. & Prof. Code §§ 16600–16601 (West 2008); N.D. Cent. Code § 9-08-06 (1943).

[15] Cal. Bus. & Prof. Code §§ 16600–16601 (West 2008); N.D. Cent. Code § 9-08-06 (1943).

[16] See *infra* text accompanying notes 20-28.

[17] Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES, June 8, 2014, at B1, http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?_r=0.

[18] *Id.*

[19] *Id.*

[20] *Id.*; Gillis Bernard, *Non-Competes Are Here to Stay in Mass. – At Least for Now*, BOSTINNO, July 31, 2014, http://bostinno.streetwise.co/2014/07/31/noncompetes-massachusetts-non-competes-are-here-to-stay-in-mass-at-least-for-now.

[21] Kyle Alspach, *Compromise Hinted Over Noncompete Agreements*, BOSTON GLOBE, July 1, 2014, http://www.bostonglobe.com/business/2014/07/01/noncompete/DJSb4Hl1kSyDzmD9sOv9NI/story.html.

[22] *Id.*

[23] Bernard, *supra* note 20.

[24] Minn. H.F. 506, 88th Leg. (2013).

[25] Gen. Assemb. 3970, 215th Leg., Reg. Sess. (N.J. 2013).

[26] Minn. House of Rep., *HF 506 Status in the House for the 88th Legislature (2013–2014)*, https://www.revisor.mn.gov/bills/bill.php?view=chrono&f=HF506&y=2013&ssn=0&b=house (last visited Nov. 9, 2014); Text and Status of Gen. Assemb. 3970, 215th Leg., Reg. Sess. (N.J. 2013) published by N.J. Legis. (noting that the bill is pending before the legislature), http://www.njleg.state.nj.us/2012/Bills/A4000/3970_I1.HTM (last visited Nov. 9, 2014).

[27] N.H. Rev. Stat. Ann. § 275:70 (2014).

[28] *Id.*

[29] See *Hursen v. Gavin*, 162 Ill. 377, 381 (1986).

[30] *Hursen*, 162 Ill. at 381.

[31] *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52 (2006).

[32] *Mohanty*, 225 Ill. 2d at 65.

[33] *Id.*

[34] *Id.* at 69.

[35] *Id.* at 76.

[36] *Bauer v. Sawyer*, 8 Ill. 2d 351, 355 (1956), quoted by *House of Vision, Inc. v. Hiyane*, 37 Ill. 2d 32, 37 (1967), quoted in *Mohanty*, 225 Ill. 2d at 65.

[37] *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill. App. 3d 421 (4th Dist. 2009), *overruled by Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶ 29.

[38] *Sunbelt Rentals, Inc.*, 394 Ill. App. 3d at 422–23.

[39] *Id.* at 423.

[40] *Id.* at 424.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 425.

[44] *Id.* at 427.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 426–27 (quoting *Nationwide Adver. Serv., Inc. v. Kolar*, 28 Ill. App. 3d 671, 673 (1st Dist. 1975)).

[48] *Kolar*, 28 Ill. App. 3d at 672.

[49] *Id.* at 673.

[50] *Sunbelt Rentals, Inc.*, 394 Ill. App. 3d at 426–28.

[51] *Id* at 428.

[52] *Id.*

[53] *Steam Sales Corp. v. Summers*, 405 Ill. App. 3d 442 (2d Dist. 2010), *overruled by Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶ 30.

[54] *Steam Sales Corp.*, 405 Ill. App. 3d at 445.

[55] *Id.*

[56] *Id.*

[57] *Id*.

[58] *Id*. at 446.

[59] *Id*.

[60] *Id.* at 452.

[61] *Id*. at 453.

[62] *Id.* at 456.

[63] *Id.* at 459.

[64] *Id.* at 456–57 (quoting *The Agency, Inc. v. Grove*, 362 Ill. App. 3d 206, 214 (2d Dist. 2005)).

[65] *Id.* at 457–59.

[66] *Id.* at 457–58.

[67] *Id*. at 457.

[68] *Id*.

[69] *Id.* at 458.

[70] *Id.*

[71] *Id*.

[72] *Id*.

[73] *Id.* at 458–61.

[74] *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶ 18.

[75] *Reliable Fire Equip.*, 2011 IL 111871, ¶ 23.

[76] See, *e.g., Steam Sales Corp.*, 405 Ill. App. 3d 442; *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill. App. 3d 421 (4th Dist. 2009).

[77] *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871.

[78] *Reliable Fire Equip.*, 2011 IL 111871, ¶¶ 3–7.

[79] *Id.* ¶ 8.

[80] *Id.* ¶¶ 13, 45–48.

[81] *Id.* ¶¶ 17–24, 28–30 (citing *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52 (2006); *Cockerill v. Wilson*, 51 Ill. 2d 179 (1972); *House of Vision, Inc. v. Hiyane*, 37 Ill. 2d 32 (1967); *Bauer v. Sawyer*, 8 Ill. 2d 351 (1956); and *Hursen v. Gavin*, 162 Ill. 377 (1896)).

[82] *Reliable Fire Equip.*, 2011 IL 111871, ¶ 42.

[83] *Id.* ¶ 29 (citing *Mohanty*, 225 Ill. 2d at 77).

[84] *Id.* ¶¶ 28, 30 (overruling *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill. App. 3d 421, 430 (2009), and *Steam Sales Corp. v. Summers*, 405 Ill. App. 3d 442 (2010)).

[85] *Id.* (citing *Nationwide Adver. Serv., Inc. v. Kolar*, 28 Ill. App. 3d 671, 673 (1st Dist. 1975)).

[86] *Id.*

[87] *Id.* ¶ 43.

[88] *Fifield v. Premier Dealer Servs., Inc.*, 2013 IL App (1st) 120327.

[89] *Fifield*, 2013 IL App (1st) 120327, ¶ 3.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* ¶ 4.

[95] *Id.*

[96] *Id.*

[97] *Id.* ¶ 5.

[98] *Id.* ¶ 6.

[99] *Id.*

[100] *Id.* ¶¶ 17–18.

[101] *Bires v. WalTom, LLC*, 662 F. Supp. 2d 1019 (N.D. Ill. 2009).

[102] *Fifield*, 2013 IL App (1st) 120327, ¶ 17 (citing *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 947 (7th Cir. 1994)).

[103] *Id.* ¶ 18 (citing *Lifetec, Inc. v. Edwards*, 377 Ill. App. 3d 260, 263 (4th Dist. 2007)).

[104] *Id.* ¶ 19.

[105] *Id.*

[106] *Id.*

[107] Chad W. Moeller and William J. Tarnow II, *Non-Compete Agreements: Lessons from Illinois Courts*, NAT'L L. REV., *available at* http://www.natlawreview.com/print/article/non-compete-agreements-lessons-illinois-courts (last visited Oct. 31, 2014).

[108] *Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc.*, 292 Ill. App. 3d 131 (2d Dist. 1997).

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

[110] *Diederich Ins. Agency, LLC v. Smith*, 2011 IL App (5th) 100048.

[111] *Lawrence & Allen, Inc.*, 292 Ill. App. 3d at 138.

[112] *Id.* at 133–34.

[113] *Id.*

[114] *Id.* at 135.

[115] *Id.* at 138 (citing *McRand, Inc. v. van Beelen*, 138 Ill. App. 3d 1045, 1055 (1st Dist. 1985)).

[116] *Id.* (citing *Agrimerica, Inc. v. Mathes*, 199 Ill. App. 3d 435, 442 (1st Dist. 1990), abrogated on other grounds by *Roy v. Coyne*, 259 Ill. App. 3d 269, 279–82 (1st Dist. 1994)).

[117] *Id.* at 144.

[118] *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 729 (3d Dist. 2008).

[119] *Brown & Brown, Inc.*, 379 Ill. App. 3d at 726.

[120] *Id.*

[121] *Id.* at 728 (citing *McRand, Inc. v. van Beelen*, 138 Ill. App. 3d 1045, 1055 (1st Dist. 1985) (finding employment of two years and two weeks to be adequate consideration for a two-year non-compete agreement)).

[122] *Id.* at 729 (citing *Lawrence & Allen, Inc.*, 292 Ill. App. 3d at 138).

[123] *Id.* (citing *Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill. App. 3d 63, 69–71 (1st Dist. 1993)). The dissent in *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 730 (3d Dist. 2008) (Schmidt, J., dissenting), took issue with the majority's characterization of the holding in the *Mid-Town Petroleum* case for the proposition that the fact that Gunderson quit was irrelevant and should not change the analysis. In *Mid-Town Petroleum*, the defendant employee Robert Gowen had worked for the plaintiff for 14 years before a new president and CEO demanded that employees (under the threat of termination) sign an employment agreement that included an 18-month non-solicitation agreement. *Mid-Town Petroleum, Inc.*, 243 Ill. App. 3d at 64–65. Gowen initially refused to sign the agreement. He was then offered a sales manager position and would report directly to the CEO. Based on this arrangement and after reaching an agreement as to the description of the sales manager position, Gowen signed the employment agreement. *Id.* at 65. About seven months later, Gowen was informed that he would no longer be reporting to the CEO, would be reporting to a vice president, and would no longer have responsibility for salesmen. *Id.* at 65–66. The day after being informed of the change, Gowen quit his position with the plaintiff, and within the month began working for a competitor and soliciting business from the plaintiff's customers. *Id.* at 64–66. The court in that case held that there was insufficient consideration to support the restrictive covenant in the employment agreement signed by Gowen, because the promises made by the plaintiff under which the agreement was signed were changed unilaterally by the plaintiff. *Id.* at 69–70. The dissent in *Brown and Brown*, in criticizing the majority's decision not to consider the circumstances under which Gunderson quit as relevant to the determination, pointed to the circumstances under which Gowen quit his position in the *Mid-Town Petroleum* case. *Brown & Brown, Inc.*, 243 Ill. App. 3d at 730 (Schmidt, J., dissenting). The dissent noted that Gowen quit because the consideration for his agreement failed, while Gunderson in the *Brown and Brown* case merely quit. The dissent pointed out that the majority went a step further to hold that the consideration failed because Gunderson quit, and noted that those circumstances were a big difference from the circumstances under which Gowen quit. *Id.* at 730–31. Accordingly, the dissent concluded that Gunderson's continued employment should have constituted adequate consideration. *Id.* at 730. The dissent predicted: "To hold, as the majority does here, that an employee can void the consideration for any restrictive covenant by simply quitting for any reason renders all restrictive employment covenants illusory in this state. They would all be voidable at the whim of the employee." *Id.*

[124] *Brown & Brown, Inc.*, 379 Ill. App. 3d at 729. Notably, the facts of the *Brown and Brown* case are very similar to those of *Fifield*. They both involved the purchase of the employee's employer and the requirement that the employee sign a two-year restrictive covenant as a result of the sale. The employees then shortly thereafter resigned voluntarily. Interestingly, the *Brown and Brown* decision is the only one that the *Fifield* court took the time to explain the facts and holding in detail. *Fifield v. Premier Dealer Servs., Inc.*, 2013 IL App (1st) 120327, ¶¶ 15–16. Given the similarities in the cases, it is not surprising that the *Fifield* court ruled the way it did, but one must consider whether the court fully developed its language that has led commentators and other courts to conclude that there is a black-line requirement of two years of continued employment for adequate consideration for a restrictive covenant.

[125] *Diederich Ins. Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶ 3.

[126] *Diederich Ins. Agency, LLC*, 2011 IL App (5th) 100048, ¶ 4.

[127] *Id.* ¶ 5.

[128] *Id.* ¶ 6.

[129] *Id.* ¶ 10. In limiting its determination to whether the consideration was adequate for the second non-solicitation agreement, the appellate court in *Diederich Insurance* made a notable distinction. Because the claim was brought under the non-compete agreement signed while Smith was employed and not under the original employment agreement (which did not contain a restrictive covenant), the claim was one to enforce a restrictive covenant. *Id.* This distinction is significant, because it changes the court's analysis. Generally, courts do not inquire into the adequacy of consideration, but rather determine whether it exists. *Brown & Brown, Inc.*, 379 Ill. App. 3d at 728. In the context of postemployment restrictive covenants, however, Illinois courts have departed from that traditional rule because the courts have recognized that a promise of continued at-will employment could be an illusory benefit. *Id.* Therefore, the fact that the claim in *Diederich Insurance* was brought under the second agreement required the court to shift its analysis from whether consideration merely existed to whether it existed and was adequate.

[130] *Diederich Ins. Agency, LLC*, 2011 IL App (5th) 100048, ¶¶ 8, 10.

[131] *Id.* ¶¶ 12–13.

[132] *Id.* ¶ 12 (citing *White v. Vill. of Homewood*, 256 Ill. App. 3d 354, 356–57 (1st Dist. 1993)).

[133] *Id.* ¶ 15.

[134] *Id.* ¶ 13.

[135] *Id.* ¶ 15 (citing *Corroon & Black of Ill., Inc. v. Magner*, 145 Ill. App. 3d 151, 163 (1st Dist. 1986) (four years sufficient); *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 729 (3d Dist. 2008) (seven month insufficient), and *Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill. App. 3d 63, 70–71 (1st Dist. 1993) (seven months insufficient)).

[136] *Diederich Ins. Agency, LLC*, 2011 IL App (5th) 100048, ¶ 15 (citing *Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc.*, 292 Ill. App. 3d 131 (2d Dist. 1997)).

[137] *Id.*

[138] *Novas, Dohr & Coll OB/Gyn Assocs., S.C. v. Keith*, No. 2013 CH 07568, 2013 WL 5409730 (Ill. Cir. Ct. Aug. 7, 2013).

[139] *Novas*, 2013 WL 5409730, at *2, *7.

[140] *Id.* at *2.

[141] *Id.*

[142] *Id.* at *3.

[143] *Id.*

[144] *Id.* at *4.

[145] *Id.* at *6 (citing *Fifield v. Premier Dealer Servs., Inc.*, 2013 IL App (1st) 120327, ¶¶ 14, 19).

[146] *Id.* at *7 (citing *Diederich Ins. Agency, LLC v. Smith*, 2011 IL App (5th) 10004, ¶ 12).

[147] *Id.*

[148] *Klein Tools, Inc. v. Stanley Black & Decker, Inc.*, No. 13 CH 13975, 2013 WL 6149305 (Ill. Cir. Ct. Oct. 16, 2013).

[149] *Klein Tools, Inc.*, 2013 WL 6149305, at *2.

[150] *Id.* at *1.

[151] *Id.* (quoting the plaintiff's Amended Verified Complaint ¶ 25).

[152] *Id.* at *1–*2.

[153] *Id.* at *2.

[154] *Id.* at *2 (quoting *Fifield v. Premier Dealer Servs.*, 2013 IL App (1st) 120327, ¶ 19).

[155] *Id.*

[156] *Id.* at *3.

[157] *Vapor 4 Life, Inc. v. Nicks*, No. 2013 CH 14827, 2013 WL 6631082 (Ill. Cir. Ct. Dec. 3, 2013).

[158] *Vapor 4 Life, Inc.*, 2013 WL 6631082, at *1.

[159] *Id.* (quoting *Fifield*, 2013 IL App (1st) 120327, ¶ 19).

[160] *Id.*

[161] *Montel Aetnastak, Inc. v. Miessen*, 998 F. Supp. 2d 694, 702 (N.D. Ill. 2014).

[162] *Montel Aetnastak, Inc.*, 998 F. Supp. 2d at 702.

[163] *Id.*

[164] *Id.* at 703.

[165] *Id.*

[166] *Id.* at 703–04, 715.

[167] *Id.* at 715.

[168] *Id.* at 716.

[169] *Id.* The federal court in *Montel Aetnastak, Inc. v. Miessen*, 998 F. Supp. 2d 694, 716 (N.D. Ill. 2014), cited to *Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill. App. 3d 63 (1st Dist. 1993), in support of the proposition that employment for a year has been considered a "substantial period" of employment. The *Mid-Town Petroleum* court stated: "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." *Mid-Town Petroleum, Inc.*, 243 Ill. App. 3d at 69 (citing *Cockerill v. Wilson*, 51 Ill. 2d 179, 181, 185 (1972) (enforcing an agreement with a five-year non-compete period, where the agreement was effective on January 1, 1967 and terminated at the end of January 1968, but basing its decision on whether the scope of the restrictions was reasonable); and *Shorr Paper Prods., Inc. v. Frary*, 74 Ill. App. 3d 498, 500–01, 508 (2d Dist. 1979) (enforcing an agreement with a one-year non-compete period, where the agreement was signed on November 16, 1977, and terminated on November 20, 1978, but basing its decision on whether the scope of the restrictions was reasonable)).

[170] *Montel Aetnastak, Inc.*, 998 F. Supp. 2d at 716 (quoting *Woodfield Grp., Inc. v. DeLisle*, 295 Ill. App. 3d 935, 943 (1st Dist. 1998) (expressing no opinion as to the adequacy of the defendant's 17 months of continued employment after signing an agreement that contained an 18-month non-solicitation period, but opining that the case law does not limit the court to a numerical formula to determine what constitutes continued employment and that other factors, such as whether the employee or employer terminated the agreement, might need to be considered)).

[171] *McRand, Inc. v. van Beelen*, 138 Ill. App. 3d 1045 (1st Dist. 1985).

[172] *Montel Aetnastak, Inc.*, 998 F. Supp. 2d at 716 (citing *McRand, Inc.*, 138 Ill. App. 3d at 1055–56).

[173] *Id.*

[174] *Instant Tech., LLC v. DeFazio*, No. 12 C 491, 2014 WL 1759184 (N.D. Ill. May 2, 2014).

[175] *Instant Tech., LLC*, 2014 WL 1759184, at *14.

[176] *Id.* at *4.

[177] *Id.* at *13.

[178] *Id.* The defendants started their employment on different dates—March 24, 2010, June 17, 2010, and "March of 2011." *Id.* at *3. One defendant was terminated on January 3, 2012, one was terminated on January 5, 2012, and one resigned on January 5, 2012. *Id.* at *13.

[179] *Id.* at *1, *6.

[180] *Id.* at *1.

[181] *Id.* at *14.

[182] *Id.*

[183] *Prairie Rheumatology Assocs., S.C. v. Francis*, 2014 IL App (3d) 140338.

[184] *Prairie Rheumatology Assocs., S.C.*, 2014 IL App (3d) 140338, ¶ 16.

[185] *Id.* ¶ 1.

[186] *Id.* ¶¶ 2–3.

[187] *Id.* ¶¶ 3–4.

[188] *Id.* ¶ 2.

[189] *Id.* ¶ 3.

[190] *Id.* ¶ 5.

[191] *Id.* ¶ 6.

[192] *Id.* ¶ 7.

[193] *Id.* ¶¶ 1, 9.

[194] *Id.* ¶ 9 (citing *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, ¶ 17).

[195] *Id.* ¶¶ 1, 11.

[196] *Id.* ¶ 13 (citing *Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc.*, 292 Ill. App. 3d 131, 137 (2d Dist. 1997)).

[197] *Id.* ¶ 14 (citing *McRand, Inc. v. van Beelen*, 138 Ill. App. 3d 1045, 1055 (1st Dist. 1985)).

[198] *Id.* ¶¶ 14–15 (citing *Fifield v. Premier Dealer Servs., Inc.*, 2013 IL App (1st) 120327, ¶ 19).

[199] *Id.* ¶ 16 (citing *Fifield*, 2013 IL App (1st) 120327, ¶ 19).

[200] *Id.* ¶ 17.

[201] *Id.* ¶ 18.

[202] *Id.* ¶ 19.

[203] *See supra* text accompanying notes 148–56; see also *Gallagher Bassett Servs., Inc. v. Vacala*, 2012 IL App (2d) 111175-U, ¶ 23 (declining to extend Illinois law to provide that access to confidential information can constitute adequate consideration for a restrictive agreement in lieu of continued employment for a substantial period).

[204] The court in *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 728–29 (3d Dist. 2008), stated: "Illinois courts have generally held that two years or more of continued employment constitutes adequate consideration. See *Lawrence & Allen, Inc.*, 292 Ill. App. 3d at 138." The court in *Diederich Insurance Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶ 15, stated: "However, in general, there must be at least two years or more of continued employment to constitute adequate consideration. See *Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc.*, 292 Ill. App. 3d [at] 138."

[205] *Fifield v. Premier Dealer Servs., Inc.*, 2013 IL App (1st) 120327, ¶ 14 (emphasis added) (citing *Brown & Brown, Inc.*, 379 Ill. App. 3d at 728–29).

[206] *Id.*

[207] *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135 (2006).

[208] *Woodfield Grp., Inc. v. DeLisle*, 295 Ill. App. 3d 935 (1st Dist. 1998).

[209] *Melena*, 219 Ill. 2d at 152 (citing *Woodfield Grp., Inc.*, 295 Ill. App. 3d at 942–43; *Lawrence & Allen, Inc.*, 292 Ill. App. 3d at 131; and *McRand, Inc. v. van Beelen*, 138 Ill. App. 3d 1045, 1055 (1st Dist. 1985)).

[210] *See supra* text accompanying notes 111–17.

[211] *Woodfield Grp., Inc.*, 295 Ill. App. 3d at 936–37, 942–43. The defendant-employee, Donna DeLisle, executed the restrictive covenant agreement in "February 1994," and voluntarily resigned on July 18, 1995. *Id.* at 936–37.

[212] *Id.* at 943.

[213] *Id.* at 942.

[214] *Fifield*, 2013 IL App (1st) 120327, ¶ 19 (emphasis added).

[215] *Id.*

[216] Adequate consideration was found in the following cases: *Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc.*, 292 Ill. App. 3d 131 (2d Dist. 1997) (about 2½ years of continued employment held to be adequate consideration for a two-year restrictive covenant); *Agrimerica, Inc. v. Mathes*, 199 Ill. App. 3d 435, 442 (1st Dist. 1990) (about two years

and three months of continued employment held to be adequate consideration for a two-year restrictive covenant); *Corroon & Black of Ill., Inc. v. Magner*, 145 Ill. App. 3d 151, 163 (1st Dist. 1986) (four years of continued employment held to be adequate consideration for a two-year restrictive covenant); *McRand, Inc. v. van Beelen*, 138 Ill. App. 3d 1045, 1055 (1st Dist. 1985) (about two years and two weeks of continued employment held to be adequate consideration for a two-year restrictive covenant); *Canfield v. Spear*, 44 Ill. 2d 49, 50, 53 (1969) (enforcing an agreement with a three-year non-compete period, where the agreement was signed in approximately May 1965 and terminated effective July 1, 1967, but not reaching the issue of the adequacy of consideration); *Novas, Dohr & Coll OB/Gyn Assocs., S.C. v. Keith*, No. 2013 CH 07568, 2013 WL 5409730 (Ill. Cir. Ct. Aug. 7, 2013) (six years of continued employment (the employee's contention that the period of continued employment was only 23 months was rejected) held to be adequate consideration for a two-year postemployment restrictive covenant).

[217] Adequate consideration was not found in the following cases: *Prairie Rheumatology Assocs., S.C. v. Francis*, 2014 IL App (3d) 140338, ¶ 16 (nineteen months of continued employment held to be inadequate consideration for a two-year restrictive covenant); *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 729 (3d Dist. 2008) (seven months of continued employment held to be inadequate consideration for a two-year restrictive covenant); *Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill. App. 3d 63, 70–71 (1st Dist. 1993) (seven months of continued employment held to be inadequate consideration for a two-year restrictive covenant); *Klein Tools, Inc. v. Stanley Black & Decker, Inc.*, No. 13 CH 13975, 2013 WL 6149305 (Ill. Cir. Ct. Oct. 16, 2013) (eleven months of continued employment held to be inadequate consideration for a two-year restrictive covenant); see also *Instant Tech., LLC v. DeFazio*, No. 12 C 491, 2014 WL 1759184 (N.D. Ill. May 2, 2014) (federal court holding that less than two years of continued employment was inadequate consideration for a two-year restrictive covenant); *Vapor 4 Life, Inc. v. Nicks*, No. 2013 CH 14827, 2013 WL 6631082 (Ill. Cir. Ct. Dec. 3, 2013) (Illinois circuit court holding that less than two years of continued employment was inadequate consideration, but the duration of the restrictive covenant was not stated in the opinion).

[218] *See supra* text accompanying notes 161–73. Another noteworthy case that enforced a restrictive covenant of more than two years without having at least two years of continued employment is the Illinois Supreme Court case of *Cockerill v. Wilson*, 51 Ill. 2d 179, 181 (1972). Although not reaching the issue of consideration, the supreme court in *Cockerill* enforced an employment agreement containing a five-year non-compete period on the basis that the scope of the restrictions was reasonable, where the agreement was effective on January 1, 1967, and terminated just over a year later, at the end of January 1968, by the employee's discharge from the employer. *Cockerill*, 51 Ill. 2d at 181, 185.

[219] *Montel Aetnastak, Inc. v. Miessen*, 998 F. Supp. 2d 694, 716 (N.D. Ill. 2014).

[220] In *LKQ Corp. v. Thrasher*, 785 F. Supp. 2d 737, 739, 744 (N.D. Ill. 2011), the federal court held that a period of continued employment of about 12 months was adequate consideration for a one-year restrictive covenant, while rejecting the mechanical application of a bright-line test "that, in certain situations, may have pernicious consequences." In *Shorr Paper Prods., Inc. v. Frary*, 74 Ill. App. 3d 498, 500–01, 508 (2d Dist. 1979), the Illinois Appellate Court Second District enforced an agreement with a one-year non-compete period, where the agreement was signed on November 16, 1977, and terminated on November 20, 1978, but the court did not reach the issue of adequate consideration because it based its decision on whether the scope of the restrictions was reasonable. As discussed above, the court in *Woodfield Grp., Inc. v. DeLisle*, 295 Ill. App. 3d 935, 942–43 (1st Dist. 1998), remanded the issue to the circuit court of whether 17 months of continued employment constituted adequate consideration for an 18-month restrictive covenant. *See supra* text accompanying notes 211–13.

[221] In *Diederich Insurance Agency, LLC v. Smith*, 2011 IL App (5th) 100048, the appellate court held that three months of continued employment did not constitute adequate consideration for a one-year restrictive covenant. *See supra* text accompanying notes 125–37. Three months of continued employment, however, cannot reasonably be held to be nearly equivalent to the one-year period of the restrictive covenant at issue in that case.

[222] *Prairie Rheumatology Assocs., S.C. v. Francis*, 2014 IL App (3d) 140338, ¶¶ 17–18.

[223] *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 729 (3d Dist. 2008).

[224] *Klein Tools, Inc. v. Stanley Black & Decker, Inc.*, No. 13 CH 13975, 2013 WL 6149305, at *3 (Ill. Cir. Ct. Oct. 16, 2013).

[225] *Instant Tech., LLC v. DeFazio*, No. 12 C 491, 2014 WL 1759184, at *14 (N.D. Ill. May 2, 2014).

[226] *McCandless v. Carpenter*, 848 P.2d 444, 446–47 (Idaho Ct. App. 1993).

[227] The Supreme Court of Kentucky in *Charles T. Creech, Inc. v. Brown*, 433 S.W.3d 345, 354 (Ky. 2014), has held that continued at-will employment alone is not consideration for a restrictive covenant. In that case, the employer asked its existing employee to sign a "Conflicts of Interests" agreement, which restricted the employee's ability to work for a competing company for three years after the termination of his employment with his employer. *Charles T. Creech, Inc.*, 422 S.W.3d at 347. The employer conceded that the only consideration it offered to the employee was his continued employment. *Id.* The employee signed the contract, but resigned his employment to take a job with a competitor about two years and four months later. *Id.* at 347–48. The employer sued the employee for compensatory and punitive damages, as well as injunctive relief. *Id.* at 349. Although the court held that continued at-will employment was no consideration at all, it suggested that a promotion, increased wages, and specialized training would be adequate consideration for a restrictive covenant. *Id.* at 354. See also *Runzheimer Int'l, Ltd. v. Friedlen*, No. 2013AP1392, 2014 WL 1465157 (Wis. Ct. App. Apr. 15, 2014) (certifying the following question to the Wisconsin Supreme Court: "Is consideration in addition to continued employment required to support a covenant not to compete entered into by an existing at-will employee?"), *cert. granted*, 848 N.W.2d 861. Idaho has legislated the issue. If the post-employment restriction is more than 18 months, the statute requires "consideration, in addition to employment or continued employment." Idaho Code § 44-2704(1). Prior to the enactment of the statute in 2008, the Idaho Court of Appeals in *Insurance Associates Corp. v. Hansen*, 723 P.2d 190, 191–92 (Idaho Ct. App. 1986), held that a two-year restrictive covenant signed 20 months after employment began was supported by adequate consideration because the employee worked another eight months after signing the agreement but would have been terminated if he had not signed it.

[228] *Pocatello Dental Grp., P.C. v. Interdent Serv. Corp.*, Case No. CV 03-450-3-LMB, 2005 WL 1041398 (D. Idaho Apr. 7, 2005) (unpublished decision).

[229] *Pocatello Dental Grp., P.C.*, 2005 WL 1041398, at *15.

[230] *Delaware Express Shuttle, Inc. v. Older*, No. Civ. A. 19596, 2002 WL 31458243, *11 (Del. Ch. 2002) (unpublished decision).

[231] *Weichert Co. of Pa. v. Young*, No. 2223-VCL, 2007 WL 4372823 (Del. Ch. 2007).

[232] *Weichert Co. of Pa.*, 2007 WL 4372823, at *1–*3.

[233] *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 306 N.W.2d 292 (Wis. Ct. App. 1981).

[234] *Reiman Assocs., Inc.*, 306 N.W.2d at 297.

[235] *Columbus Med. Equip. Co. v. Watters*, 468 N.E.2d 343, 345–46 (Ohio Ct. App. 1983); see also, *e.g.*, *Gillett Commc'ns of Milwaukee, Inc. v. Feldmeyer*, No. 90-0724, 1990 WL 250403 (Wis. Ct. App. Nov. 6, 1990) (unpublished opinion referenced in table located at 464 N.W.2d 680) (noting that each time the defendant employee signed an employment agreement with a more stringent covenant against competition, the agreement provided the defendant with additional benefits).

[236] *Stephen L. LaFrance Pharmacy, Inc. v. Tallant*, No. 97 CV 104-B-A, 1997 WL 392736 (N.D. Miss. June 25, 1997).

[237] *Stephen L. LaFrance Pharmacy, Inc.*, 1997 WL 392736, at *4. Interestingly, the court in *Stephen L. LaFrance Pharmacy, Inc. v. Tallant*, No. 3:97CV104-B-A, 1997 WL 392736, *4 (N.D. Miss. June 25, 1997), also held that the defendant's continued employment alone constituted sufficient consideration, "particularly in light of the fact that she had signed a more restrictive covenant not to compete at the outset of her employment." Notably, this holding is directly opposite of the conclusion reached in the *Diederich Insurance* case, where the Illinois appellate court did not consider continued employment to be sufficient consideration, despite the fact that the period during which the restriction applied was reduced by a year. *Diederich Ins. Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶ 12.

[238] *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984).

[239] *Cent. Adjustment Bureau Inc.*, 678 S.W.2d at 35 (applying a fact-specific analysis to determine whether there was adequate consideration for a non-compete agreement). Incidentally, the *Central Adjustment Bureau Inc.* court also considered (though it was not pivotal to the outcome) the fact that the defendants left their employment voluntarily. *Id.*

[240] *Medrehab of Wisconsin, Inc. v. Johnson*, No. 96-2705, 1998 WL 102213 (Wis. Ct. App. Mar. 11, 1998) (unpublished opinion referenced in table located at 578 N.W.2d 208).

[241] *Medrehab of Wisconsin, Inc.*, 1998 WL 102213, at *1.

[242] *Technicolor, Inc. v. Traeger*, 551 P.2d 163, 168–69 (Haw. 1976).

[243] *Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 467 (Del. Ch. 1977).

[244] *Hammermill Paper Co. v. Palese*, No. 7128, 1983 WL 19786, *3 (Del. Ch. June 14, 1983).

[245] *Puritan-Bennett Corp. v. Richter*, 657 P.2d 589 (Kan. Ct. App. 1983), *aff'd as modified*, 679 P.2d 206 (Kan. 1984).

[246] *Puritan-Bennett Corp.*, 657 P.2d at 592.

[247] *Uarco Inc. v. Eastland*, 584 F. Supp. 1259, 1262 (D. Kan. 1984).

[248] *Young v. Mastrom, Inc.*, 392 S.E.2d 446, 448–49 (N.C. Ct. App. 1990) (considering benefits in the form of changes in pay structure, the rate of compensation, the reimbursement of employee expenses, and vacation and sick leave as adequate consideration for a restrictive covenant, but finding the benefits as structured in the case to be illusory, and thus declining to find the benefits to constitute consideration for the restrictive covenant).

[249] *Procter & Gamble Co. v. Stoneham*, 747 N.E.2d 268, 276 (Ohio Ct. App. 2000).

[250] *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 775–76, 780 (Tex. 2011).

[251] *Marsh USA Inc.*, 354 S.W.3d at 775. As early as 1951, the Kentucky Court of Appeals has found that the value paid for goodwill as part of the sale of a business to be sufficient consideration to support the enforcement of a non-competition provision in the bill of sale. *Ceresia v. Mitchell*, 242 S.W.2d 359, 361–62 (Ky. Ct. App. 1951).

[252] *Hodges v. Todd*, 698 S.W.2d 317 (Ky. Ct. App. 1985).

[253] *Hodges*, 698 S.W.2d at 318.

[254] *Id.* at 319.

[255] *Calhoun v. Everman*, 242 S.W.2d 100 (Ky. Ct. App. 1951).

[256] *Calhoun*, 242 S.W.2d at 102–03 (declining to enforce a non-compete agreement, despite acknowledging that detrimental reliance on the employee's promise not to compete would be sufficient consideration to enforce the promise, because the employer failed to establish its detrimental reliance upon the promise). In 1915, the Supreme Court of New Mexico held that where a purchaser of a business relies on the seller's promise not to compete as an inducement to purchase the business, the detrimental reliance of the purchaser is sufficient consideration for the seller's agreement to not compete. *Locke v. Murdoch*, 151 P. 298, 302 (N.M. 1915).

[257] *Evco v. Brandau*, 626 P.2d 1192, 1196–97 (Kan. Ct. App. 1981)

[258] *Wior v. Anchor Indus., Inc.*, 669 N.E.2d 172, 175 (Ind. 1996).

[259] *Wior*, 669 N.E.2d at 175–76.

[260] *Id.* at 176–77.

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About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at **www.iadtc.org**.

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