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Recent Illinois Decision Reinforces the Importance of Consideration for Non-Compete Agreements

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A recent appellate court decision in Illinois highlights the crucial role that consideration plays in enforcing agreements with post-employment restrictions. In *Fifield v. Premier Dealer Services, Inc.*, 2013 WL 3192931 (Ill. App. 1st June 24, 2013), the court refused to enforce nonsolicitation and noncompetition provisions in an employment agreement because the employee's employment, which lasted for three months before he decided to resign, was deemed to be inadequate consideration.

Eric Fifield ("Fifield") worked for a subsidiary of an insurance company that sold finance and insurance products to the automotive industry. In October 2009, Premier Dealership Services ("PDS") purchased that company. PDS develops, markets, and administers vehicle after-market products and services. Fifield would have lost his job at the end of October, but PDS offered him a position. As a condition of that employment, Fifield was required to sign an Employee Confidentiality and Inventions Agreement ("Agreement"). The Agreement included a provision that Fifield would not compete directly or indirectly with PDS for a period of two years after his employment with PDS ended for any reason. According to the Agreement, Fifield would not solicit PDS's customers, dealers, agents, reinsurers, or producers, and he would not interfere with or damage any relationship between PDS and its customers, dealers, agents, reinsurers, or producers, nor would he accept any business from any former customer, dealer, agent, reinsurer or producer with whom

PDS has a prior business relationship within the twelve months prior to his separation of employment with PDS.

Fifield negotiated a change to the Agreement. PDS agreed that the nonsolicitation and noncompetition provisions would not apply if Fifield were terminated without cause within his first year of employment. Fifield then signed the Agreement and began working for PDS on November 1, 2009.

On February 1, 2010, Fifield gave PDS two weeks notice of his resignation and subsequently began working for Enterprise Financial Group ("EFG"). On March 5, 2010, Fifield and EFG filed a complaint for declaratory relief in the Circuit Court of Cook County, Illinois to invalidate certain provisions of the Agreement. Fifield also claimed that he did not have access to confidential information while he was employed by PDS. PDS filed an answer and a counterclaim to prevent Fifield from using PDS's confidential information.

The trial court granted Fifield's request for declaratory relief. The lower court concluded that "the non-solicitation and non-interference provisions found within [the Agreement] are unenforceable as a matter of law for lack of adequate consideration." The appellate court agreed.

PDS argued that its offer of employment to Fifield was ample consideration because Fifield would have been unemployed had he not accepted PDS's offer. In addition, PDS argued that Fifield signed the Agreement before his employment commenced, so this was not a post employment restriction that would have warranted additional consideration. And, to dispel the contention that continued employment in an "at-will" state like Illinois is illusory, PDS pointed out that the restrictions would not be enforced if the employee were terminated without cause within the first year of his employment.

The Illinois appellate court rejected all of these arguments. The court stated that sufficient consideration requires that employment continue for a considerable period of time, which it found to be two years under Illinois case law. The court found that this two-year timeframe applies whether the employment relationship ends at the behest of the employee or the employer. The court also rejected the notion that there is a distinction between restrictive covenants signed pre-employment and after employment has already commenced. Even if signed before the employment commenced, such restrictions are considered to be post-employment restrictive covenants because they restrict the employee's subsequent ability to find work. Additionally, the court concluded that the provision that waived the restrictions if the employee did not work for PDS for at least one year had no effect on the two-year standard for adequate consideration. Fifield's three months of employment with PDS was insufficient. He was not bound by the restrictive covenants in the

Agreement.

The laws governing contractual provisions that attempt to curtail an employee's post-employment efforts to find new employment vary from state to state. While the focus is often on whether the scope of the restrictions, such as the geographic and time limitations, is reasonable, fundamental principles of contract formation apply. Restrictive covenants that are not supported by adequate consideration may not be enforced if challenged. The length of an employee's employment is generally not known at the time such agreements are executed. *Fifield* serves as a reminder that employers with employees in Illinois proceed at their peril if they do not contemplate additional forms of consideration when requiring employees to sign restrictive covenants.

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