

## Tied & Bound

A recent case brings the legality of restrictive employment covenants into question.

By Brian J. Hunt, CPA, JD

Restrictive covenants that limit an employee's ability to seek out employment elsewhere are important for employers who need to protect trade secrets, confidential and proprietary information, and client bases in which they've invested substantial resources.

From the employee's perspective, though, a restrictive covenant may be prohibitive to the point of keeping them from any gainful employment. In light of this, Illinois courts tend to heavily scrutinize such covenants. In *Fifield v. Premier Dealer Services, Inc.*, in fact, the courts were presented with a particularly unusual set of facts.

Great American Insurance Company (GAIC) employed Eric D. Fifield and subsequently assigned him to a subsidiary, Premier Dealer Services (PDS), which marketed finance and insurance products to the automobile industry. In October 2009, GAIC sold PDS to Premier, an Illinois developer, marketer and administrator of automotive after-market products and programs. In connection with the sale, GAIC advised Fifield that his employment would end in October 2009.

In late October, however, Premier offered Fifield employment on the condition that he executed an agreement that included non-solicitation and non-competition provisions. The agreement provided that Fifield would not solicit or accept business from any entity with which Premier had a relationship within 12 months prior to his termination. This would apply for a two-year period and to any of the 50 states.

Fifield negotiated the addition of a provision stating that the non-solicitation and non-competition provisions would not apply if he

were to be terminated without cause during his first year. He signed the agreement and began his employment at Premier on November 1, 2009. On February 1, 2010 (approximately three months later), Fifield gave his two-week's notice, formally resigning on February 12, 2010.

Less than a month later, Fifield and his new employer, Enterprise Financial Group, Inc. (EFG), filed a complaint for declaratory relief, seeking a declaration that Fifield had no access to confidential and proprietary information at Premier, and that certain provisions of his employment agreement were invalid and unenforceable.

In response, Premier filed a counterclaim seeking to enforce the non-solicitation and non-competition provisions, and requesting a permanent injunction to prevent Fifield from using Premier's proprietary information. Thereafter, the trial court entered an order granting Fifield and EFG's motion for declaratory relief, stating that the non-solicitation and non-interference provisions are "unenforceable as a matter of law for lack of adequate consideration."

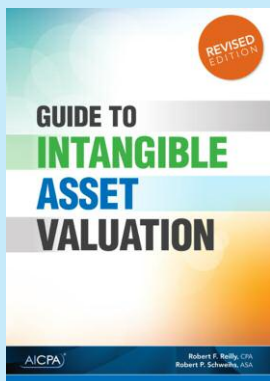
The Appellate Court began by stating that post-employment covenants operate as partial restrictions on trade. In order for a restrictive covenant to be valid and enforceable, the terms and covenants must be reasonable. However, before even considering whether a restrictive covenant is reasonable, the Court has to make two determinations: (1) whether the restrictive covenant is ancillary to a valid contract; and (2) whether the restrictive covenant is supported by adequate consideration. The Appellate Court noted that the only issue presented for its review was whether the restrictive covenants were supported by adequate consideration.

In this regard, the Appellate Court noted that continued employment for a substantial period beyond the threat of discharge is sufficient consideration to support a restrictive covenant. Premier argued that Fifield's employment itself was the consideration he received, and argued that the restrictive covenants were not post-employment because Fifield had signed the agreement before Premier employed him.



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However, the Court disagreed, noting that Illinois courts have treated restrictive covenants in similar situations as post-employment, and reasoning that the non-solicitation and non-competition provisions restricted Fifield's ability to seek employment post-Premier.

The Appellate Court also noted that Illinois courts repeatedly hold that there must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant, and that the rule is maintained even if the employee resigns rather than being terminated.

Lastly, the Appellate Court stated that the amendment to the agreement Fifield negotiated did not affect application of the two-year standard for adequate consideration. Along the same lines, the Court noted that, at most, Fifield's employment was only protected for one year, which is still inadequate under Illinois law.

As a result, the Appellate Court affirmed the trial court's granting of Fifield and EFG's Motion for Declaratory Judgment.

What's interesting in this case is the fact that Fifield had actively negotiated the terms of the restrictive covenants. While the Court could have used that fact against him, it instead relied on longstanding Illinois

law, which establishes two years as a typical minimum for adequate consideration.

Both employers and employees reading the *Fifield* decision should truly contemplate its outcome. If Fifield had negotiated the employment agreement differently, perhaps by negotiating additional perks such as a car, the result here might have been very different. On the other hand, if the employer had denominated a certain signing bonus as consideration for the restrictive covenant, it might well have been sufficient to support the covenants.

Finally, although unstated, the fact that the restrictive covenants applied to all 50 states for a period of two years—therefore denying Fifield any employment opportunities whatsoever—likely played some role in the Court's decision. □

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