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Restrictive Covenants in Illinois: Adequate Consideration Problems Show that the Common Law is an Inadequate Solution

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STUDENT NOTES

RESTRICTIVE COVENANTS IN ILLINOIS: ADEQUATE CONSIDERATION PROBLEMS SHOW THAT THE COMMON LAW IS AN INADEQUATE SOLUTION

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INTRODUCTION

Imagine you run a small business where you have an exclusive client base that took you years to build. Now imagine you have hired a new employee with the hopes that she will be able to expand and grow your business. Just to be on the safe side, you require that employee to sign a restrictive covenant in order to protect your client list that you have built throughout your career. Specifically, you request that the new employee sign a restrictive covenant.[1] Everything seems perfect. You have a new employee and your company's proprietary information is protected. You even feel safe when the employee resigns three months later, takes your client list with her, and then begins working for a competitor. You have confidence that the courts will enforce your restrictive covenant.

But in this exact situation, Illinois courts will not enforce your agreement. In fact, the First District of the Illinois Appellate Court recently held that an agreement such as this is not enforceable in a very similar scenario.[2] In *Fifield v. Premier Dealer Services, Inc.*, the appellate court held that a man who worked for three months and voluntarily resigned was free from the restrictive covenant that he signed prior to beginning his employment.[3] The court held that a restrictive covenant could only be enforced if there is at least two years of continued employment after it is signed.[4]

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1. For the purposes of this article, restrictive covenants will refer to both non-compete clauses and non-solicitation agreements. *See* Edwards v. Arthur Andersen L.L.P., 189 P.3d 285, 293 (Cal. 2008) (holding that there is no narrow-restraint exception to California's statutory voiding of restrictive covenants and that non-solicitation agreements fall under the statute).

2. Fifield v. Premier Dealer Servs., Inc., 2013 IL App (1st) 120327, ¶19, 993 N.E.2d 938, 943–44.

3. *Id.*

4. *Id.*

Historically, Illinois courts have heavily scrutinized post-employment restrictive covenants. Restrictive covenants have been held to be void as unlawful restraints of trade.[5] However, courts recognized early on that these restraints could be upheld if they were reasonable and supported by consideration.[6] Also, Illinois courts have been willing to enforce restrictive covenants when they protect legitimate business interests.[7] "[W]hether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case."[8] Some factors that can be considered in this analysis are "the near-permanence of customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions."[9] In practice, courts should uphold restrictive covenants when there is a proper balance between the employers' interest in protecting themselves against unfair competition and the employees' interest in enjoying their ability to work in their chosen fields. But the recent decisions of *Fifield*[10] and *Brown & Brown, Inc. v. Mudron*[11] show that these interests are not being properly balanced.

While technically correct and in accordance with Illinois law, these decisions put in doubt the enforceability of any restrictive covenant where an employee has worked fewer than two years. This problem specifically focuses on whether there is adequate consideration to enforce a restrictive covenant, but decisions of this nature have eroded the law of restrictive covenants to the point where it is time to revisit whether restrictive covenants are even worth the trouble and effort in order to have them enforced. Other aspects of the reasonableness of restrictive covenants are heavily litigated, including geographic limitations, temporal restrictions, and scope-of-activity restrictions.[12] Cases involving the reasonableness of these other aspects can be reviewed at length; however, the singular problem of adequate consideration is worthy enough for considerable discussion. Problems arise when employers have spent resources creating restrictive covenants but cannot be sure if they will be enforced. Some of these problems concern the

5. Hursen v. Gavin, 44 N.E. 735, 735 (Ill. 1896).
6. *Id.*
7. Reliable Fire Equip. Co. v. Arredondo, 2011 IL 111871, ¶ 17, 965 N.E.2d 393, 396.
8. *Id.* ¶ 43, 965 N.E.2d at 403.
9. *Id.*
10. Fifield v. Premier Dealer Servs., Inc., 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d 938, 943–44.
11. Brown & Brown, Inc. v. Mudron, 887 N.E.2d 437, 441 (Ill. App. Ct. 2008).
12. *See Reliable Fire Equip. Co.*, 2011 IL 111871, ¶ 17, 965 N.E.2d at 396.

costs and efficiency of businesses, hiring practices, and the ability of businesses to adequately prepare for the future.

After well over 100 years of Illinois cases concerning post-employment restrictive covenants, the time has come for an impactful change to this area of the law. Unfortunately, the Illinois Supreme Court denied the appeal of the *Fifield* case, so Illinois law regarding the enforceability of restrictive covenants has not yet been reviewed.[13] After the *Fifield* decision, restrictive covenants are increasingly difficult to enforce and employers can no longer use them to predictably control their legitimate business interests. For these reasons and because restrictive covenants are already viewed as unlawful restraints of trade, all restrictive covenants in Illinois should be void as a matter of public policy. The Illinois General Assembly should enact legislation that protects the interests of employers and employees by voiding all future restrictive covenants.

Section I of this article will focus on the background of restrictive covenants in Illinois. Specifically, subsections A, B, and C will look at Illinois law before and after the *Fifield* and *Brown* decisions, the development of the bright-line, two-year rule for adequate consideration employed by Illinois courts, the particular factual scenarios of *Fifield* and *Brown*, and restrictive covenant law in some other states. Section II will analyze the problems with Illinois case law and synthesize this with the law of the previously examined states in order to recommend that the Illinois legislature should void all future restrictive covenants as a matter of public policy. Section III will respond to criticisms of an approach to revamp Illinois restrictive covenant law.

I. BACKGROUND ON RESTRICTIVE COVENANTS IN ILLINOIS

Recent court decisions in Illinois have thrown the law of restrictive covenants into turmoil. Currently, Illinois businesses cannot adequately plan for the future because they will not know with certainty whether their restrictive covenants will be enforced. Two recent decisions in particular have contributed to this problem by holding that employees can choose to quit working for their employers after signing a restrictive covenant and will not be subject to the covenant's restrictions.[14] Illinois also employs a strict bright-line, two-year rule con-

13. *Fifield*, 2013 IL App (1st) 120327, 993 N.E.2d 938, *appeal denied*, 996 N.E.2d 12 (Ill. 2013) (unpublished table decision).

14. *Fifield*, 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d at 943–44; *Brown & Brown*, 887 N.E.2d at 441.

cerning adequate consideration for determining whether to enforce restrictive covenants, even where the rule does not satisfy the interests it was created to protect.[15] Employees should have the freedom to work and make a livelihood in their chosen fields, but employers need to know when their covenants will be enforced in order to make appropriate business decisions and to protect their legitimate interests.

A. Illinois Law before and after Fifield *and* Brown

When analyzing a restrictive covenant in Illinois, a court must first look to see if the covenant is ancillary to a valid contract and whether it is supported by adequate consideration.[16] Illinois courts have a legitimate concern with restrictive covenants because of Illinois's at-will employment status. Because an employer can terminate an employee at any time, an employee could be terminated the day after signing a restrictive covenant and nonetheless be subject to its restrictions.[17] Outside of the employment context, courts typically do not make an inquiry into whether the consideration is adequate because its existence alone is sufficient.[18] But in the employment context, courts are wary of the illusory promise of continued employment and will look into the adequacy of the consideration supporting the restrictive covenant.[19] In Illinois, adequate consideration is generally held to be continued employment for a substantial period of time in order to support a restrictive covenant.[20] Furthermore, it appears that Illinois courts now have a bright-line, two-year rule for what is considered a substantial period of time.[21]

B. Development of the Two-Year Rule

Illinois courts have not always used a bright-line, two-year rule for adequate consideration. In 1945, the appellate court held that a period of continued employment was adequate consideration for a

15. *See Fifield*, 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d at 943–44.

16. Abel v. Fox, 654 N.E.2d 591, 593 (Ill. App. Ct. 1995); Millard Maint. Serv. Co. v. Bernero, 566 N.E.2d 379, 384 (Ill. App. Ct. 1990).

17. Curtis 1000, Inc. v. Suess, 24 F.3d 941, 946 (7th Cir. 1994).

18. *Id.*; *Brown & Brown*, 887 N.E.2d at 440.

19. *Curtis 1000*, 24 F.3d at 946.

20. *Fifield*, 2013 IL App (1st) 120327, ¶ 4, 993 N.E.2d at 942; *Brown & Brown*, 887 N.E.2d at 440.

21. *Fifield*, 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d at 943; *Brown & Brown*, 887 N.E.2d at 440.

restrictive covenant.[22] In *Smithereen Co. v. Renfroe* an employee signed a restrictive agreement after already having commenced work for his employer, and then continued to work for another five years after the signing.[23] The court held that the continued employment was adequate consideration to support the covenant.[24]

Subsequent decisions further developed the amount of time needed for sufficient consideration. In 1983, the First District held that two years of continued employment was sufficient consideration for a restrictive covenant.[25] In *McRand, Inc. v. Van Beelen*, two current employees signed restrictive covenants, worked for two more years, and then voluntarily resigned.[26] In finding the covenant valid, the court recognized that the employees prospered from the employment, received regular raises and bonuses, and were given "responsibilities which they would not have received if they had not signed the covenants."[27] However, in *Mid-Town Petroleum, Inc. v. Gowen*, discussed below, the First District held that seven months of continued employment was not adequate consideration for a restrictive covenant.[28] These decisions seem to reinforce a bright-line, two-year rule by saying that seven months of continued employment is not adequate whereas two years of continued employment is sufficient.

Recently, however, a federal court in Illinois did not follow the bright-line, two-year adequate consideration rule where the employee voluntarily resigned twelve months after signing the restrictive covenant.[29] The Northern District of Illinois was unsure if Illinois state courts required a bright-line, two-year test regarding adequate consideration.[30] In holding that twelve months was adequate consideration for a self-terminating employee, the court relied on the dicta of Illinois state courts.[31]

In *LKQ Corp. v. Thrasher*, the court suggested that maybe there should be factors involved when determining sufficient consideration

22. Smithereen Co. v. Renfroe, 59 N.E.2d 545, 550–51 (Ill. App. Ct. 1945).

23. *Id.* at 244.

24. *Id.* at 243–44.

25. McRand, Inc. v. Van Beelen, 486 N.E.2d 1306, 1314 (Ill. App. Ct. 1985).

26. *Id.*

27. *Id.*

28. Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221, 1226 (Ill. App. Ct. 1993) (holding that the restrictive covenant was not enforceable in part because of the employee's demotion).

29. LKQ Corp. v. Thrasher, 785 F. Supp. 2d 737, 744 (N.D. Ill. 2011).

30. *Id.*

31. *Id.* at 743–44; *see also* Woodfield Grp., Inc. v. DeLisle, 693 N.E.2d 464, 469 (Ill. App. Ct. 1998); *McRand*, 486 N.E.2d at 1314.

other than period of time.[32] These factors include whether the employee terminated employment, whether she received raises and bonuses, and the degree to which her responsibilities increased after signing the covenant.[33] In another case from the Northern District of Illinois, the court expressly refused to apply a bright-line rule because of "contradictory holdings in the lower Illinois courts and the lack of a clear direction from the Illinois Supreme Court."[34] However, Illinois state courts are not bound to follow this authority and may reject its method of deciding whether there is adequate consideration to support restrictive covenants. Recent state court decisions have stuck with the bright-line, two-year rule.

It appears to be an easy analysis if we know that a court will enforce a restrictive covenant as long as there are two years of continued employment after signing. However, Illinois state courts are holding that the requirement of two years' continued employment must be satisfied even when the employee voluntarily resigns from the business.[35] If a court looks to the adequacy of consideration because of the concern of an illusory promise, then the concern is alleviated when the employee herself terminates employment. This creates a situation in which an employee who signed a restrictive covenant may work for any period of time that is less than two years, voluntarily resign, and take confidential client information to a competitor without any repercussions. Of course, that is exactly what happened in *Brown* and *Fifield*.

1. *Brown & Brown, Inc. v. Mudron*

In 2008, the Third District of the Illinois Appellate Court decided that it would not enforce a restrictive covenant for a lack of adequate consideration when a woman quit her job seven months after signing the covenant.[36] Diane Gunderson (Gunderson) worked for the John Manner Insurance Agency (JMI) as a customer service representative.[37] Brown & Brown, Inc. (Brown) bought out JMI and required existing employees, including Gunderson, to sign restrictive covenants prohib-

32. *LKQ Corp.*, 785 F. Supp. 2d at 743–44.

33. *Id.* (citing *Woodfield*, 693 N.E.2d at 469; *McRand*, 486 N.E.2d at 1314).

34. Montel Aetnastak, Inc. v. Miessen, 998 F. Supp. 2d 694, 716 (N.D. Ill. 2014); *but see* Instant Tech., L.L.C. v. DeFazio, 40 F. Supp. 3d 989, 1010 (N.D. Ill. 2014) (predicting that the Illinois Supreme Court will uphold the two-year test for adequate consideration).

35. Fifield v. Premier Dealer Servs., Inc., 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d 938, 943; Brown & Brown, Inc. v. Mudron, 887 N.E.2d 437, 440 (Ill. App. Ct. 2008).

36. *Brown & Brown*, 887 N.E.2d at 441.

37. *Id.* at 438.

iting soliciting or servicing Brown's customers for two years after separation from the company.[38] Brown made it clear to all employees that if they did not sign the agreement, their employment would be terminated.[39] Gunderson signed the agreement, but resigned and joined a competing agency.[40] Brown filed suit alleging Gunderson breached the restrictive covenant by soliciting and servicing Brown's customers.[41]

The *Brown* court relied heavily on the two-year requirement for adequate consideration in its ruling.[42] The court also relied on *Mid-Town*, another case where an employee resigned seven months after signing a restrictive covenant.[43] In *Mid-Town*, a salesman signed a restrictive covenant only after being promised a promotion to sales manager.[44] However, the employee resigned seven months after signing because his company informed him that there would be significant changes to his job description.[45] The court did not enforce the restrictive covenant because seven months of continued employment was not adequate consideration.[46] The *Brown* court did not seem to think that the *de facto* demotion of the salesman in *Mid-Town* was a factor in the *Mid-Town* court's finding that seven months' continued employment was not adequate consideration.[47] The *Brown* court made it clear that in Illinois, a court will not enforce a restrictive covenant signed by a current employee without at least two years of continued employment as adequate consideration.[48]

The dissent in *Brown* believed that the *Mid-Town* court only held that the seven months' continued employment was inadequate because the actual failure of consideration turned on the salesman's demotion.[49] Justice Schmidt also recognized a problem with a bright-line rule for consideration because if "an employee can void the consideration for any restrictive covenant by simply quitting for any reason [this] renders all restrictive employment covenants illusory in this

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 438–39.
42. *Id.* at 441 (Schmidt, J., dissenting).
43. Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221, 1226 (Ill. App. Ct. 1993).
44. *Id.* at 1224.
45. *Id.*
46. *Id.* at 1227.
47. *See Brown & Brown*, 887 N.E.2d at 441.
48. *See id.*
49. *Id.* at 441 (Schmidt, J., dissenting).

state."[50] While *Brown* concerned the adequacy of consideration for restrictive covenants signed after the commencement of employment,[51] *Fifield* extended that theory to restrictive covenants signed at the commencement of employment.[52]

2. *Fifield v. Premier Dealer Services, Inc.*

The First District of the Illinois Appellate Court held in *Fifield* that adequate consideration must support a restrictive covenant signed at the commencement of employment.[53] The facts of *Fifield* are quite similar to *Brown*, except for a few significant details. Great American Insurance Company (GAIC) owned and operated Premier Dealer Services (PDS), which was a corporation that "develop[ed], market[ed], and administer[ed] a variety of after-market products and programs for the automotive industry throughout the country."[54] Eric Fifield (Fifield) worked as an employee of GAIC and did work for PDS.[55] In October of 2009, GAIC sold PDS to PDS Holdings, LLC (PDS Holdings), an unrelated third party.[56] GAIC informed Fifield that he would be unemployed by the end of October.[57] Fortunately for Fifield, PDS Holdings made him an offer of employment. However, he had to sign an "Employee Confidentiality and Inventions Agreement" (Agreement) as a condition of that employment.[58] The Agreement contained numerous non-solicitation and non-competition provisions.[59]

Fifield negotiated with PDS Holdings to include a provision in the Agreement that "stated that the nonsolicitation and noncompetition provisions would not apply if Fifield was terminated without cause during the first year of his employment."[60] After Fifield signed the agreement, he began his employment at PDS Holdings, but resigned

50. *Id.* at 442.
51. *Id.* at 441.
52. Fifield v. Premier Dealer Servs., Inc., 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d 938, 943–44.
53. *Id.*
54. *Id.* ¶ 3, 993 N.E.2d at 939; Brief for Appellant at 1–2, *Fifield*, 2013 IL App (1st) 120327, 993 N.E.2d 938 (No. 10 CH 9204).
55. *Fifield*, 2013 IL App (1st) 120327, ¶ 3, 993 N.E.2d at 939.
56. *Id.*; Brief for Appellant, *supra* note 54, at 2.
57. *Fifield*, 2013 IL App (1st) 120327, ¶ 3, 993 N.E.2d at 939.
58. *Id.*
59. *Id.*
60. *Id.* ¶ 4, 993 N.E.2d at 940.

from his position only three months later and began working for a competitor of PDS Holdings.[61]

Obviously, Fifield and PDS Holdings had very different views of whether the restrictive covenant should be enforced. PDS Holdings posited that Fifield's new position with the company was adequate consideration to support the covenant.[62] PDS Holdings further argued that, because Fifield negotiated the details of the Agreement, the "illusory benefit of at-will employment [was] not at issue."[63] But Fifield argued that the covenant was not supported by adequate consideration because PDS Holdings did not employ him for at least two years after signing the Agreement.[64] Fifield also asserted that it did not matter that he signed the Agreement before the beginning of the employment relationship because federal courts "have refused to make a distinction between restrictive covenants that are signed before an individual is employed and restrictive covenants that are signed after an individual is employed."[65]

The court focused its analysis on the single issue of whether there was adequate consideration to support the restrictive Agreement.[66] Fifield and the court relied on *Brown*'s strict two-year rule for adequate consideration.[67] If seven months of employment after signing a restrictive covenant was not enough in *Brown*, then of course three months would be far short of that standard.[68] PDS Holding's main concern with *Brown* was that in that case, Gunderson was already an employee when she signed the restrictive covenant.[69] In contrast, Fifield was about to be unemployed and PDS Holdings hired him with the condition that he sign the Agreement.[70]

The *Fifield* court did not find this distinction to be convincing. The court relied on *Bires v. WalTom, L.L.C.*, in which a restrictive covenant signed by a racecar driver was not enforced because of a lack of adequate consideration.[71] The *Bires* court did not see any difference be-

61. *Id.*
62. *Id.* ¶ 9, 993 N.E.2d at 940–41.
63. *Id.* ¶ 9, 993 N.E.2d at 941.
64. *Id.* ¶ 10, 993 N.E.2d at 941.
65. *Id.* ¶ 11, 993 N.E.2d at 941.
66. *Id.* ¶ 13, 993 N.E.2d at 942.
67. *Id.* ¶ 17, 993 N.E.2d at 943.
68. *Id.* ¶ 19; *see* Brown & Brown, Inc. v. Mudron, 887 N.E.2d 437, 441 (Ill. App. Ct. 2008).
69. *Fifield*, 2013 IL App (1st) 120327, ¶ 17, 993 N.E.2d at 943; *Brown & Brown*, 887 N.E.2d at 441.
70. *Fifield*, 2013 IL App (1st) 120327, ¶ 3, 993 N.E.2d at 939.
71. Bires v. WalTom, L.L.C., 662 F. Supp. 2d 1019, 1030 (N.D. Ill. 2009).

tween someone who signed a restrictive covenant at the commencement of employment and someone who signed a restrictive covenant during employment.[72] *Fifield* and *Bires* followed the lead of the Seventh Circuit and refused to honor a distinction between pre- and post-hire restrictive covenants.[73] As the Seventh Circuit noted, "[T]he only effect of drawing a distinction between pre-hire and post-hire covenants would be to induce employers whose employees had signed such a covenant after they started working to fire those employees and rehire them the following day with a fresh covenant not to compete."[74]

In *Fifield*, there was some confusion on the term "post-employment" between the First District and the company. In the company's reply brief, it argued that Fifield did not enter into a post-employment restrictive covenant because he signed the agreement before he started working with Premier.[75] Justice Cunningham remarked, "Premier cites no authority for its novel definition of postemployment restrictive covenants."[76] However, after reviewing Premier's reply brief, it is clear that Premier conflated the term "post-employment restrictive covenant" with an agreement entered into before the commencement of employment; in other words, a "pre-hire restrictive covenant."[77] Premier was merely trying to draw a distinction between the present case's "pre-hire restrictive covenant" and *Brown*'s restrictive covenant signed after the commencement of employment, that is, a "post-hire restrictive covenant."[78]

Because other courts held that there was no distinction between pre-hire and post-hire covenants and the offer of employment could not alone be adequate consideration, the First District ruled that the Agreement was unenforceable.[79] This decision made it official that a restrictive covenant will not be enforced in Illinois without two years of continued employment or another form of consideration. With the bright-line, two-year rule firmly in place, employers will most likely have to support restrictive covenants with some additional benefit

72. *Id.*

73. *See* Curtis 1000, Inc. v. Suess, 24 F.3d 941, 947 (7th Cir. 1994); *Bires*, 662 F. Supp. 2d at 1030; *Fifield*, 2013 IL App (1st) 120327, ¶ 17, 993 N.E.2d at 943.

74. *Curtis 1000*, 24 F.3d at 947.

75. Reply Brief for Appellant at 5, *Fifield*, 2013 IL App (1st) 120327, 993 N.E.2d 938 (No. 10 CH 9204).

76. *Fifield*, 2013 IL App (1st) 120327, ¶ 18, 993 N.E.2d at 943.

77. *See* Reply Brief for Appellant, *supra* note 75, at 5.

78. *See id.*

79. *Fifield*, 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d at 943–44.

such as a bonus or promotion. But a promotion for employees who are initially hired does not make sense and a bonus or additional cash payment would be in essence a signing bonus for every new employee.

C. Restrictive Covenant Law in Other States

In order to adequately understand the law of restrictive covenants in Illinois, and in order to make an educated suggestion for Illinois on how best to deal with this problem, it is necessary to review other states' analyses of the same types of questions at issue in these recent Illinois cases. This subsection will analyze three states' restrictive covenant laws to demonstrate differences and possible solutions to the issue of whether a bright-line, two-year rule for adequate consideration is appropriate. First, this subsection will look at restrictive covenant laws in Massachusetts because the law varies significantly from Illinois. Second, this subsection will examine the restrictive covenant law in Pennsylvania because that state is comparable in size and population to Illinois. Finally, this subsection will discuss how California treats restrictive covenants, specifically that California does not recognize employment restrictive covenants based on contract law.

1. Massachusetts

Under Massachusetts law, in order to enforce a non-compete agreement an employer must demonstrate that the agreement is necessary to protect a legitimate business interest of the employer, is supported by consideration, reasonably limited in all circumstances, and is consistent with public policy.[80]

Massachusetts's courts assume that there is sufficient consideration for a restrictive covenant signed at the commencement of employment.[81] This already is a significant distinction from Illinois decisions because Illinois does not recognize employment alone as consideration for a restrictive covenant.[82] Massachusetts's courts do not seem to be as concerned about the illusory promise of continued

80. Leibowitz v. Aternity, Inc., No. 10 CV 2289(ADS), 2010 WL 2803979, at *22 (E.D.N.Y. July 14, 2010) (interpreting Pennsylvania law) (quoting Stone Legal Res. Grp., Inc. v. Glebus, No. CA025136, 2003 WL 914994, at *3 (Mass. Super. Ct. Dec. 16, 2003)). We are only concerned with the definition and application of how the consideration element is used in restrictive covenant cases.

81. Slade Gorton & Co. v. O'Neil, 242 N.E.2d 551, 554 (Mass. 1968).

82. *See* Curtis 1000, Inc. v. Suess, 24 F.3d 941, 947 (7th Cir. 1994); *Fifield*, 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d at 943; Brown & Brown, Inc. v. Mudron, 887 N.E.2d 437, 441 (Ill. App. Ct. 2008).

employment as do the courts in Illinois. In Massachusetts, the bargained-for exchange is the signing of the restrictive covenant for employment.[83]

However, the law is much less clear when an employee signs a restrictive covenant while already employed. At the most employer-friendly end of the spectrum exists a series of cases that support the proposition that continued employment alone suffices for consideration.[84] These cases rely on a theory that the new restrictive covenant is actually ancillary to, or relates back to, the commencement of employment.[85] Additionally, adequate consideration may be found if the employee has been given "access to . . . confidential and proprietary information."[86] Unlike Illinois law, an employer in Massachusetts may not have to support a restrictive covenant with anything more than continued employment. Massachusetts has no bright-line rule for determining adequate consideration. Also, these cases indicate that continued employment with no corresponding increase in pay constitutes adequate consideration.[87]

But, this employer-friendly slant is not always followed in Massachusetts. Many courts now weigh continued employment as only one factor in determining whether to enforce a restrictive covenant.[88] A Massachusetts federal court decision held that an employer needed to give some consideration in addition to continued employment in order to enforce a restrictive covenant.[89] The court in *IKON Office Solutions, Inc. v. Belanger* noted, "[I]n order for a restrictive covenant to withstand scrutiny, some additional consideration ought to pass to an employee upon the execution of a post-employment agreement."[90] As an aside, the court used the term "post-employment agreement" presum-

83. *See Slade Gorton*, 242 N.E.2d at 554.

84. BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY 2837–38 (David J. Carr et al. eds., 8th ed. 2012).

85. *Id.* at 2837.

86. *Id.* (citing EMC Corp. v. Donatelli, No. 09-1727-BLS2, 2009 WL 1663651, at *6 (Mass. Super. Ct. May 5, 2009)).

87. *See EMC Corp.*, 2009 WL 1663651, at *7.

88. *See* Metro. Removal Co. v. D.S.I. Removal Specialists, Inc., No. 20051503, 2006 WL 619111, at *1–2 (Mass. Super. Ct. Feb. 2, 2006) (holding that non-competition and non-solicitation agreements signed during continued at-will employment and without additional consideration were not valid); Cypress Grp., Inc. v. Stride & Assocs., Inc., No. 036070-BLS2, 2004 WL 616302, at *3 (Mass. Super. Ct. Feb. 11, 2004) ("Any time a restrictive covenant is signed by an employee, the employer must provide some clear additional benefit."); MALSBERGER, *supra* note 84, at 2838.

89. IKON Office Solutions, Inc. v. Belanger, 59 F. Supp. 2d 125, 131 (D. Mass. 1999).

90. *Id.*

ably to mean "post-hire agreement."[91] This same type of confusion was present in *Fifield*, discussed above, where the court and the company had different definitions of "post-employment restrictive covenants."[92]

Massachusetts is suffering from some confusion on whether to enforce restrictive covenants signed after an employee has already been working for an employer. Like in Illinois, this confusion leads to a conundrum for employers because they do not know with certainty when or if their restrictive covenants will be enforced. However, when it comes to employees signing agreements at the commencement of employment, the law in Massachusetts seems well settled while Illinois businesses are left wondering how to proceed.

2. Pennsylvania

In order for a restrictive covenant to be enforced in Pennsylvania, an employer must show that it is "incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographical extent."[93] Additionally, the restrictive covenant must be supported by adequate consideration.[94]

When an employee signs a restrictive covenant at the onset of employment, the consideration given is the employment itself. Pennsylvania courts have determined this consideration to be adequate to support the restrictive covenant.[95] The commencement of employment, even when it is terminable at-will, is sufficient to support the covenant.[96] Like Massachusetts, but unlike Illinois, when an employee begins a job in Pennsylvania and signs a restrictive covenant, the covenant is supported by adequate consideration.

On the other hand, when an employee signs a restrictive covenant after the employment relationship has begun, the continued employment will not be sufficient consideration. This is in contrast to some decisions in Massachusetts, but similar to all cases in Illinois, in that courts will not enforce the covenant unless there is some "correspond-

91. *See id.*

92. *See* Fifield v. Premier Dealer Servs., Inc., 2013 IL App (1st) 120327, ¶ 18, 993 N.E.2d 938, 943; Reply Brief for Appellant, *supra* note 75, at 5.

93. Hess v. Gebhard & Co. Inc., 808 A.2d 912, 917 (Pa. 2002).

94. Piercing Pagoda, Inc. v. Hoffner, 351 A.2d 207, 210 (Pa. 1976).

95. MALSBERGER, *supra* note 84, at 4005–08.

96. Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838, 846 n.14 (Pa. 1957).

ing benefit or change in status."[97] Pennsylvania's high court held that a man who began employment for his employer through an oral contract and later signed a written employment contract, which included a restrictive covenant, did not have to follow the covenant's restrictions.[98] The court held that if the man's "employment status had changed beneficially when the parties reduced their agreement to writing, the law . . . would dictate that the restrictive covenant, if reasonable, would be enforceable."[99] This rule is consistent throughout Pennsylvania case law.

Again, like Massachusetts, there is no mention of a bright-line numerical rule that details an amount of time needed in order for a court to enforce post-hire restrictive covenants. Whether the Massachusetts method of requiring no additional consideration, the Pennsylvania method of requiring a beneficial change in employment status, or the Illinois method of requiring at least two years' continued employment is best will be discussed below.

3. California

The State of California has a drastically different approach to restrictive covenants. California has determined that because of a strong public policy against restraints of trade, all restrictive covenants in the employment contract context are void.[100] The California state legislature made a policy determination that the interests of employees to "retain the right to pursue any lawful employment and enterprise of their choice" will be protected.[101] While the legislature clearly thought that restrictive covenants were against public policy, it left open limited exceptions to the statute in which a restrictive covenant may be enforced.[102] These exceptions are limited to the sale of a business, the dissolution of a partnership, and the dissolution or sale of a limited liability company.[103]

97. Citadel Broad. Co. v. Gratz, 52 Pa. D. & C.4th 534, 546 (Pa. Ct. Com. Pl. 2001); *see also* Wincup Holdings, Inc. v. Hernandez, No. CIV.A. 04-1330, 2004 WL 953400, at *4 (E.D. Pa. May 3, 2004).

98. Maint. Specialties, Inc. v. Gottus, 314 A.2d 279, 281 (Pa. 1974).

99. *Id.*

100. *See* CAL. BUS. & PROF. CODE § 16600 (West 2014).

101. Edwards v. Arthur Andersen L.L.P., 189 P.3d 285, 291 (Cal. 2008) (quoting Metro Traffic Control, Inc. v. Shadow Traffic Network, 27 Cal. Rptr. 2d 573, 577 (Cal. Ct. App. 1994)).

102. BUS. & PROF. §§ 16601-16602.5.

103. *Id.*

California courts have interpreted § 16600 of the Business and Professions Code in a very broad manner.[104] This means that even restrictive covenants that are limited in scope to a particular part of a trade or business will not be enforced.[105] A strict construction of the statute requires a restrictive covenant to fall within one of the statutory exceptions in order to be enforced.[106] California's method of statutory constraints on restrictive covenants does not completely preclude protections for a business's trade secrets and proprietary information. California law allows certain restrictions in the employment context if those restrictions would be enforceable under an unfair competition tort analysis.[107] Also, California courts have recognized a "trade secret" exception to § 16600.[108] An employer can protect its trade secrets even without a restrictive covenant because injunctive relief is available under the tort of misappropriation of trade secrets.[109]

If all employment-related restrictive covenants are considered *per se* invalid, then the questions involving whether a covenant is supported by adequate consideration, whether a covenant was signed before or after the beginning of an employment relationship, and whether a covenant is reasonable, are no longer relevant. This type of rule gives courts clear guidelines because there is a presumption that a post-employment restrictive covenant will be unenforceable. California's rule also provides certainty to employers and employees that these covenants will not be enforced. And, unfair competition torts will still protect employers from unfair competition practices by former employees.

II. ANALYSIS

Illinois courts have weakened post-employment restrictive covenants to the point that they have basically become an illusory promise on behalf of employees during the first two years of employment. When focusing on the single issue of adequate consideration, it is clear that an impactful change in the law needs to occur. In order to create a fair paradigm in which employers and employees can adequately predict whether a restrictive covenant will be enforced, it may be neces-

104. *See Edwards*, 189 P.3d at 297.
105. *Id.* at 955.
106. *Id.*
107. Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1338 (9th Cir. 1980).
108. *See* Muggill v. Reuben H. Donnelly Corp., 398 P.2d 147, 149 (Cal. 1965).
109. ReadyLink Healthcare v. Cotton, 24 Cal. Rptr. 3d 720, 731 (Cal. Ct. App. 2005).

sary to void all restrictive covenants in the employment context in Illinois as a matter of public policy. After reviewing restrictive covenant law in comparable states, it is clear that enforceability problems will exist no matter how the law develops. First, this section will review whether the outcomes of *Brown* and *Fifield* under Massachusetts, Pennsylvania, and California law would be in the best interests of both employers and employees. Second, this section will recommend the best way to change the law of restrictive covenants in Illinois.

A. Comparing Restrictive Covenant Law of Other States

Illinois courts can look to the laws of Massachusetts, Pennsylvania, and California to see if there is a model for restrictive covenants that will better serve the interests of employers and employees than the current system. Overall, those three states represent methods that vary in degree from no restrictive covenants, as in California, to a stricter restrictive covenant law, as in Massachusetts.

1. Massachusetts Law in Illinois

The Commonwealth of Massachusetts has a stricter rule regarding adequate consideration for restrictive covenants than Illinois. The largest difference is the distinction between pre-hire and post-hire covenants. In Illinois, adequate consideration for a pre-hire or post-hire restrictive covenant must be something other than the employment itself.[110] However, Massachusetts' law is settled in that a pre-hire restrictive covenant is adequately supported by consideration with the employment alone.[111] If we apply the pre-hire restrictive covenant law in Massachusetts to the facts of *Fifield*, the judgment of the court would have to be reversed.[112] Fifield would have been bound to the restrictive covenant that he signed before he started his employment.[113] The restrictive covenant would have been enforced whether he resigned one day or ten years after he commenced his employment. This type of clear-cut rule would significantly benefit employers, but would be unfair to employees, especially because of the illusory promise of at-will employment discussed above. Employers would know that their covenants would be enforced and they would be allowed to hire the people

110. Fifield v. Premier Dealer Servs., Inc., 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d 938, 943.

111. Slade Gorton & Co. v. O'Neil, 242 N.E.2d 551, 554 (Mass. 1968).

112. *See Fifield*, 2013 IL App (1st) 120327, ¶¶ 3–4, 19, 993 N.E.2d at 939–40, 943–44.

113. *Id.* ¶ 4, 993 N.E.2d at 940.

that they wanted and immediately bring them into the fold of the business. This would also allow employers to give their employees access to the business's proprietary information without a *de facto* mandatory two-year waiting period. Employees could take charge of their careers by actively participating in the business.

As for covenants signed post-hire in Massachusetts, the law is not completely clear. Some cases hold that adequate consideration is already satisfied because the restrictive covenant relates back to the original commencement of employment.[114] Another line of cases holds that some sort of additional consideration needs to be included for a restrictive covenant to be supported by continued employment.[115] In applying either of the post-hire rules to the facts in *Brown*, in which the post-hire restrictive covenant was not enforced, it is clear that the parties would be in the same position regardless if the case utilized Massachusetts or Illinois post-hire rules.[116] In fact, if Massachusetts' law were applied, employers and employees would have even less of an idea of whether the covenant would be enforced as Massachusetts courts do not apply uniform rules to post-hire restrictive covenants.

While Massachusetts enjoys the clarity of pre-hire restrictive covenants being supported by the adequate consideration of initial employment, the post-hire covenant scenario is murkier and less predictive than the law in Illinois. Currently, the rule in Illinois, while it does not totally protect the interests of the employer, can at least be applied evenly and without arbitrariness.

2. Pennsylvania Law in Illinois

Pennsylvania's law regarding pre-hire restrictive covenants is exactly the same as the rule in Massachusetts. A restrictive covenant signed before the commencement of employment is enforceable because it is supported by the adequate consideration of the employment alone.[117] This again would have led the Illinois Appellate court in *Fifield* to a different outcome.[118] Fifield signed his restrictive covenant before he commenced his employment[119] so the agreement would have been

114. *See* MALSBERGER, *supra* note 84, at 2837.
115. *Id.* at 2838.
116. *See* Brown & Brown, Inc. v. Mudron, 887 N.E.2d 437, 441 (Ill. App. Ct. 2008).
117. MALSBERGER, supra note 84, at 4005–08.
118. *See Fifield*, 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d at 943–44.
119. *Id.* ¶ 4, 993 N.E.2d at 940.

enforced under Pennsylvania law.[120] Again, the benefits here of a clear rule are not absolute because they do not properly weigh the interests of employees.

Unlike Massachusetts, Pennsylvania does have a clear rule regarding post-hire restrictive covenants. The rule is similar to the one in Illinois in that a restrictive covenant signed after the commencement of employment requires some "corresponding benefit or change in status."[121] This rule would not change the outcome of a case like *Brown* because the employee there did not receive any corresponding benefit or change in status other than continued employment.[122] However, given the facts of the *Mid-Town* case—on which the *Brown* court relied—where the employee received a promotion and then resigned after seven months of continued employment, *Mid-Town* may have been decided differently under Pennsylvania law.[123]

But, even if Illinois were to apply a rule like Pennsylvania's regarding post-hire restrictive covenants, it becomes patently unfair for employees because of the illusory promise of at-will employment. In *Brown*, Gunderson could have been promoted—which would be adequate consideration under Pennsylvania law—and then fired a day later.[124] Theoretically, the post-employment restrictive covenant would be enforceable because there was adequate consideration for it. Such a rule is also not in the best interest of employers because they have to give up something of value in order to enforce their restrictive covenants. Businesses that are forced to make promotions, pay bonuses, or come up with some other type of compensation to enforce these agreements are not capable of acting efficiently because this leads to wasteful spending. So again, clarity of the law does not always mean that the best interests of both employers and employees are considered.

3. California Law in Illinois

As discussed above, California generally does not enforce restrictive covenants absent certain exceptions or through an unfair competi-

120. *See id.* ¶ 19, 993 N.E.2d at 943–44.

121. *See* Citadel Broad. Co. v. Gratz, 52 Pa. D. & C.4th 534, 546 (Pa. Ct. Com. Pl. 2001); *see also* Wincup Holdings, Inc. v. Hernandez, No. CIV.A. 04-1330, 2004 WL 953400, at *3–4 (E.D. Pa. May 3, 2004).

122. *See* Brown & Brown, Inc. v. Mudron, 887 N.E.2d 437, 438 (Ill. App. Ct. 2008).

123. *See* Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221, 1226 (Ill. App. Ct. 1993); *see also Brown & Brown*, 887 N.E.2d at 441.

124. *See Brown & Brown*, 887 N.E.2d at 438.

tion tort analysis.[125] This approach would be a radical change to Illinois restrictive covenant law, but it would solve a large number of problems concerning adequate consideration and reasonableness. A California rule for restrictive covenants would also alleviate litigation as to what is considered a legitimate business interest that can be protected by the agreements. The Illinois Supreme Court recently affirmed the legitimate business interest test as a component of a three-pronged test for determining whether an employer's restrictive covenant is reasonable and would be eligible for enforcement.[126] The cost and burden of litigation for both employers and employees would be lessened if both sides knew that restrictive covenants are *per se* invalid. This promotes economic efficiency because parties will be able to trust that the state of the law for restrictive covenants is predictable.[127]

Applying the California rule to both *Brown* and *Fifield* would not yield results different from how the cases were decided in reality.[128] Both Gunderson and Fifield would be free of the formal restraints of the restrictive covenants; however, Fifield may be subject to an unfair business competition suit because he worked at Premier for such a short period of time.[129] The opportunity for employers to protect their legitimate business interests would seem to be destroyed by using the California rule for these two cases, but employers' interests are in fact protected if they know from the outset that they will not be able to enforce these types of agreements. A rule of no restrictive covenants, combined with the ability of employers to bring an unfair competition suit, would mean that employers would be able to protect their legitimate business interests without unfairly burdening employees' ability to work in their desired profession.

B. The Process of Changing the Common Law in Illinois

A world without restrictive covenants may work in practice, but changing the Illinois common law could be an arduous task. The common law as an entity lurches forward at a snail's pace. Benjamin Cardozo remarked on the glacial pace of the common law process:

125. *See* CAL. BUS. & PROF. CODE § 16600 (West 2014).

126. Reliable Fire Equip. Co. v. Arredondo, 2011 IL 111871, ¶ 17, 965 N.E.2d 393, 396.

127. *See* People v. Gersch, 553 N.E.2d 281, 286 (Ill. 1990).

128. *See* Fifield v. Premier Dealer Servs., Inc., 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d 938, 943–44; *Brown & Brown*, 887 N.E.2d at 441.

129. *See Fifield*, 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d at 943; *Brown & Brown*, 887 N.E.2d at 441. The exact details of an unfair business competition tort in these situations are beyond the scope of this article.

> There has been a new generalization which, applied to new particulars, yields results more in harmony with past particulars, and, what is still more important, more consistent with social welfare. This work of modification is gradual. It goes on inch by inch. Its effect must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier.[130]

Cardozo's remarks, while amplifying the slow pace of the process, actually demonstrate the benefits of the common law.[131] The case-by-case method slowly brings the common law in line with the goals and ideals of society without drastically changing the rules on which citizens rely. But society has drastically changed since restrictive covenants were first recognized in Illinois. Societal changes mean that most people no longer work for the same employer for extended periods of time. These people need to be free of restrictions when moving on to their next job in order to be productive members of society. Employers need to be able to protect their legitimate business interests, but also should not have to incur increased costs in order to protect those interests. The common law method has not been able to keep up with these conditions.

One would think that, when considering the fact that restrictive covenants have been recognized in Illinois for over one hundred years, it seems unlikely that a major change could happen in this field of law.[132] But there is clearly a need for a change in this field, and the only way for that to happen is through either legislative or judicial action.

1. Changes to Illinois Law through Legislative Action

The simplest way to achieve a California-type structure for restrictive covenants in Illinois is to enact legislation that voids any contract that restrains people from competing. The California statute could even be used as a model. It is simple in its formulation: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[133] The Illinois General Assembly could even add on the exceptions discussed above.[134] Moreover, a statutory solution that

130. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 25 (1921).
131. *Id.* at 24–25.
132. *See* Hursen v. Gavin, 44 N.E. 735, 735 (Ill. 1896).
133. CAL. BUS. & PROF. CODE § 16600 (West 2014).
134. *Id.* §§ 16601–16602.5.

voids these contracts would be in line with the direction the Illinois courts are headed in their erosion of the law of restrictive covenants.

Legislative action provides the advantages of an immediate and comprehensive impact. The Illinois Supreme Court has recognized the power of the legislature to make swift and thorough changes to the common law.[135] "The legislature is formally recognized as having a superior position to that of the courts in establishing common law rules of decision. The Illinois General Assembly has the inherent power to repeal or change the common law, or to do away with all or part of it."[136] The General Assembly has the power to change the entire landscape of restrictive covenants in one fell swoop.

While the state legislature actually possesses the power to make these changes, obviously the political process makes it difficult to attain legislative results. Numerous business groups may lobby against a rule that voids restrictive covenants. At first, employers would feel very uncomfortable about not having a contractual safety net to protect their legitimate business interests. In fact, this may be why the legislature has not already acted. Todd Maisch, the Vice President of Government Relations for the Illinois Chamber of Commerce, recently gave an opinion on legislative action regarding restrictive covenants:

> There's a real sense that we'd rather have this played out in the courts and let the courts give direction. . . . The legislature certainly has not found a way to build strong consensus to find a balance and I think that's because of the diversity of interests involved.[137]

But because the courts have been moving in a direction that lessens the enforceability of restrictive covenants, lobbyists may not want to have this situation play out in the courts.

Legislative action may be the best avenue to achieve substantial change in the area of restrictive covenants. The Illinois General Assembly can make comprehensive changes to an area of law through the passage of a statute without waiting for a particular case to come before it. While there will be some opposition to sweeping change, it makes sense for both the interests of employers and employees to settle the law without the restriction of moving inch by inch for decades.[138]

135. *See* People v. Gersch, 553 N.E.2d 281, 286 (Ill. 1990).

136. *Id.*

137. Andrew Maloney, *Lawmakers Unlikely to Address Noncompete Clauses after Denial*, CHI. DAILY L. BULL. (Oct. 24, 2013), http://www.chicagolawbulletin.com/home.aspx.

138. *See* CARDOZO, *supra* note 130, at 25.

2. Changes to Illinois Law through Judicial Action

The other way to change restrictive covenant law in Illinois is through the case-by-case method of the common law. Comprehensive change to an area of law such as restrictive covenants will be difficult to achieve via this method. Unlike the pervasive power of legislative action, change through the courts will happen gradually and piece-by-piece.[139] The common law process requires both time and the willingness of judges to overturn precedent, both of which come at the price of many more years of suffering through an unsettled area of the law.

First, Illinois courts will need to see many similar cases involving restrictive covenants. Specifically, several cases involving the adequacy of consideration for restrictive covenants need to come before the courts in order to correctly balance the interests of employers and employees. An inherent problem with this method of changing the law is the amount of time it takes for enough similar cases to arise that all deal with the same issue. The advantages of the common law system in gradually changing the law to reflect the policies of society actually become disadvantages when the policies are misaligned with current case law. From an efficiency perspective, the common law process may not lead to the best results in situations where there are multiple possible rules that can be equally efficient and where judicial preferences and the preponderance of precedent are stacked against an efficient solution.[140] Here, the judicial preferences and precedents of Illinois courts have been eroding the effectiveness of restrictive covenants. Overturning or even modifying these rules in a substantial way may not be efficiently accomplished through the common law process.

Second, judges must be willing to overturn precedent in order to change the law of restrictive covenants to a California-like model. The recent decisions in *Fifield* and *Brown* show that judges are willing to apply precedential rules even though the rules may not make complete sense when trying to balance the interests of employers and employees.[141] Hard and fast rules for contracts are reminiscent of classical contract theory.[142] And this classical formation "in theory, did not take

139. *See Gersch*, 553 N.E.2d at 286.

140. *See* Nuno Garoupa & Carlos Gómez Ligüerre, *The Evolution of the Common Law and Efficiency*, 40 GA. J. INT'L & COMP. L. 307, 340 (2012).

141. *See* Fifield v. Premier Dealer Servs., Inc., 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d 938, 943–44; Brown & Brown, Inc. v. Mudron, 887 N.E.2d 437, 441 (Ill. App. Ct. 2008).

142. Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 10 (2004).

into account the complexity of social reality, including the unequal distribution of economic advantage in society and the haphazard and inattentive way in which private parties regard contract law."[143] A judge's strong conviction for *stare decisis* will further hinder considerable change. "Only on rare occasions will courts determine that a change in the common law is needed to reflect societal changes or vindicate public interests."[144]

Change to restrictive covenant law through judicial action will come slowly and will be limited to the actual issues that are before the courts. Compared to an overhaul through legislative action, judicial change to the common law will not lead to a satisfying or timely result. The better way to affect change will be for the Illinois General Assembly to enact legislation that eliminates restrictive covenants.

III. CRITICISMS OF ELIMINATING RESTRICTIVE COVENANTS IN ILLINOIS

The majority of concerns for the elimination of restrictive covenants in Illinois will come from businesses and business groups arguing that restrictive covenants are necessary to protect legitimate business interests: (1) to make sure that employees do not take confidential information to competitors, and (2) to keep talented employees from easily moving on to new jobs. However, businesses are still protected through the Illinois Trade Secrets Act.[145] They can obtain an injunction and damages if a court determines that there has been "actual or threatened misappropriation" of trade secrets.[146]

Businesses can also use unfair business competition torts to protect their legitimate business interests, similar to how California uses them. Recently, the Secretary of Housing and Economic Development of Massachusetts relayed the position of Governor Deval Patrick's administration to the Massachusetts legislature, advocating for the elimination of all non-compete agreements.[147] The policy reasons behind this push are to: "(1) retain talented entrepreneurs; (2) support individual career growth and flexibility; and (3) encourage new innovative

143. *Id.*

144. *Gersch*, 553 N.E.2d at 286.

145. 765 ILL. COMP. STAT. ANN. 1065 (West 2014).

146. *Id.* § 1065/3-4.

147. *Employee Rights and Benefits #2: Noncompetes, Hiring & Personnel, & Apprenticeship Programs Before the J. Comm. on Labor & Workforce Dev.*, 188th Gen. Ct. (Mass. 2013) (statement of Gregory Bialecki, Secretary of Housing and Economic Development), *available at* http://www.boston.com/business/technology/innoeco/9-10-2103Testimony.pdf.

businesses that are the engines of economic growth."[148] Viewing all non-compete clauses as unlawful may actually promote business growth by ensuring that competition is not inhibited and that workers are free to move to where they will be the most efficient. The Secretary also mentioned the Uniform Trade Secrets Act and other tools as a way to protect legitimate business interests, such as proprietary information and specially trained employees, in Massachusetts.[149]

Another concern regarding the abolition of restrictive covenants in Illinois is the reticence of the General Assembly to do anything concerning that area of the law. It should be noted that Jil Tracy, a former member of the Illinois House of Representatives, introduced a bill in 2011 that would have codified much of the common law regarding non-compete clauses.[150] The bill failed, but it would have changed the common law by treating as enforceable non-competes that are given in a written offer to key employees two weeks before the first day of employment.[151] The bill would have set out the criteria for enforceability, including what types of employees can be required to sign non-competes, what constitutes adequate consideration for a post-hire non-compete, and how to narrowly tailor a non-compete so as to not be an unlawful restraint of trade.[152]

However, the 2011 bill would have only dealt with non-compete clauses and not non-solicitation agreements.[153] This would have still left a considerable cloud over adequate consideration issues for non-solicitation agreements. While the bill shows that some members of the legislature are at least thinking about the problem of enforcing restrictive covenants in Illinois, the bill's inner workings demonstrate that it would be very difficult to codify the common law with enough specificity as to avoid litigation and excess costs.

Totally eliminating all restrictive covenants by statute may not be the only solution available for these problems. The state legislature could opt to only discard non-competes, leaving non-solicitation clauses that protect business client lists strictly to the common law.[154] While many aspects of restrictive covenant law treat non-compete and non-

148. *Id.*
149. *Id.*
150. H.B. 0016, 97th Gen. Assemb. (Ill. 2011).
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*

solicitation agreements alike, in practice non-compete clauses are more likely to cause problems for employees who are not able to work in their desired fields. Non-compete clauses can actually hurt the state because employees may move outside of the state in order to escape the restrictions of the covenant. The policy of Illinois should be to hold on to its talented workers and keep them employed by Illinois businesses. Whether it is better to eliminate non-compete clauses only or eradicate all restrictive covenants is up to the legislature.

An approach to solving the adequate consideration problem, evident in *Fifield*[155] and *Brown*,[156] would be to allow the courts to handle it by changing the common law. One solution would be for the courts to adopt a fact-sensitive approach that is attentive to how the employee terminates employment.[157] This solution would bring into balance the interests of employers and employees by making sure employers could not give the illusory promise of continued employment, and employees could not unilaterally revoke a restrictive covenant by resigning before two years of employment.[158] Unfortunately, this approach would not solve the bigger problem of large expenses for employers who try to enforce restrictive covenants through the courts. It also would not adequately protect employees who cannot afford to fight restrictive covenants and need to work to support their families. The better approach is to make sweeping change through the legislature.

CONCLUSION

Recent decisions by the Illinois Appellate Court have confused employers as to what will be regarded as adequate consideration in the pre-hire and post-hire restrictive covenant context. This problem only scratches the surface of restrictive covenant problems in Illinois. The Illinois General Assembly should eliminate restrictive covenants through statute. A rule like California's would be the best way to promote the interests of both employers and employees. Without substantial change, the costs of litigating restrictive covenants will continue to be a drain on the efficiency of Illinois businesses and courts.

155. Fifield v. Premier Dealer Servs., Inc., 2013 IL App (1st) 120327, ¶ 19, 993 N.E.2d 938, 943–44.

156. Brown & Brown, Inc. v. Mudron, 887 N.E.2d 437, 441 (Ill. App. Ct. 2008).

157. Timothy James O'Hern, *Post-Employment Restrictive Covenants: Illusory in Illinois? Addressing the Implications of* Brown and Brown, Inc. v. Mudron*, 887 N.E.2d 437 (Ill. App. Ct. 2008)*, 34 S. ILL. U. L.J. 227, 247 (2009).

158. *See id.*