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Businesses should take heed of Illinois court's novel approach to restrictive covenants

By Christopher P. Keleher

Information is the lifeblood of the service profession. Companies must be vigilant in protecting knowledge and goodwill, two integral ingredients earned through the course of experience. To this end, restrictive covenants are a fain, necessary and recognized tool to certain information. Under the auspices of "freedom to contract," courts have enforced covenants that are reasonable in scope. Reasonable minds will differ as to such a determination, prompting a steady flow of restrictive covenant litigation in courts across the country.

Glancing at the facts of a recent Illinois decision, *Brown & Brown v. Mudron*, would raise few eyebrows. However, the reasoning and ultimate holding of the Third District Court of Appeals is cause for concern and warrants close scrutiny. The decision departs from a long line of Illinois precedent and turns restrictive covenant jurisprudence on its head.

The facts

Brown & Brown is a Florida corporation providing insurance and reinsurance services. In 2002, it acquired a Joliet, Illinois based insurance agency. Pursuant to the purchase, the Joliet employees were obligated to sign new employment agreements. The agreement was unremarkable, specifying the employee could be terminated at any time and including a restrictive covenant. An employee was forbidden from soliciting or servicing Brown & Brown customers for two years following the cessation of employment.

The former employee was a customer service representative. She had worked for the Joliet-based agency since 1997. When Brown & Brown presented her with the employment agreement, she signed. Seven months later, she resigned, and joined a competing insurance agency. This move prompted Brown & Brown to file a breach of contract action in state court.

The decision

Before delving into the merits, the court had to first address whether Illinois or Florida law applied. The employer agreement clearly articulated Florida law was to govern. But the court gave short shift to this provision, invoking "fundamental public policy" to impose Illinois law on the parties. Specifically, Illinois courts consider the hardship a covenant has upon an employee, while Florida expressly prohibits weighing this factor. This juxtaposition was significant enough to overcome the plain language of the employee agreement specifying Florida law. This determination had dire consequences for Brown & Brown and foreshadowed the ultimate conclusion.

Turning to the restrictive covenant, the court set forth the requisite elements a covenant must possess to be enforced. A covenant must be reasonable in scope and necessary to protect an employee's legitimate business interest. Additionally, there must be adequate consideration supporting the covenant. It was this factor the court found dispositive.

Courts examine the adequacy of consideration because "a promise of continued employment may be an illusory benefit" for at will employees. The court noted two years of employment constitutes adequate consideration. The former employee's seven month span fell far short of this mark. That her truncated tenure was of her own choosing was of no import to the court. The court relied on an earlier case, *Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill. App. 3d 63 (1993), for this proposition. In *Mid-Town Petroleum*, the court found no valid consideration where employee resigned seven months after signing covenant. The court further rejected any notion that employee benefits was sufficient consideration as the evidence on

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this question was scant. Thus, in a brief paragraph, the court summarily concluded the employment agreement did not possess adequate consideration. The restrictive covenant, therefore, could not stand.

The dissent

The majority's shocking break with precedent spawned a dissent. The dissenting judge's astute analysis raised compelling questions. The dissent exposes the disparity between the underlying facts and those of the central case it relied on, *Mid-Town Petroleum v. Gowen*.

The majority's perfunctory analysis of *Mid-Town Petroleum* belied the nuances of the case. In *Mid-Town*, the employee faced the conundrum of signing a restrictive covenant or losing his job. He opted for the latter in two separate occasions. This obstinacy goaded the employer into dangling the carrot of promotion before him. Only then did he capitulate. However, this enticement proved transient and he was subsequently stripped of his title. Upon this turn of events, the employee quit. Based on this sharp factual distinction, the dissent deftly disposed of the majority's central plank. But beyond legal nuances and factual subtleties, decisions have consequences and the dissent waived that allowing an employee to "void the consideration for any restrictive covenant by simply quitting for any reason renders all restrictive employment covenants illusory in this state."

After chastising the majority for its misconstruction of Illinois law, the dissent concluded the covenant was reasonable. The dissent further asserted the record contained support for Brown & Brown's claims. Citing evidence that the former employee made sales presentations to a Brown & Brown client, the dissent suggested the employer's grievance had merit and deserved greater scrutiny.

The Analysis

While there is much to criticize in *Brown & Brown v. Mudran*, the dissent captures the essence of the majority's failings. In short, the opinion rests on a frail foundation, namely, the misapplication of *Mid-Town Petroleum*. Furthermore, the failure of the Court to grasp the practical implications of its holding is particularly troubling. The dissent's assessment that restructured covenants are "voidable at the whim of the employee" is not exaggeration.

An appeal to the Illinois Supreme Court is likely. However, the Illinois Supreme Court has discretion in whether it will hear the case. Thus, while the viability of *Brown & Brown* is speculative, it remains good law. Entities doing business in Illinois should be aware of this case and seek to circumvent its cumbersome contours.

The conclusion

Brown & Brown misreads precedent and fails to recognize the realities of the business world. While the decision is relegated to the Third District, there is now established law for other Illinois courts who find *Brown & Brown* persuasive. While other courts would likely reject the Third District's approach, employers should be on guard for any fallout from *Brown & Brown*.

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