

Recent Illinois Federal Court Rulings Cloud Fifield's Bright-Line Test

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Two recent rulings in the Northern District of Illinois, Eastern Division and the Central District of Illinois, Peoria Division, have further blurred the “bright line” two-year consideration rule established by the Illinois First District Court of Appeals in *Fifield v. Premier Dealer Services*, 2013 IL App (1st) 120327 ([cert. denied](#)).

In *Bankers Life v. Miller*, No. 14CV3165, 2015 WL 515965 (N.D. Ill. Feb. 6, 2015), U.S. District Court Judge Manish Shah rejected Fifield's holding that (absent material consideration) two years of continued employment is “required” before enforcing a post-employment restrictive covenant.

A week after the *Bankers Life* ruling, in *Cumulus Radio Corp v. Olson*, No. 15cv1067, 2015 WL 643345 (C.D. Ill. Feb. 13, 2015), U.S. District Court Judge Billy McDade similarly rejected the position that *Fifield* sets a two-year bright-line rule and held that a “totality of the circumstances” approach must be used to assess whether a post-employment restrictive covenant is supported by adequate consideration.

While *Fifield* remains binding authority in the First District and is gaining support in other Illinois Appellate Districts, three federal court judges in Illinois have now rejected its bright-line standard.

Rationale for Rejecting *Fifield*

The defendants in *Bankers Life* were all former employees of the plaintiff-company. They each signed contracts during their employment containing restrictive covenants. After the defendants left Bankers Life to work for a competitor, they allegedly solicited customers and other Bankers Life employees to join them. They also allegedly took confidential information. Bankers Life filed suit, and the defendants moved to dismiss

on the grounds that six of the seven defendants received inadequate consideration for their restrictive covenants.

Evaluating the adequacy of the consideration supporting the restrictive covenants, Judge Shah held that Illinois case law suggests “two years of continued employment are sufficient to support a restrictive covenant,” but Illinois case law does not “hold that two years are necessary.” Judge Shah distinguished the cases in which the Illinois Appellate Court deemed the length of employment insufficient consideration for a restrictive covenant by noting that these cases involved short periods of employment. *Fifield*, for example, involved an employee who voluntarily resigned after three months. This, concluded Judge Shah, precludes the cases from being used to support the argument that Illinois applies a bright-line rule that two years of employment is required.

Judge Shah went on to note that the Illinois Supreme Court specifically cautioned against creating bright line rules in its landmark ruling in *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871 (2011). Based on this precedent, he reasoned that “the Illinois Supreme Court would similarly reject a rigid approach to determining whether a restrictive covenant was supported by adequate consideration; it would not adopt a bright-line rule requiring continued employment for at least two years in all cases.”

The defendant in *Cumulus Radio* was an account executive who, when he was hired, signed an employment agreement that included a number of post-employment restrictions. Twenty-one months after he was hired, the employee voluntarily ended his employment and went to work for a competing radio station. After the (former) employee began soliciting customers of Cumulus Radio, the company filed suit and moved for a temporary restraining order against the defendant.

As Judge Shah had done, Judge McDade rejected the defendant’s argument that the restrictive covenants in the employment agreement were unenforceable because they were not supported by adequate consideration. Judge McDade held:

the Court does not believe that the Illinois Supreme Court would adopt the bright-line test announced in *Fifield*. Such a rule is overprotective of employees, and risks making post-employment restrictive covenants illusory for employers subject completely to the whimsy of the employee as to the length of his employment. A case-by-case, fact-specific determination, on the other hand, can ensure that employees and employers alike are protected from the risks inherent in basing consideration on something as potentially fleeting as at-will employment.

Federal Court Split May Invite Forum Shopping

Judge Shah’s and Judge McDade’s rejection of *Fifield*’s two year mandate follows Northern District Chief Judge Ruben Castillo’s similar refusal to follow *Fifield*’s two-year rule, in *Montel Aetnastak, Inc. v. Miessen*, No. 13C3801, 2014 WL 702322 (N.D. Ill. Jan. 28, 2014). In that case, Judge Castillo found that it was not appropriate to “mechanically apply a bright line test” and instead favored a fact-specific approach that

focused on whether the plaintiff had been employed for a “substantial period.” But these decisions stand in stark contrast to the decision by former Chief Judge Holderman in a May 2014 case, holding that the *Fifield* two-year rule was the law of Illinois.

Employers Should Stay the Course

The widening split on *Fifield* in Illinois’ federal courts creates greater opportunities for parties to have restrictive covenants enforced that are not compliant with *Fifield*. But the fact there is a split makes such an outcome far from certain. Employers in Illinois should still be careful to ensure they provide some form of material consideration (beyond employment) to employees when asking them to sign agreements containing restrictive covenants.

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