April 2015 Vol. 60, No. 10

ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

The concept of "inherent power" does not divest a circuit court of its jurisdiction

By George S. Bellas and Misty J. Cygan, Bellas & Wachgowski, Chicago

In *LVNV Funding, LLC v. Matthew Trice*, 2015 IL 116129, the Illinois Supreme Court held that LVNV's failure to register as a collection agency under the Collection Agency Act (the "Act") did not deprive the circuit court of jurisdiction.

Matthew Trice failed to pay his credit card debt for plumbing work he had charged. LVNV Funding subsequently purchased the interest in Trice's credit card debt. LVNV then hired an attorney in Illinois to file a debt collection action against Trice. A judgment was entered in favor of LVVN prior to Trice, who was appearing *pro se*, obtaining an attorney.

After obtaining an attorney, Trice filed a section 2-1401 (735 ILCS 5/2-1401) petition asking for the final judgment to be vacated. The petition alleged as grounds that LVNV was a debt collection agency within the meaning of the Act and that it had failed to register as such, which is a requirement under the Act. Trice submitted that the judgment entered against him was therefore "void" because the circuit court lacked jurisdic-

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Non-compete clauses and *Fitfield's* two-year bright line rule: Illinois Supreme Court still silent while district courts engage in battle over adequacy of consideration

By Jessica Fangman and The Honorable Russell W. Hartigan

Non-compete agreements are no longer limited to corporations, innovative technology firms, and businesses engaged in sales transactions.[1] Now, more than ever, employers in service industries—from fast food sandwich shops to yoga studios and event planning businesses—require its employees to sign employment contracts with restrictive covenants.[2]

Critics of restrictive covenants argue that non-compete clauses disincentivize "innovation and economic development," while proponents contend that non-compete agreements "help spur the state's economy and competitiveness by encouraging companies to invest heavily in their workers."[3]

The current restrictive covenant debate in Illinois centers around the Illinois Appellate Court's decision in *Fifield v. Premier Dealer Services Inc.*, in which the court held that at least two years of continued employment was sufficient consideration to render the non-compete clause enforceable.[4] Illinois courts, both at the trial and

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tion over the parties and subject matter.

The circuit court denied Trice's section 2-1401 petition and ruled that the judgment was not void even if LVNV had failed to register as a debt collector. The appellate court reversed, holding that the circuit court "lacks authority to enter or enforce a judgment in LVNV's favor on a complaint LVNV filed in violation of the Act." The appellate court's ruling rendered any judgment entered void.

Upon remand, the circuit court declared portion of the Act unconstitutional so as not to render the appellate court's holding "that a complaint filed by an unregistered collection agency is … a nullity, and any judgment entered on such a complaint is void," null.

The appellate court's ruling relied on the theory of "inherent power," which refers to the circuit court losing its jurisdictional power over a matter if a certain statutory requirement or prerequisite hasn't been met – in this case that requirement would be the failure to obtain a debt collection license.

The appellate court was misguided in its application of the concept of "inherent power" to the circuit courts because the concept had already been rejected in *Steinbrecher v. Steinbrecher*, 197 Ill.2d 514 (2001).

Steinbrecher held that the failure to comply with a statutory requirement cannot strip a circuit court of its jurisdiction because a circuit court's jurisdiction is derived from the constitution and not from a statute, as is the case with administrative agencies or courts of limited jurisdiction.

Therefore, the idea of "inherent power" is only applicable to administrative agencies or courts of limited jurisdiction. The Supreme Court later affirmed the holding in *Steinbrecher* in *Belleville Toyota, Inc. v. Toyota Motor Sales*, 199 Ill.2d 325 (2002).

Based on the holdings of *Steinbrecher* and *Belleville Toyota*, the Supreme Court in *LVNV* concluded that the entry of judgment in favor of LVNV was not void because the circuit court possessed jurisdiction over the parties and the subject matter. The failure of LVNV to register as a debt collector under the Act did not divest the circuit court of jurisdiction, so that the trial court's original denial of Trice's section 2-1401 petition was correct. ■

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Published at least four times per year.

Annual subscription rate for ISBA members: $25.

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Non-compete clauses and *Fitfield's* two-year bright line rule: Illinois Supreme Court still silent while district courts engage in battle over adequacy of consideration

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appellate levels, are split as to whether *Fifield* created a bright line rule or whether the court merely found two years employment was sufficient consideration to render non-compete agreements enforceable.[5]

Restrictive Covenants Must Be Reasonable and Supported By Adequate Consideration

Restrictive covenants must protect legitimate business interests and "employ reasonable means to protect that interest."[6] Whether a restrictive covenant is enforceable depends on whether, under the facts and circumstances of the case, "the restraints imposed thereby are reasonably necessary for the protection of the employer's business from unfair or improper competition."[7]

A restrictive covenant is reasonable when the "covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor; and (3) is not injurious to the public."[8] Generally, non-compete restrictive covenants must "contain a reasonable geographic limitation" and must also "be limited in time."[9]

In addition to these requirements, "for a restrictive covenant … to be enforceable, the employer must give the employee something of value in exchange for the employee's promise not to compete."[10]

Before *Fifield*, the Illinois Appellate Court in *Woodfield Group, Inc. v. DeLisle* held that "continued employment for a substantial period will support a non-compete agreement."[11] Thus, the issue facing employers is whether their employees must work for the employer for two consecutive years, or whether the employees must work for a "substantial period," an analysis that lends itself to a totality of the circumstances approach rather than a bright line rule.

The Northern District Court Rejects *Fifield's* Bright Line Rule

The most recent court to apply *Fifield* was the Northern District of Illinois in *Bankers Life and Casualty Co. v. Miller* ("*Bankers Life*").[12] In *Bankers Life*, the court rejected the defendants' argument that the Illinois Appellate Court's holding in *Fifield* required two years of employment to legally enforce the restrictive covenant.[13] In denying the defendants' motion to dismiss, the court reasoned that the Illinois Appellate Court cases cited by the defendant held that two years was not *necessary*, but was rather *sufficient* consideration.[14]

In *Bankers Life*, three defendants were managers or supervisors and four defendants worked as sales agents for Bankers Life, an insurance agency.[15] Bankers Life employees are given access to detailed information about customers and Bankers Life "invests substantial resources to cultivate customer relationships."[16] All of the defendants signed employment contracts with Bankers Life, which contained a clause restricting the employee's right to work for a competitor.[17] In one day, nine employees, including all of the defendants, resigned and went to work for a competitor.[18]

Bankers Life filed suit, alleging breach of contract, misappropriation of trade secrets, and breach of fiduciary duties.[19] Each defendant signed an employment contract that contained a restrictive covenant, which "limit[ed] defendants' rights to compete with Bankers Life."[20] Certain provisions of the non-compete clause "limited defendants' rights to: (1) use Bankers Life's confidential information; (2) solicit Bankers Life's customers; or (3) solicit Bankers Life's employees."[21]

In its motion to dismiss defendants argued "six of the seven defendants receive inadequate consideration for signing their restrictive covenants, and thus the covenants are invalid."[22]

In analyzing the sufficiency of consideration, the court began by noting that the Illinois Supreme Court has yet to rule on whether *Fifield* created a bright line rule requiring two years of employment to enforce a non-compete clause.[23] In reaching its decision, the court then noted that two northern district courts have reached opposite conclusions in deciding whether the Illinois Supreme Court would enforce a bright line rule.[24]

In *Instant Technology, LLC v. DeFazio*, the district court adopted a bright line rule based on *Fifield* and found that the restrictive covenants did not apply to three of the defendants because Instant Technology employed them for less than two years.[25]

In contrast, the district court in *Montel Aetnastak, Inc. v. Miessen*, rejected the bright line rule, and instead found that "[i]n Illinois, continued employment for a "substantial period" is sufficient consideration to support an employment agreement.[26] The *Montel Aetnastak* court found it was not appropriate to apply the bright line rule "given the contradictory holdings of the lower Illinois courts and the lack of a clear direction from the Illinois Supreme Court … ."[27]

In declining to apply the bright line rule, the *Bankers Life* court also found that the most recent Illinois Supreme Court decision on restrictive covenants, *Reliable Fire Equip. Co. v. Arredondo*, cautioned lower courts and litigants to avoid bright line rules in holding that "a restrictive covenant will be upheld if it contains a reasonable restraint and the agreement is supported by consideration."[28] In *Reliable Fire Equip. Co.*, the court held that a totality of the circumstances analysis is appropriate when analyzing whether the non-compete clause is enforceable.[29]

The *Bankers Life* court concluded that the Illinois Supreme Court would "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."[30]

What Should an Employer Do?

Employers are cautioned to "review their restrictive covenants to provide for additional consideration, where necessary, and make other strategic decisions that enhance their chances of deterring wrongful conduct by departing employees and enforcing restrictive covenants if necessary."[31]

Employers can rely on *Bankers Life* to support the argument that the trial court should apply a totality of the circumstances analysis, instead of a bright line rule, when addressing whether the employer provided adequate consideration.[32]

Until the Illinois Supreme Court decides the issue or the Seventh Circuit provides additional guidance—*Instant Technology* is

pending in the Seventh Circuit Court of appeals[33]—employers should be sure to err on the side of more employee work time to ensure their covenants are enforceable.

As restrictive covenants become more popular among service professions, employers should ensure that their employees understand the meaning of including a non-compete clause in an employment contract. ■

Ms. Fangman is a third year student at Loyola University Chicago School of Law. Judge Hartigan sits on the Cook County Circuit Court.

1. Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. Times, Jun. 8, 2014, http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html.
2. *Id.*
3. *Id.*
4. *Fifield v. Premier Dealer Serv. Inc.*, 2013 IL App (1st) 120327, ¶ 14.
5. *Bankers Life and Cas. Co., v. Miller et. al.*, No. 14-CV-3165, 2015 WL 515965, at *3-4.
6. Gene A. Petersen, *Understanding Illinois Non-competition Agreements and Restrictive Covenants*, 89 Ill. B. J. 472, 475 (2001).
7. *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 75 (1st Dist. 1992).
8. *Reliable Fire Equip. Co. v. Arredondo*, 2011 WL 111871, ¶ 18.
9. Petersen, *supra* note 6 at 476.
10. Bar Jouranl citing *Agrimerica v. Mathes*, 199 Ill. App. 3d 435,441-42 (1st Dist. 1990).
11. *Woodfield Group, Inc. v. DeLisle*, 295 Ill. App. 3d 935, 942 (1st Dist. 1998).
12. *Bankers Life*, 2015 WL 515965.
13. *Id.* at *
14. *Id.* at *3-*4 (citing *Fifield*, 2013 IL App (1st) 120327 (finding three months was insufficient consideration to render non-compete clause enforceable); *Diederich Ins. Agency v. Smith*, 2011 IL App (5th) 1000048 (same); *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724 (3d Dist. 2008) (finding seven months was insufficient consideration to render non-compete clause enforceable); *Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill. App. 3d 63 (1st Dist. 1993) (same)).
15. *Id.* at *1.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at *1-*2.
20. *Id.* at *1.
21. *Id.* at *3.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Instant Technology, LLC v. DeFazio*, 40 F.Supp.2d 989, 1010-11 (N.D. Ill. 2014).
26. *Montel Aetnastak, Inc. v. Miessen*, 998 F.Supp.2d 694, 715 (N.D. Ill. 2014).
27. *Id.* at 716. (cite to cases w/ parentheticals with contrary holdings)
28. *Reliable Fire Equip. Co. v. Arredondo*, 358
29. Id. at ¶ 42-43.
30. Bankers Life at 10.
31. Daniel A. Kaufman, Brian P. Paul, *Shedding Some Light on Consideration Needed to Enforce Restrictive Covenants in Illinois*, The National Law Review, Mar. 3, 2015, http://www.natlawreview.com/article/shedding-some-light-consideration-needed-to-enforce-restrictive-covenants-illinois.
32. *Id.*
33. Rufino Gaytan, Deobrah Rehorst, *Another Court Rejects Notion that Restrictive Covenant Agreements Must be Supported by At Least Two Years of At-Will Employment*, The National Law Review, Feb. 13, 2015, http://www.natlawreview.com/article/another-court-rejects-notion-restrictive-covenant-agreements-must-be-supported-least.

Appellate court applies limitations statute to uphold dismissal of wrongful death action against physicians

By Robert T. Park, Califf & Harper, P.C., Moline

In *Moon v. Rhode,* over three years after his mother's death, plaintiff brought a wrongful death and survival action for medical malpractice against a radiologist and her practice group. The trial court granted a Section 2-619(a)(5)[1] motion and dismissed the action as untimely. Reviewing the dismissal *de novo*, the Third District of the Appellate Court affirmed.[2]

Plaintiff argued that the action should not be dismissed because the discovery rule in 735 ILCS 5/13-212(a) states a suit against a physician "arising out of patient care" may be brought no more than "2 years after the date on which the claimant knew or, through the use of reasonable diligence should have known … of the injury or death for which damages are sought in the action …" Plaintiff argued that he did not know of the negligence that led to the suit until he received expert reports implicating the defendants as culpable in his mother's death.

The court rejected this argument, saying "the required knowledge is of the death or injury, not of the negligent conduct."[3] According to the court, the statute's language "required the plaintiff to file a wrongful death claim within two years of the date on which plaintiff knew of the death." Plaintiff had two years from when he knew of his mother's death to file suit but his action was not filed within that period.

The court acknowledged that "some appellate courts have applied the discovery rule to wrongful death actions where circumstances surrounding the death permitted such an extension…"[4] The court cited *Praznik v. Sport Aero, Inc.*,[5] involving an airplane crash where the wreckage was not found for over two and a half years after the accident.[6] The court stated the statute, § 13-212, "codifies the extension set forth in *Praznik*, at least in suits against healthcare providers."

The court found that the statute "provides that the clock starts ticking upon knowledge or notice of the injury or death, not upon notice of a potential defendant's negligent conduct."[7]

The court noted that the Wrongful Death Act[8] is a statute in derogation of the common law that should be strictly construed.[9] The opinion, citing *Wyness v. Armstrong World Industries, Inc.*,[10] noted that the Supreme Court has had 160 years since the passage of the Act to apply the discovery rule to it but has never done so.[11]

The court noted that the Survival Act[12] does not create a new cause of action but simply allows a personal representative to bring a claim that the decedent had at the time of her death. This Act, also in derogation of the common law, should be strictly construed. The Supreme Court has never applied the discovery rule to extend the statute of limitations of a survival action, according to the court.[13]

Even if the discovery rule were applied, the court would find the action untimely. Plaintiff obtained the pertinent medical records eight months after his mother's death but waited another 14 months to submit them for review. He also did not send X-rays for review until almost four years after death. These facts showed plaintiff "filed his complaint long after he became possessed with sufficient information, which put him on inquiry to determine whether actionable conduct was involved."[14]

Justice Lytton dissented. While admitting the Supreme Court had never ruled directly on the issue, he cited appellate and federal cases that had applied the discovery rule to medical malpractice wrongful death cases.[15]

He also argued that the Supreme Court had applied the discovery rule to a survival action in *Advincula v. United Blood Services*.[16] He further contended that the majority opinion did not correctly construe the statutory language of 735 ILCS 5/13-212(a), which he said "must be applied to wrongful death and survival actions, where the damages caused by the medical professional resulted in the death of the decedent."[17]

Finally, Justice Lytton said that plaintiff did not have the requisite knowledge to file suit until he "became aware that any defendant committed medical negligence." When plaintiff had sufficient knowledge to start the limitations period is a disputed question of fact to be decided at trial.[18] He would therefore have reversed the dismissal of plaintiff's complaint.

1. 735 ILCS 5/2-619(a)(5) allows a defendant to move to dismiss a complaint on the grounds that "the action was not commenced within the time limited by law."
2. 2015 IL App (3d) 130613 (Apr. 10, 2015).
3. *Id.*, ¶ 18.
4. *Id.,* ¶ 21.
5. 42 Ill.App.3d 330 (1976).
6. *Moon v. Rhode, supra,* ¶ 21.
7. *Id.* at ¶ 22.
8. 740 ILCS 180/0.01 *et seq.*
9. *Moon v. Rhode, supra,* ¶ 23.
10. 131 Ill. 2d 403, 409 (1989).
11. *Moon v. Rhode, supra,* ¶ 24.
12. 755 ILCS 5/27-6.
13. *Moon v. Rhode, supra,* ¶ 26.
14. *Id.,* ¶ 27.
15. *Id.*, ¶ 38.
16. 176 Ill. 2d 1 (1996), cited at *Moon v. Rhode, supra,* ¶ 42 (Justice Lytton dissenting).
17. *Moon v. Rhode, supra,* ¶ 49 (Justice Lytton dissenting).
18. *Id.*, ¶ 57.

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Trial Briefs
Illinois Bar Center
Springfield, Illinois 62701-1779
April 2015
Vol. 60 No. 10

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