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)

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I. INTRODUCTION

For over a hundred years, in nearly all jurisdictions, the courts have held that at-will employment relationships may be terminated by either party, at any time, for any reason, with or without notice.[1] Accordingly, promises made by either the employee or employer to continue an at-will employment, are inherently illusory.[2] However, an arguably necessary deviation from strict obedience to the principles of the at-will relationship has occurred as a response to increased employee mobility in the last fifty years. The typical corporate employee of the 1950s, who worked for one company his entire life, is now extinct[3] and has been replaced with a nomadic employee who seamlessly shifts from competitor to competitor.[4] Consequently, employers have used covenants not to compete in employment contracts to protect their investment in employee training, trade secrets, customer contacts and other information deemed necessary to the particular employer.[5]

Unfortunately, state case law has been highly unpredictable in its treatment of covenants not to compete[6] and Illinois is no exception. The Third District Appellate Court of Illinois recently decided *Brown and Brown, Inc. v. Mudron*, holding that the post-employment covenant not to compete at issue

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1. Richard Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 707 (2006).
2. *Id.* at 714.
3. Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1736–37 (2004).
4. *Id.* at 1737–38.
5. Brian Kingsley Krumm, *Covenants Not To Compete: Time for Legislative and Judicial Reform in Tennessee*, 35 U. MEM. L. REV. 447, 447–48 (2005).
6. Mark A. Glick et al., *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 357–58 (2002).

failed for lack of adequate consideration.[7] In *Brown*, the court stated that since the employee only continued working for the employer for seven months after signing the covenant not to compete, there was not adequate consideration to support the covenant, regardless of why the at-will relationship was terminated.[8] The court found that the primary focus, in determining the validity of a covenant not to compete, should be on the length of the continued employment after the covenant not to compete was signed, and because the employee in *Brown* had quit after only seven months of post-covenant employment, the court found that this failed to meet the two-year minimum for post-covenant employment.[9] In reaching this result, the *Brown* court relied heavily on the First District's decision in *Mid-Town Petroleum, Inc. v. Gowen*,[10] which the *Brown* court interpreted as mandating that seven months could not be adequate consideration for a post-employment covenant not to compete.[11]

Determining the enforceability of a covenant not to compete is typically a very fact-based inquiry.[12] The *Brown* court, however, seemed to abandon this approach in favor of a hard-and-fast rule, the implications of which could be devastating for employers. The *Brown* court permitted an employee to void the consideration for a post-employment covenant not to compete by quitting shortly after signing the covenant not to compete. Under the *Brown* court's holding, the covenant is voidable by the employee, as long as one quits within two years after signing the covenant. This renders restrictive covenants in employment contracts illusory where the employee promises not to compete after having began his employment with the employer, because the employee is not bound by the agreement, unless the employee chooses to continue the employment for the next two years.

Section II of this Note will examine post-employment restrictive covenants and particularly the adequacy of consideration determination under Illinois contract law, as well as how other jurisdictions have dealt with this developing aspect of contract law. Section III will address the majority and dissenting opinions in *Brown*. Section IV will analyze: (1) whether the *Brown* court appropriately applied prior case law, (2) the competing interests of the employee and the employer, (3) alternative approaches to balancing the interests of the employee and employer, and (4) what approach Illinois courts

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7. Brown and Brown, Inc. v. Mudron, 887 N.E.2d 437 (Ill. App. Ct. 2008).
8. *Id.* at 441.
9. *Id.*
10. Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221 (Ill. App. Ct. 1993).
11. *Brown*, 887 N.E.2d at 441.
12. Glick, *supra* note 6, at 358.

should adopt to most effectively balance the competing interests of the employer and the employee. Section V will conclude that post-employment restrictive covenants are an essential tool for employers in a high-tech, knowledge-based economy,[13] and that the *Brown* court has wrongfully altered the availability of that tool for Illinois employers by permitting the employee to void the covenant by quitting.

II. BACKGROUND

The traditional rule concerning contracts in Illinois, as well as other jurisdictions, is that the law does not inquire into the adequacy of the consideration to support a promise; the inquiry is whether consideration exists.[14] In Illinois, however, the traditional rule is not followed in cases addressing covenants not to compete.[15] In these cases, Illinois requires that in order for continued employment to constitute "adequate" consideration, it must be for a substantial period of time.[16] This section will address Illinois' approach to the adequacy of consideration, as well as discuss how other jurisdictions have approached the dilemma.

A. Adequacy of Consideration Under Illinois Law

Illinois courts have supported the rule that continued at-will employment beyond the threat of discharge is sufficient consideration for a restrictive covenant.[17] Furthermore, the continued employment beyond the threat of discharge must be for a substantial period of time.[18] Illinois has chosen to depart from the traditional refusal to inquire into the adequacy of consideration due to a recognition of the illusory nature of restrictive covenants for at-will employees.[19] If any promise of continued at-will employment was deemed "adequate" consideration, an employer could threaten an existing employee with discharge if the employee did not sign the covenant, thereby forcing the employee to sign the covenant. The employer could then immediately terminate the employee, thereby obtaining the benefits of the restrictive covenant. Conversely, by requiring the post-covenant employment to last a substantial period of time, the court avoids the need to investigate the

13. *Id.* at 357.
14. Curtis 1000, Inc. v. Suess, 24 F.3d 941, 945 (7th Cir. 1994) (applying Illinois law).
15. *Id.*
16. *Id.* at 946.
17. McRand, Inc. v. van Beelen, 486 N.E.2d 1306, 1313 (Ill. App. Ct. 1985).
18. *Curtis*, 24 F.3d at 946.
19. *Id.*

employer's intentions when requiring the employee to sign the restrictive covenant.[20] Without the substantial period of continued employment requirement, the court would have to determine whether the employer really intended to continue the employee's employment, or whether the employer planned on immediately firing the employee all along and using the covenant against the former employee.

In *Curtis 1000, Inc. v. Suess*, the court stated that the substantial period requirement has the effect of creating an irrebuttable presumption that if the employee is fired shortly after signing the covenant, the consideration for the covenant is illusory.[21] The court further stated that the expectation of continued employment was something of value and was not deemed worthless just because it was uncertain at the time the covenant was enacted. Rather, the court ensured the continued employment was valuable by requiring it to be substantial.[22] In *Curtis*, the court found that eight years of continued employment was adequate consideration to support the restrictive covenant.[23] The *Curtis* case is relevant in terms of restrictive covenants because it sets out the significant reasons why Illinois courts have required that continued employment last for a "substantial period," as opposed to judging the validity of the covenant at the instant there is an agreement.

In *Curtis*, the court had no trouble concluding that eight years of subsequent employment constituted a substantial period of time. In subsequent cases, however, Illinois courts have struggled with determining what is "substantial" enough to satisfy the requirement of "adequate" consideration. In *Lawrence & Allen v. Cambridge Human Resource Group*, the court determined that two years of continued employment served as adequate consideration to support the restrictive covenant.[24] In *McRand, Inc. v. van Beelen*, the court also found two years of continued employment to be adequate.[25] In these cases, the courts did not mention other factors regarding the adequacy of consideration, although they did not rule out the possibility of other relevant factors. In *Mid-Town Petroleum, Inc. v. Gowen*, the First District Appellate Court of Illinois analyzed not only the length of the continued employment, but also other factors relevant to the adequacy of consideration.[26]

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20. *Id.*
21. *Id.*
22. *Id.* at 947.
23. *Id.*
24. Lawrence & Allen v. Cambridge Human Res. Group, 685 N.E.2d 434, 441 (Ill. App. Ct. 1997).
25. McRand, Inc. v. van Beelen, 486 N.E.2d 1306, 1314 (Ill. App. Ct. 1985).
26. Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221 (Ill. App. Ct. 1993).

B. Other Factors Impacting Adequate Consideration

In *Mid-Town*, the employee, Gowen, worked as a sales representative for Mid-Town for 14 years prior to signing a restrictive covenant, wherein he agreed to refrain from soliciting business from customers of Mid-Town, a petroleum seller and distributor, for eighteen months after leaving the company.[27] Gowen refused to sign the restrictive covenant twice, despite being told that he would be discharged if he did not sign the covenant.[28] On August 21, 1991, Gowen received a promotion to sales manager, a new position at Mid-Town, which prompted him to sign the restrictive covenant the very same day.[29] The new position of sales manager provided that Gowen would report directly to Mid-Town's CEO.[30] However, seven months after receiving the promotion and signing the restrictive covenant, Gowen was informed that he would no longer be reporting to the CEO and Gowen resigned the following day.[31] Gowen then immediately began soliciting business from customers he had served at Mid-Town.[32] Accordingly, Mid-Town sought a preliminary injunction to prevent Gowen from soliciting business from Mid-Town's customers.[33]

The court in *Mid-Town* first sought to determine whether Gowen would have signed the covenant had he not received the promotion to sales manager.[34] The court determined that since Gowen refused to sign the covenant twice before being offered the promotion, he would not have signed the covenant without the coinciding promotion.[35] The court then inquired as to whether his seven months of continued employment as sales manager would constitute adequate consideration in comparison to the continued employment authorized by other Illinois courts.[36] The court concluded that seven months is comparatively insubstantial to the two, four or eight years previously held to be substantial in Illinois.[37] Ultimately, the court concluded that there was not adequate consideration to support the restrictive covenant, because Gowen's promotion lasted only seven months and the evidence indicated he

27. *Id.* at 1223.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1226.
35. *Id.* at 1227.
36. *Id.* at 1226–27.
37. *Id.*

would not have signed the covenant without the coinciding promotion.[38] The court said that the proposed consideration of a promotion failed when Gowen was demoted from sales manager, and not solely because his continued employment lasted for seven months. Essentially, the court looked at why the proposed consideration failed (because Gowen was demoted), as opposed to simply observing that it failed (continued employment lasted less than two years).

The *Mid-Town* court also drew another distinction between its case and others decided by Illinois courts. In response to Mid-Town's contention that any consideration is sufficient to support a contract, in this case the seven months of continued employment, the court responded: "while a peppercorn can be considered sufficient consideration to support a contract in a court of law, a peppercorn may be insufficient consideration in a court of equity to support a prayer for the issuance of a preliminary injunction."[39] Seemingly, the court sought to distinguish how courts of equity and courts of law address the adequacy of consideration dilemma regarding restrictive covenants.

Following *Mid-Town*, Illinois courts have often stated that *Mid-Town* took the position that seven months of continued employment does not rise to the level of the substantial period necessary for adequate consideration.[40] *Mid-Town*, however, also seemed to recognize that other factors besides the length of the continued employment were relevant in determining the adequacy of the consideration, such as the fact that the employee twice refused to sign the restrictive covenant and only signed it after he was given a promotion. In *Woodfield Group, Inc. v. DeLisle*,[41] the court seemed to adopt this approach and recognized another factor to consider when determining the adequacy of consideration. Although the adequacy of consideration was not at issue in the restrictive covenant before the *Woodfield* court, it stated the following:

> We do not believe case law limits the courts' review to a numerical formula for determining what constitutes substantial continued employment. Factors other than the time period of the continued employment, such as whether the employee or the employer terminated employment, may need to be considered to properly review the issue of consideration.[42]

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38. *Id.* at 1227.
39. *Id.*
40. Brown and Brown, Inc. v. Mudron, 887 N.E.2d 437, 441 (Ill. App. Ct. 2008); Curtis 1000, Inc. v. Suess, 24 F.3d 941, 946 (7th Cir. 1994); Woodfield Group, Inc. v. DeLisle, 693 N.E.2d 464, 469 (Ill. App. Ct. 1998); Abel v. Fox, 654 N.E.2d 591, 594 (Ill. App. Ct. 1995).
41. Woodfield Group, Inc. v. DeLisle, 693 N.E.2d 464, 469 (Ill. App. Ct. 1998).
42. *Id.* at 469 (dictum).

The *Woodfield* court acknowledged that the requirement of substantial continued employment had never been held to require a fixed time period. Doing so might alter the at-will relationship the parties have agreed upon. *Woodfield* and *Mid-Town* acknowledge the principle that the enforceability of a restrictive covenant is a very fact-based inquiry,[43] which requires the court to address all of the factors relevant in determining the adequacy of consideration. Furthermore, the *Woodfield* court recognized the distinction between whether the employee or employer terminated the relationship, a factor that is particularly relevant for this note.

C. The Quit/Fired Distinction in Other States

State law treatment of post-employment restrictive covenants is extraordinarily varied.[44] Some states have chosen to address the topic legislatively, while others have relied entirely on the common law.[45] Examination of the intricacies of each jurisdiction's law is not necessary for the purposes of this note. In analyzing the *Brown* decision, however, it is helpful to contrast it with how other jurisdictions have treated the relevance of whether the employee terminated the employment or was fired by the employer.

Central Adjustment Bureau, Inc. v. Ingram[46] is a pivotal case regarding the adequacy of consideration in post-employment restrictive covenants in Tennessee. The *Ingram* case marked the Tennessee Supreme Court's departure from prior case law which had held that a promise of continued at-will employment could not serve as adequate consideration because neither party was obligated to remain in the relationship.[47] Rather, the *Ingram* court stated that continued at-will employment could serve as consideration if there was actual performance of the promise through continued employment.[48]

In this regard, Tennessee and Illinois treat post-employment restrictive covenants similarly. The *Ingram* court, however, further stated that the sufficiency of performance depends on the facts of each case.[49] An important factor in the court's determination is the circumstances under which an employee leaves his employment.[50] If the employee is discharged arbitrarily

43. Glick, *supra* note 6, at 358.
44. Krumm, *supra* note 5, at 468.
45. *Id.*
46. Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28 (Tenn. 1984).
47. Krumm, *supra* note 5, at 458.
48. *Ingram*, 678 S.W.2d at 34.
49. *Id.* at 35.
50. *Id.*

or in bad faith, it weighs in favor of invalidating the covenant, whereas if the employee voluntarily quits, it weighs in favor of enforcing the covenant.[51] In fact, the Tennessee Supreme Court found no evidence the employer had acted in bad faith and further found that the employees left voluntarily. The court, therefore, enforced the covenant.[52]

South Dakota has also given considerable weight to the circumstances under which the employee leaves the at-will employment when determining the enforceability of post-employment restrictive covenants. In *Central Monitoring Service, Inc. v. Zakinski*, the Supreme Court of South Dakota addressed the distinction it has made between covenants regarding employees that quit, as opposed to those who have been fired.[53] Although restrictive covenants in South Dakota have primarily been dealt with legislatively,[54] South Dakota courts have still found it necessary to make the quit/fired distinction. In *Zakinski*, the court stated that if an employee quits or is fired for good cause, no further showing of reasonableness is required as long as the covenant comports with the statute.[55] If an employee is fired through no personal fault, however, the court must then investigate the reasonableness of the covenant.[56]

Although South Dakota law is less similar to Illinois than that of Tennessee regarding post-employment restrictive covenants, it is helpful in understanding the need for drawing a distinction between an employee who quits or is fired for good cause, and the employee who is fired through no personal fault. South Dakota and Tennessee have found this distinction extremely useful when determining whether a restrictive covenant contains adequate consideration. Yet, as the exposition of the *Brown* case indicates, Illinois has been unwilling to consider this factor.

III. EXPOSITION OF THE CASE

The central issue presented in *Brown* was whether continued employment for seven months after signing a post-employment non-competition agreement was sufficient consideration to support a restrictive

51. *Id.*
52. *Id.*
53. Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513 (S.D. 1996).
54. *Id.* at 516.
55. *Id.* at 521; S.D. CODIFIED LAWS § 53–9–11 (2008).
56. *Zakinski*, 553 N.W.2d at 521.

covenant.[57] The Third District Appellate Court of Illinois determined that it was insufficient consideration for the restrictive covenant. The court relied on *Mid-Town* in holding that seven months was not a substantial period of continued employment to warrant adequate consideration. This section will address: (A) the facts and procedure of the case, (B) the majority's decision and reasoning, and (C) the dissenting opinion.

A. Facts and Procedure

In 2002, Brown, a corporation that provides insurance services, purchased the John Manner Insurance Agency (JMI) in Joliet, Illinois.[58] As part of the purchase, all of JMI's existing employees were threatened with discharge if they did not sign an employment agreement with Brown.[59] One employee refused to sign the agreement and was, in fact, discharged.[60] The agreement provided that an employee could be terminated at any time, with or without cause, although it did not specifically use the term "at-will."[61] The agreement also provided a post-employment restrictive covenant, which prohibited an employee from soliciting or servicing any of Brown's customers or disclosing confidential information for two years after employment with Brown had concluded.[62]

Gunderson, a customer service representative at JMI for five years, was one of the employees who signed the employment agreement with Brown and continued working at the agency after Brown's purchase.[63] However, seven months after signing the agreement, Gunderson resigned and joined a competing agency.[64]

Subsequently, Brown filed a lawsuit alleging that Gunderson breached the employment agreement by soliciting and servicing Brown's customers, as well as taking and using confidential information in violation of the restrictive covenant.[65] Following extensive discovery, Gunderson moved for summary judgment.[66] In granting Gunderson's motion for summary judgment, the trial

57. Prior to addressing the adequacy of consideration question, the *Brown* court had to address a choice-of-law question, wherein they determined Illinois law applied to the enforcement of the covenant. *See* Brown and Brown, Inc. v. Mudron, 887 N.E.2d 437, 440 (Ill. App. Ct. 2008)
58. *Id.* at 438.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 439.

court found a lack of credible evidence showing that Gunderson solicited Brown's customers or that Gunderson had otherwise violated the restrictive covenant.[67] Brown then appealed to the Third District Appellate Court of Illinois.[68]

B. The Majority's Decision and Reasoning

The majority began its analysis with the proposition that post-employment restrictive covenants are generally held to be enforceable if they are reasonable in both geographic and temporal scope and if the covenant is necessary to protect a legitimate business interest of the employer.[69] The *Brown* court never reached the reasonableness or the legitimate business interest determinations because, prior to analyzing those issues, the court needed to make two findings.[70] First, the court had to find that the covenant was ancillary to either a valid transaction or a valid relationship.[71] Second, the court had to inquire into whether there was adequate consideration to support the covenant.[72] In this case the court only needed to consider the adequacy of consideration because it was dispositive of the issue of the enforceability of the restrictive covenant.[73]

The court began its analysis of adequate consideration by accurately stating that Illinois has departed from the traditional rule that the law does not inquire into the adequacy of consideration, only its existence.[74] The court summarized the reason behind this departure given in *Curtis 1000, Inc. v. Suess,* stating that the departure recognizes that in an at-will employment relationship a promise of continued employment may be an illusory benefit.[75] The court stated that "under Illinois law, continued employment for a substantial period of time beyond the threat of discharge is sufficient consideration to support a restrictive covenant."[76]

The majority then began to reconcile what other Illinois courts have determined to be continued employment for a substantial period of time, stating that "Illinois courts have generally held that two years or more of

67. *Id.*
68. *Id.*
69. *Id.* at 440 (citing Abel v. Fox, 654 N.E.2d 591, 593 (Ill. App. Ct. 1995)).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* (citing Curtis 1000, Inc. v. Suess, 24 F.3d 941, 946 (7th Cir. 1994)).
76. *Id.*

continued employment constitutes adequate consideration."[77] Further, the court found that *Mid-Town* stood for the proposition that seven months of continued employment was not sufficient consideration to support a restrictive covenant.[78] Brown alleged that Gunderson received additional employee benefits as consideration for the restrictive covenant, but the court found no evidence showing what the alleged benefits were or how they differed from those Gunderson was already receiving.[79]

Since Gunderson had continued employment for seven months after signing the restrictive covenant, which was the exact length of continued employment at issue in *Mid-Town*, the court concluded that the employment agreement was not supported by adequate consideration and thus the restrictive covenant was unenforceable against Gunderson.[80] Furthermore, the court stated that under *Mid-Town*, "[t]he fact that Gunderson resigned does not change our analysis."[81] Since the court found the employment agreement lacked consideration, it was unnecessary to evaluate whether any issues of material fact existed regarding Gunderson's conduct in breach of the employment agreement.[82]

C. Dissenting Opinion

Justice Schmidt authored the dissenting opinion and criticized the majority for mischaracterizing the holding in *Mid-Town* and rendering a decision that may have drastic implications for employers.[83] The dissent took particular issue with the majority's characterization of the holding in *Mid-Town* as stating that whether an employee resigns is irrelevant to its determination.[84] The dissent contended that although the employee in *Mid-Town* resigned seven months after entering into a restrictive covenant, which is superficially similar to the case at hand, the two cases are drastically different.[85] In *Mid-Town* the court emphasized that the employee quit because the consideration failed, as opposed to this case, where the consideration failed because Gunderson, the employee, quit.[86] The dissent pointed out that in *Mid-*

77. *Id.*
78. *Id.* at 441 (citing Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221, 1226–27 (Ill. App. Ct. 1993)).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 441–43.
84. *Id.* at 441.
85. *Id.* at 442.
86. *Id.*

Town the court went to great lengths to explain that the employee twice rejected the terms of a proposed agreement that provided for continued employment as consideration and the employee only signed the agreement when a promotion was offered as consideration.[87] In addition, the dissent took issue with the majority's determination that seven months of continued employment can never serve as adequate consideration because this proposition lacked support in *Mid-Town*.[88]

Next, the dissent berated the majority for not considering the potential implications of its ruling.[89] The dissent stated that "[t]o hold, as the majority does here, that an employee can void the consideration for any restrictive covenant by simply quitting for any reason renders all restrictive covenants illusory in this state. They would all be voidable at the whim of the employee."[90]

Lastly, the dissent focused on a final distinction that the *Mid-Town* court made in rendering its decision. The *Mid-Town* court acknowledged that a peppercorn of consideration is sufficient to support consideration in a court of law when one is seeking damages, while a peppercorn may not be sufficient in a court of equity.[91] The dissent reasoned that since *Mid-Town* dealt with equitable relief, more consideration was required in that case than in the present case.[92] The dissent further concluded that it would have found a genuine issue of material fact, had the majority not invalidated the agreement.[93] Thus, the dissent would have reversed the grant of summary judgment and remanded the case.[94]

IV. ANALYSIS

Post-employment restrictive covenants entered into after employment has already begun in at-will employment relationships are plagued with questions of enforceability and public policy that are not as prevalent in other contractual relationships. This has led many jurisdictions, including Illinois, to create an exception to its consideration jurisprudence. Illinois courts now inquire into the adequacy of consideration, as opposed to simply determining whether consideration existed at the time the contract was entered into. Also, Illinois

87. *Id.*
88. *Id.* at 441.
89. *Id.* at 442.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 443.

courts have imposed a requirement of substantial continued employment where an at-will employee signs a post-employment restrictive covenant before the covenant will be enforceable.

Prior to *Brown and Brown, Inc. v. Mudron*, Illinois courts have approached the substantial continued employment requirement on a case-by-case basis, rather than reducing the inquiry to a numerical formula. The *Brown* court altered this case-by-case approach by holding that an employee could invalidate a post-employment restrictive covenant by quitting, because the continued employment only lasted seven months. By reducing the substantial continued employment requirement to a numerical formula, the *Brown* court has inexplicably rendered post-employment restrictive covenants in at-will employment contracts illusory in Illinois.

The *Brown* court reached the wrong result by holding that the post-employment restrictive covenant at issue lacked consideration. This section will begin with a discussion of how the *Brown* court failed to accurately apply prior Illinois case law in reaching its holding. The remainder of this section will address the proper balance of the competing interests of the employer and the employee in restrictive covenants entered into after the employment has already begun. It will also address how other jurisdictions have balanced the competing interests of the employer and the employee, and will go on to state the case for abandonment of the numerical formula of *Brown*, in favor of a fact-intensive approach that takes into account why the employment was terminated.

A. The *Brown* Court's Decision

The enforceability of post-employment restrictive covenants is typically a very fact-based inquiry.[95] In *Brown*, the Third District Appellate Court of Illinois abandoned this fact-based inquiry in favor of a numerical formula. The result is incorrect because it permits an employee to void consideration for a post-employment restrictive covenant by quitting a relatively short time after entering into the restrictive covenant.

1. Brown's *Abandonment of the Fact-Based Inquiry Not Supported by Illinois Law*

The *Brown* court relies primarily on *Mid-Town Petroleum, Inc. v. Gowen*[96] in reaching its conclusion that seven months of continued

95. Glick, *supra* note 6, at 358.
96. Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221 (Ill. App. Ct. 1993).

employment after signing a post-employment restrictive covenant is inadequate consideration.[97] Although the *Brown* court adopts the conclusion of *Mid-Town*, it fails to recognize how the *Mid-Town* court reached that conclusion.

In *Mid-Town*, the court went into great detail explaining why the employee signed the restrictive covenant and ultimately why the employee resigned from the employer.[98] This fact-intensive inquiry resulted in the court determining that the employee would not have signed the restrictive covenant without a coinciding promotion.[99] Furthermore, the employee would not have quit the employment if he were not demoted by the employer.[100] In *Mid-Town*, the court essentially said that given that the employee would not have signed the restrictive covenant without a coinciding promotion and that his promotion lasted seven months before being demoted by the employer, there was not sufficient consideration. Conversely, the *Brown* court interpreted *Mid-Town* to stand for the proposition that seven months is never sufficient consideration to support a post-employment restrictive covenant.[101] This illustrates the difference between a fact-based inquiry (*Mid-Town*) and a numerical formula (*Brown*). Although the *Brown* court claimed to be applying *Mid-Town*, it is clear the court misapplied *Mid-Town* and this error resulted in the *Brown* court incorrectly invalidating the post-employment restrictive covenant at issue.

Although the difference in approaches taken by the *Mid-Town* court and the *Brown* court may be subtle, it was likely determinative in the *Brown* case. If the court in *Brown* had taken a fact-based approach, it likely would have given significant weight to the fact that the employee willingly quit her employment.[102] Rather, the *Brown* court reduced its inquiry to a numerical formula, holding that two years of continued employment is sufficient consideration, but seven months is insufficient consideration.[103] This approach completely ignores the facts of the case and, more importantly, the policy reasons why Illinois courts inquire into the adequacy of consideration to begin with, which will be discussed below.

The approach adopted by the *Brown* court was explicitly warned against in *Woodfield Group, Inc. v. Delisle*.[104] In *Woodfield*, the court stated that Illinois case law does not reduce the issue of adequate consideration to a

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97. Brown and Brown, Inc. v. Mudron, 887 N.E.2d 437, 441 (Ill. App. Ct. 2008).
98. *Mid-Town*, 611 N.E.2d at 1223–25.
99. *Id.* at 1227.
100. *Id.*
101. *Brown*, 887 N.E.2d at 441.
102. *Id.*
103. *Id.*
104. Woodfield Group, Inc. v. DeLisle, 693 N.E.2d 464, 469 (Ill. App. Ct. 1998).

numerical formula.[105] Rather, the *Woodfield* court suggested that a court should determine who terminated the employment to ensure a proper review of the adequacy of consideration.[106] This is another example of an Illinois court recognizing that the adequacy of consideration determination should be a fact-based inquiry, which further suggests the *Brown* court was wrong for adopting the approach specifically warned against in *Woodfield.*

2. Different Standards for Adequacy of Consideration in Legal and Equitable Claims

In *Mid-Town,* the court further justified its holding by stating that what may constitute sufficient consideration in a court of law may be insufficient in a court of equity.[107] The employer in *Mid-Town* sought the equitable relief of a preliminary injunction,[108] as opposed to the legal relief of money damages sought by the employer in *Brown.*[109] The court in *Mid-Town* admitted that a peppercorn of consideration can be sufficient to support a finding of adequate consideration in a suit at law for damages.[110]

A court of equity, however, will often require more consideration to better effectuate the purposes of equity.[111] Equity is defined as: "Fairness; impartiality; evenhanded dealing. The body of principles constituting what is fair and right."[112] For example, courts of equity look at the inadequacy of consideration as evidence of unconscionability or fraud.[113] This illustrates that courts of equity often refuse to enforce contracts that courts of law may enforce. By looking to principles of fairness utilized in equitable actions, the *Mid-Town* court found that the post-employment restrictive covenant was not supported by adequate consideration.[114] Although the distinction between the court of equity in *Mid-Town* and the court of law in *Brown* should not be determinative in most cases, it further illustrates that the *Brown* court's blind adherence to *Mid-Town* was unwarranted, considering the significant factual differences between the two cases.

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105. *Id.*
106. *Id.*
107. Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221, 1227 (Ill. App. Ct. 1993).
108. *Id.*
109. Brown and Brown, Inc. v. Mudron, 887 N.E.2d 437, 442 (Ill. App. Ct. 2008).
110. *Mid-Town*, 611 N.E.2d at 1227.
111. *Id.*
112. BLACK'S LAW DICTIONARY 579 (8th ed. 2004).
113. Curtis 1000, Inc. v. Suess, 24 F.3d 941, 946 (7th Cir. 1994).
114. *Mid-Town*, 611 N.E.2d at 1227.

B. Balancing the Interests of the Employer and the Employee

Over the past few decades the relationship between the employee and employer has drastically changed. The loyal corporate employee of the 1950s and 60s is a thing of the past. The new corporate employees are "free agents willing to sell themselves to the highest bidder."[115] Accordingly, in recent years, more and more employers have used restrictive covenants to protect the investment they have made in their employees.[116] Employees have an equally paramount interest in being able to sell their services and do not want to be restricted by employers trying to limit their career opportunities.[117] Balancing the competing interests of the employer and employee has led Illinois courts to create an exception to the consideration doctrine by inquiring into the adequacy of consideration and ultimately allowing substantial continued employment to constitute consideration for a post-employment restrictive covenant entered into after the employment has already begun. Precisely identifying the interests that the substantial continued employment requirement is designed to protect is helpful in understanding how the *Brown* court failed to strike an appropriate balance.

1. The Interests of the Employer

Many have contended that post-employment restrictive covenants with at-will employees entered into after the employment has already begun are not supported by consideration and are thus unenforceable.[118] They contend that the employer is not promising or refraining from doing anything.[119] Since the employment is at-will, the employer is free to discharge the employee immediately after the employee signs the restrictive covenant, thus there is not a promise of continued employment.[120] Therefore, some jurisdictions have only upheld restrictive covenants where the employee is at-will when the covenant is entered into at the outset of the employment relationship.[121] In this scenario, the employer is promising to give employment in exchange for the restrictive covenant.[122] Illinois courts have criticized this result and have

115. Matheny, *supra* note 3, at 1737.
116. *Id.* at 1743.
117. Glick, *supra* note 6, at 357.
118. Lord, *supra* note 1, at 726.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 727.

recognized that this may lead to absurd practices on behalf of the employer. In *McRand, Inc. v. van Beelen*, the court stated that "to hold that consideration is insufficient [in cases where the covenant is not signed until after the employment commenced] would force the employer to discharge these employees one day, and rehire them the next day after the covenant had been signed."[123] To avoid this practice, Illinois courts not only created an exception to the consideration doctrine by inquiring into the adequacy of consideration, but also imposed a substantial continued employment requirement.

Inquiring into the adequacy of consideration recognizes the undeniable interest employers have in protecting legitimate business interests through the use of restrictive covenants and the *Brown* court was wrong to ignore this interest. The substantial continued employment requirement ensures that the employer is not simply trying to limit competition, because it prevents the employer from immediately terminating the employee after entering into the restrictive covenant. If the employer does immediately terminate the employee the court will find the restrictive covenant unenforceable because it was not supported by adequate consideration.

2. The Interests of the Employee

In general, employees despise restrictive covenants for the same reason employers frequently require them. Employees want to use the expertise and experience they have gained from their employment to obtain a better paying job in that field and do not want to be restrained by their previous employer.[124] However, the average employee has limited bargaining power and the restrictive covenant is presented on a sign-this-or-be-fired basis.[125] The adequacy of consideration inquiry coupled with the substantial continued employment requirement are used to combat the limited bargaining power of most employees. This approach taken by Illinois courts showcases a sensitivity to the contention that continued employment may be an illusory benefit when the employment is at-will and may be terminated by the employer at any time for any reason.[126]

As discussed above the "substantial continued employment" requirement is used to ensure that the employer does not immediately discharge an employee after requiring the employee to enter into a restrictive covenant after employment has already begun. As the court stated in *Curtis 1000, Inc. v.*

123. McRand, Inc. v. van Beelen, 486 N.E.2d 1306, 1314 (Ill. App. Ct. 1985).
124. Glick, *supra* note 6, at 357.
125. Krumm, *supra* note 5, at 449.
126. Curtis 1000, Inc. v. Suess, 24 F.3d 941, 946 (7th. Cir. 1994).

Suess the substantial continued employment requirement "avoids the need to investigate the employer's intentions; it does this by in effect creating an irrebuttable presumption that if the employee was fired shortly after he signed the covenant the consideration for the covenant was illusory."[127] The "substantial continued employment" requirement has been implemented to ensure employers do not use their bargaining power to take advantage of the employee.[128] This was not the case in *Brown*, however, because the employee willingly left the employment. *Brown*, therefore, was not an example of the employer using its increased bargaining power to take advantage of the employee. Rather, this was an example of an employee exploiting the human capital invested by the employer. The employee used the training and access to clients made available by the employer to obtain a new job that was in direct competition with the former employer. This is the precise evil that restrictive covenants attempt to prevent.

3. How the Brown *Court Failed to Balance the Competing Interests*

In *Brown*, the court drastically overcompensated for the employee's diminished bargaining power by finding inadequate consideration for the restrictive covenant at issue. As the court in *Curtis* explained, the "substantial continued employment" requirement was devised to protect the employee from immediately being discharged by the employer.[129] In *Brown*, the employee willingly resigned, in order to seek better employment in the same field.[130] The substantial continued employment requirement was not devised to protect the employee who willingly leaves the current employment, which is why the *Brown* court was wrong in deciding this case in Gunderson's favor. The *Brown* court reasoned that since the continued employment was only for seven months, it was not "substantial" and the restrictive covenant accordingly lacked adequate consideration.[131]

This numerical approach taken by the *Brown* court fails to recognize the employer's interest in obtaining a restrictive covenant. Under *Brown*, an employee would be free to resign within seven months of signing a restrictive covenant and would be afforded both the benefit of continued employment and the benefit of competing with the previous employer. This fails to recognize what the parties are said to be promising when they enter into the restrictive

127. *Id.*
128. *Id.*
129. *Id.*
130. Brown and Brown, Inc. v. Mudron, 887 N.E.2d 437, 438 (Ill. App. Ct. 2008).
131. *Id.* at 441.

covenant. The employee is promising to obey the terms of the restrictive covenant, whereas the employer is essentially promising to refrain from exercising a legal privilege to terminate the at-will employment for a substantial period of time after entering into the restrictive covenant. Upon stating what each party is promising, it is nonsensical to allow an employee to void the consideration by quitting, because the employee has not promised to remain employed for a substantial period of time after entering the restrictive covenant. The *Brown* court's decision permits the employee to void the consideration by invalidating the promise made by the employer. The proper balance of interests articulated in *Curtis* provides that if the employer fires the employee immediately after entering into the restrictive covenant the employer only obtains the benefit of discharging the employee and not the additional benefit of also enforcing the restrictive covenant.[132] The approach taken in *Brown* has the effect of rendering the restrictive covenant illusory when it is entered into because the employee is not bound to either continue employment or obey the restrictive covenant for the preceding seven months. In this regard *Brown* has wrongfully hampered an employer's ability to protect a legitimate business interest through the use of restrictive covenants.

C. How Other Jurisdictions Have Balanced the Interests of the Employer and Employee

State law regarding whether continued employment of an at-will employee constitutes adequate consideration to support a restrictive covenant has not developed in unison.[133] Texas courts have taken a very narrow approach to this issue, striking most restrictive covenants down when it is alleged that the continued employment was consideration.[134] Texas courts have strictly applied classic contract doctrine by stating that since the employer is not bound to continue employment in an at-will employment relationship, the continued employment is not sufficient consideration to support the restrictive covenant.[135] Illinois courts, however, have correctly rejected this approach, primarily due to the concern that if the employer were not permitted to enter into a post-employment restrictive covenant with an at-will employee, the employer would be forced to discharge the employee one day and rehire him the next day after he signs the restrictive covenant.[136] The

132. Curtis 1000, Inc. v. Suess, 24 F.3d 941, 946 (7th Cir. 1994).
133. Krumm, *supra* note 5, at 470.
134. Lord, *supra* note 1, at 734.
135. *Id; See also* Martin v. Credit Protection Ass'n, Inc., 793 S.W.2d 667, 670 (Tex. 1990).
136. McRand, Inc. v. van Beelen, 486 N.E.2d 1306, 1314 (Ill. App. Ct. 1985).

approach taken by Illinois courts is more analogous to the practical approaches taken by courts in Tennessee and South Dakota.

As discussed above, South Dakota and Tennessee law regarding the enforceability of post-employment restrictive covenants with an at-will employee have developed differently, but have crafted similar rules governing these restrictive covenants.[137] South Dakota and Tennessee each take a fact-intensive approach to determining the enforceability of restrictive covenants.[138] Each court recognizes that continued employment may be sufficient consideration to support a post-employment restrictive covenant with an at-will employee.[139] As has been discussed throughout this note, Illinois courts, with the exception of *Brown*, have also adopted this approach to post-employment restrictive covenants.

South Dakota and Tennessee, however, have explicitly recognized one factor that Illinois courts have omitted in analyzing post-employment restrictive covenants concerning an at-will employee. The Supreme Court of South Dakota and the Supreme Court of Tennessee have each recognized that identifying why the employment ended is essential in determining the enforceability of the restrictive covenant.[140] These courts have recognized that in order to properly balance the competing interests of the employee and the employer in a restrictive covenant, one must first determine whose actions caused the termination of employment. In *Zakinski*, the Supreme Court of South Dakota drew a distinction between an employee who voluntarily quits or is fired for good cause and an employee who is fired for no personal fault.[141] If the employee is fired for no personal fault then there is a higher risk that the employer entered into the restrictive covenant for the sole purpose of restraining competition.[142] In *Ingram*, the Supreme Court of Tennessee held that the reason for termination of employment clearly has a bearing on whether the court should enforce a post-employment restrictive covenant with an at-will employee.[143] Unfortunately, as the decision in *Brown* illustrates, the need for this distinction has not been so clear in Illinois. Although it was acknowledged by the court in *Woodfield*, the quit/fired distinction has never expressly been adopted by an Illinois court as a factor in determining whether

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137. Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513 (S.D. 1996); *See also* Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28 (Tenn. 1984).
138. *Zakinski*, 553 N.W.2d at 520; *Ingram*, 678 S.W.2d at 33.
139. *Zakinski*, 553 N.W.2d at 520 (applying S.D. CODIFIED LAWS § 53–9–11 (2008)).; *Ingram*, 678 S.W.2d at 33.
140. *Zakinski*, 553 N.W.2d at 521; *Ingram*, 678 S.W.2d at 35.
141. *Zakinski*, 553 N.W.2d at 521.
142. *Id.* at 520.
143. *Ingram*, 678 S.W.2d at 35.

a restrictive covenant is enforceable.[144] Illinois should adopt the approaches taken by South Dakota and Tennessee to ensure that the interests of the employer and the employee are properly balanced.

D. Abandon *Brown*

The most effective way to balance the interests of the employee and the employer in a post-employment restrictive covenant with an at-will employee is through a fact-intensive approach that takes into account why the employment was terminated. A determination that a restrictive covenant lacks consideration when it is entered into because the employment is at-will, as Texas recognizes,[145] gives the employee too much power and wrongfully restricts an employer's use of restrictive covenants. Similarly, determining that the restrictive covenant is enforceable at the time it is entered into, without ensuring that the consideration is adequate, gives the employer too much power and would allow an employer to immediately discharge the employee after entering into the covenant while maintaining the ability to enforce the restrictive covenant. Accordingly, Illinois courts have balanced these two approaches by inquiring into the adequacy of consideration and imposing a "substantial continued employment" requirement to satisfy consideration for a post-employment restrictive covenant with an at-will employee. By not also determining why the employment was terminated, Illinois courts have failed to effectuate the purposes of the adequacy of consideration inquiry.

The evil that the adequacy of consideration inquiry and the substantial continued employment requirement are designed to prevent is immediate discharge of the employee by the employer for no cause.[146] Thus, the court determines whether the continued employment after the restrictive covenant was entered into and before the employer discharged the employee was sufficient consideration for the restrictive covenant. If the employee voluntarily quits her employment, however, the same evil the adequacy of consideration inquiry and substantial continued employment requirement were designed to prevent is not present. By simply determining why the employment was terminated, the court could appropriately balance the competing interests of the employer and the employee and fulfill the purpose of the adequacy of consideration inquiry.

It may be contended that by employing *Brown's* strict numerical approach, the determination regarding the enforceability of restrictive

144. Woodfield Group, Inc. v. DeLisle, 693 N.E.2d 464, 469 (Ill. App. Ct. 1998).
145. Martin v. Credit Protection Ass'n, Inc., 793 S.W.2d 667, 670 (Tex. 1990).
146. Curtis 1000, Inc. v. Suess, 24 F.3d 941, 946 (7th Cir. 1994).

covenants would be more predictable for employees and practitioners. However, this is not consistent with the more equitable approach of inquiring into the adequacy of consideration. Illinois courts have chosen to sacrifice the predictability of strict adherence to contract law principles, in favor of a more equitable approach that avoids the harsh results of strictly applying those principles. To now reduce the adequacy of consideration inquiry to a numerical formula would negate the purpose of entering into the inquiry to begin with.

The decision in *Brown* failed to effectuate the purpose of the adequacy of consideration inquiry and the "substantial continued employment" requirement by skipping the first step of determining why the employment at issue was terminated. Accordingly, Illinois courts should follow Tennessee and South Dakota by taking a fact-intensive approach that inquires into why the employment was terminated, before determining whether sufficient consideration existed to support the restrictive covenant. However, it is not enough for future Illinois courts to simply inquire into who terminated the employment. Illinois courts must take into account all of the relevant facts and circumstances that led to the end of the employment. This would allow the court to consider whether the acts of the employer led to the employee quitting, as in *Mid-Town*, or whether the employee quit through no fault of the employer, as in *Brown*. If the former is true, the court should require more continued employment to constitute adequate consideration. If the latter is true, however, the court should require very little continued employment. This would appropriately balance the interests of the employee and the employer in restrictive covenants where an at-will employee entered into the agreement after the employment has already begun.

V. CONCLUSION

The decision in *Brown and Brown, Inc. v. Mudron* failed to take a fact-intensive approach that considers why the employment was terminated when determining the adequacy of consideration. Rather, the *Brown* court reduced the adequacy of consideration inquiry to a numerical formula that was both unsupported by Illinois case law and an inappropriate balancing of the interests of the employee and the employer in a restrictive covenant with an at-will employee that were signed after the employment began. The problem with the approach taken by the *Brown* court is that the approach has the effect of rendering all restrictive covenants with at-will employees that were signed after the employment began illusory in Illinois. By allowing the employee to void the consideration by quitting, *Brown* has essentially stated that the employee has not promised anything at the time the restrictive covenant is

entered into. Thus, the court has effectively stripped the use of restrictive covenants from employers who seek to protect their legitimate business interests. Future Illinois courts can solve this problem by taking a fact-based approach that takes into account why the employment was terminated.