Garden Leave as Consideration for a Non-Compete?

Insights
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How much consideration is enough? I am asked this question frequently by employers and employees attempting to determine whether their non-compete is supported by adequate consideration. Regular readers of this blog know by now that covenants signed by at-will employees after the inception of employment must be supported by new and independent consideration. But how much consideration is enough? My take: there are as many answers to that question as there are judges on the bench.

Sure, the cases provide some guidance. In some states, mere continued employment will provide sufficient consideration. In other states, something more is required, such as a raise or a bonus. But courts differ in their treatment of how much consideration is enough. Applying Minnesota law, the United States District Court for the Eastern District of Wisconsin recently found sufficient a promise to supplement any loss of income attributable to a non-compete agreement. Given its similarity to so-called "Garden Leave" provisions, this case is worthy of mention.

In Timothy Thiesing v. Dentsply, 2010 U.S. Dist. LEXIS 102372, the former employee (Timothy Thiesing) challenged Dentsply's non-compete agreement arguing that it was not supported by consideration. About three years after Thiesing started working, Dentsply presented him and all of its other sales representatives with an agreement during an annual meeting in Dallas. The employees were told to sign the agreement or they would be fired. Understandably, Thiesing signed the agreement. Later, he argued that it was not supported by consideration.

In its search for consideration, the court examined two provisions of the agreement. First, it reviewed a Garden Leave clause in which Dentsply promised to pay Thiesing his base salary for the two-year duration of his non-compete so long as he could document conscientious efforts to find other work. The court concluded this provision did not constitute consideration in support of the non-compete clause because Dentsply was not unconditionally bound to pay Thiesing. Rather, Dentsply retained the option to not pay Thiesing if he failed to conscientiously seek other employment, and Thiesing would nonetheless remain bound by the non-compete.

Next, the court considered a separate provision of the agreement in which Dentsply agreed to pay Thiesing the difference between his salary at a new job and his salary last received at Dentsply if the non-compete clause prevented him from securing a job of equal or greater pay. Unlike the Garden Leave provision, Dentsply's obligation in this regard was unconditional. Accordingly, the

court found that it qualified as consideration warranting the enforcement of the agreement. Acknowledging that it had previously found the Garden Leave provision to be insufficient consideration, the court noted that "a promise is not rendered unenforceable by the fact that part of the consideration for it is invalid.... In other words, one valid consideration is enough."

For a copy of the court's decision, click on the pdf file below.

Thiesing v. Dentsply.pdf (173.07 kb)

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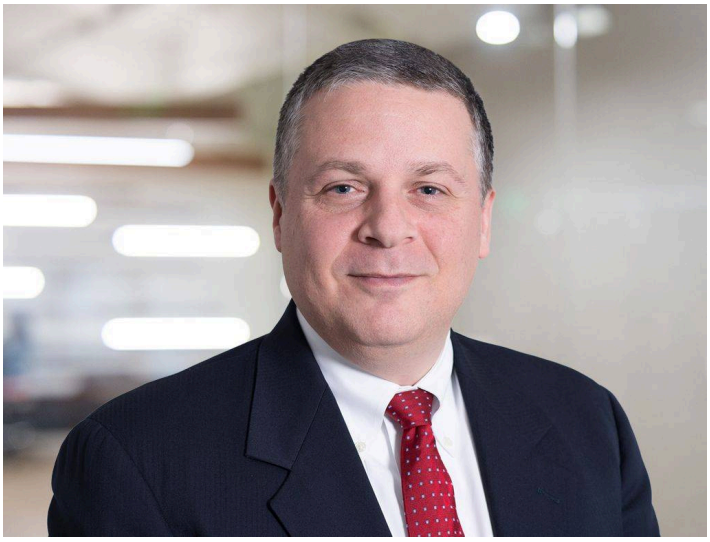

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