AN ILLINOIS LAW FIRM

GETTING DOWN TO BUSINESS

HEYL ROYSTER
BUSINESS & COMMERCIAL LITIGATION NEWSLETTER

 Summer 2015

WELCOME LETTER

Dear Friends, Clients and Colleagues:

In this issue of our newsletter, Brad Keller explores the importance of venue in litigation and the enforceability of post-employment restrictive covenants, and Stacy Crabtree examines potential liabilities to volunteers under the Fair Labor Standards Act.

We are very excited to let you know about two seminars that we will be offering in the near future to our clients, friends, and colleagues. The first will be "Avoiding Litigation - How to Stay Out of Court, or What to Do Now to Win Quickly Later." This seminar will touch on topics including how to draft "smart" contracts and other agreements, preservation of materials important to your defense, and steps to head off potential liabilities.

We will also be providing a seminar on the unique risks to those interested in servicing or otherwise doing business with the new medical marijuana cultivation centers and dispensaries. This seminar will address the current state of federal and Illinois law along with the risks and due diligence you should consider.

We will be sending out invitations once we have our dates and locations set. We hope you will be able to join us to discuss these important topics.

In some exciting news for the firm, we have completed the move of our Peoria office to our new location in the Hamilton Square Building!

As always, if there are any particular topics that you would like us to discuss in future editions or if we can assist you with any legal matters, please do not hesitate to contact me at mludolph@heylroyster.com.

Our Business & Commercial Litigation team at Heyl Royster hopes you have a great summer!

Mark A. Ludolph
Editor

THE IMPORTANCE OF VENUE IN LITIGATION

By: Brad Keller, bkeller@heylroyster.com

While venue may not be one of the most exciting legal topics to discuss, its importance on litigation cannot be overstated. Venue can influence a case throughout all stages of litigation in many ways and can have a significant impact on the value of a case.

First, in a jury trial, venue determines the jurors that will ultimately decide a case. Certain venues in Illinois, such as Cook County or Madison County, are nationally known for being areas in which high verdicts have been awarded. Depending on the facts of the case and the parties involved, there may be great advantage or

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Firm Attorneys Edit and Author Illinois Appellate Law Publication

Brad Elward served as co-editor-in-chief of the Illinois Institute for Continuing Education (IICLE) volume, *Civil Appeals (Illinois): State and Federal 2015*, which was re-written this past year. The editorial work involved determining the scope of topics, coordinating authors, and editing all submissions for the volume. Elward also authored chapters for the publication on *Interlocutory Appeals of Certified Questions* (Ch. 14), *Workers' Compensation Appeals* (Ch. 16), *Motion Practice* (Ch. 21), *Direct Appeals to the Illinois Supreme Court* (Ch. 28), and *Motions for Supervisory Orders and Mandamus* (Ch. 28). He co-authored the chapters on *Preserving Error For Appeal* (Ch. 2) with Stacy Crabtree, *Appeal Bonds and Stays of Judgment* (Ch. 9) with Brian Smith, and *Interlocutory Appeals Of Certain Orders* (Ch. 12), with Emily Perkins. Craig Unrath, chair of the firms' Appellate Advocacy Practice, authored the chapter on *Final Judgments* (Ch. 3), and Natalie Thompson authored the chapters on *Sanctions* (Ch. 33) and *Costs* (Ch. 34).

disadvantage in a case being filed in the "home base" of one of the parties involved. Second, venue can have an obvious effect on the convenience and expense associated with litigating a case. Litigation that occurs far from a business's primary location may be very expensive to that business in terms of time, money, and effort.

Where Does Illinois Law Require A Lawsuit To Be Filed?

In Illinois, the Code of Civil Procedure sets requirements for where a lawsuit must be filed. Venue is controlled by Section 2-101 of the Code of Civil Procedure, 735 ILCS 5/2-101, which provides that:

> Every action must be commenced (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose. 735 ILCS 5/2-101.

In determining venue, a corporation is considered a resident of any county in which it has its registered office or other office or is doing business. 735 ILCS 5/2-102(a). A partnership sued in its firm name is a resident of any county in which any partner resides or in which the partnership has an office or is doing business. 735 ILCS 5/2-102(b).

In order for a corporation or partnership to be "doing business" of a character sufficient to satisfy the venue statute, the corporation or partnership must be conducting its usual and customary business within the county in which the action is commenced, at the time the action is commenced. *Weaver v. Midwest Towing, Inc.*, 116 Ill. 2d 279 (1987); *Stambaugh v. International Harvester Co*., 102 Ill. 2d 250 (1984).

For purposes of venue, a party's residence is determined at the time suit was filed rather than when process of service was made or when the accident arose. *Wilson v. Central Illinois Public Service Co*., 165 Ill. App. 3d 533, 537 (5th Dist. 1988).

Methods for Changing Venue

Illinois provide defendants options for attempting to change venue. There are two primary options under Illinois law: (1) defendant can file a motion to transfer venue based on the venue being improper under Illinois law; or (2) defendant can file a motion to transfer based on *forum non conveniens*, asking the court to transfer the matter for convenience reasons.

Under Section 2-104 of the Code of Civil Procedure, a defendant has the option of moving to transfer the case to a proper venue. Under this section, a defendant waives its right to move for transfer based on improper venue if the motion is not made on or before the date upon which the defendant is required to plead or within any further time that may be granted to answer or otherwise move with respect to Complaint. 735 ILCS 5/2-104(b). Thus, it is crucial to determine if venue is proper as soon as possible.

Second, if venue is technically proper under Section 2-101, but is inconvenient, the defendant can request pursuant to Illinois Supreme Court Rule 187 that a case be transferred for reasons of convenience. This doctrine is known as *forum non conveniens*. In considering such a motion, the court weighs several public and private interest factors, such as the convenience for witnesses, the location of pertinent evidence, the interest of the citizens of the venue in deciding the case, and the congestion of the court docket. A motion filed on *forum non conveniens* grounds must be filed within 90 days after the last day allowed for that defendant's answer.

Conclusion

The effect of venue on a lawsuit is often underappreciated. Because of the importance of venue on litigation, it is crucial for a business looking to file a law suit to discuss the optimal venue with counsel prior to the commencement of litigation. On the other hand, for a business that has been sued, it is equally as important to discuss the effect that the chosen venue may have on the case with counsel, and to consider options for moving venue, if necessary.

Brad Keller is an associate in the Peoria office. Brad concentrates his practice on civil litigation defense in the areas of trucking/transportation, product liability, trucking/transportation, sexual torts, toxic torts, premises liability, auto, and commercial litigation.

"I Have to Pay a Volunteer What?" Liability to Volunteers under the Fair Labor Standards Act

By: Stacy Crabtree, scrabtree@heylroyster.com

Volunteers are an integral part of operations for some organizations. Despite the altruistic intent, volunteers can pose a significant risk to an organization as an employer. The Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq*., as amended, (the "Act") governs certain aspects of an employer's obligations related to its employees, including minimum wage, overtime pay, record keeping, and limitations on youth employment. Although the Act does not apply to every organization, it does apply to organizations engaged in commerce; federal, state, or local government agencies; hospitals or other institutions engaged in caring for the sick, aged, or mentally ill; schools; and organizations with annual sales in excess of $500,000, regardless of for-profit or nonprofit status. *See, e.g.,* 29 U.S.C. § 206(a) & 203(b), (r). As a result, many organizations may be at risk of having to pay supposed volunteers wages, including overtime, if the organization fails keep the employee versus volunteer distinction intact.

To address volunteers, courts have interpreted the definition of "employee" in the Act such that an "employee" does *not* include an individual who "without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit." *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 295 (1985). Regulations promulgated by the United States Department of Labor provide a specific definition of "volunteer," but only in the context of services performed for state and local government agencies. *See* 29 C.F.R. § 553.101. As defined, "volunteers" for state or local government agencies are those who perform services "for civic, charitable, or humanitarian reasons" on their own free will, without pressure or coercion from their employer and without the promise, expectation, or receipt of compensation for the services. *Id.* Further, state and local government agencies' employees may not perform the same type of services that those employees perform as part of their job on a volunteer basis. *Id.* § 553.101(d).

Unfortunately, whether an organization labels an individual as a "volunteer" rather than an "employee" makes little difference. Instead, courts apply a reasonableness standard and look at the "objective facts surrounding the services performed to determine whether the totality of the circumstances establish volunteer status, . . . or whether, instead, the facts and circumstances objectively viewed, are rationally indicative of employee status." *Okoro v. Pyramid 4 Aegis*, No. 11-C-267, 2012 U.S. Dist. LEXIS 56277, *23 (E.D. Wis. April 23, 2012). Courts will look at the economic reality of the situation, the relationship of parties, and the goals of the Act. *Id.* Some other factors courts may look at include, without limitation, whether:

- the individual has a personal civic, humanitarian, charitable, religious, or public service motive to perform the services;
- the services performed are different from those typically performed by paid workers;
- the individual has control over his or her schedule and works less than full time;
- the organization received an immediate advantage from any work done by the individual.

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In light of the ambiguous "totality of the circumstances" test applied by courts, concerns specific to a particular organization should be directed to an attorney. There are a number of steps, however, every organization can take to minimize its liability to volunteers under the Act.

1. Do not pay volunteers for their services. The only payment an organization should make to a volunteer is for reimbursement of actual expenses incurred by that volunteer for the organization.
2. Limit the amount of "perks" volunteers receive for volunteering.
3. Do not enter into contracts with volunteers for their services.
4. Do not promise future employment to volunteers.
5. Do not require volunteers to abide by the employee handbook, but instead consider creating a separate volunteer handbook. If a volunteer handbook is desired, consult with an attorney as to the appropriate language in the handbook to ensure it does not otherwise imply an employer-employee relationship.

Following these basic steps will at least start an organization on the right path of avoiding financial liability to volunteers under the Act.

Stacy Crabtree represents clients in commercial and contract law, as well as tort litigation. Her clients include businesses large and small, and she regularly works onsite with a Fortune 50 manufacturing company assisting with vendor agreements, open-source software and freeware licenses, and compliance issues.

Consideration Necessary for All Post-Employment Restrictive Covenants

By: Brad Keller, bkeller@heylroyster.com

Post-employment restrictive covenants, also called non-compete agreements or covenants not to compete, are a frequent topic of litigation in all jurisdictions. A recent case from the Third District, *Prairie Rheumatology Associates, S.C. v. Francis*, 2014 IL App (3d) 140338, applied Illinois law regarding restrictive covenants to invalidate such an agreement between a medical clinic and a doctor, finding that the agreement was not properly supported by consideration. The case serves as a good reminder of the requirements for a valid restrictive covenant with employees.

General Rules Regarding Restrictive Covenants

Under Illinois law, a post-employment restrictive covenant is enforceable only if it is reasonable in geographic and temporal scope and is necessary to protect an employer's legitimate business interest. *Abel v. Fox*, 274 Ill.App.3d 811, 813 (4th Dist. 1995).

Prior to examining the reasonableness of a restrictive covenant, the court must first make two determinations: (1) that the covenant is ancillary to either a valid transaction or a valid relationship; and (2) that there is adequate consideration to support the covenant. *Creative Entertainment, Inc. v. Lorenz*, 265 Ill.App.3d 343 (1st Dist. 1994).

Assuming both determinations are made, a court then is to determine if the terms of the covenant are reasonable. The reasonableness of the terms of a restrictive covenant is evaluated through a three-part test found in the Restatement of Contracts and *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 17. Under that test, a restrictive covenant is reasonable only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer; (2) does not impose undue hardship on the employee; and (3) is not injurious to the public. *Id.*

Facts of *Prairie Rheumatology Associates* Case

In *Prairie Rheumatology Associates*, the plaintiff was a medical clinic ("PRA") in Joliet specializing in rheumatology. The majority of PRA's patients came to

the clinic on referrals from physicians, including the physicians on staff at the two area hospitals, Saint Joseph and Silver Cross. 2014 IL App (3d) 140338, ¶ 2.

The defendant, Dr. Francis, a licensed physician specializing in rheumatology, took a job with PRA in 2012 and entered a "Physician Agreement" with an effective date of April 9, 2012. The agreement provided Francis with an annual salary and required PRA to assist her in gaining staff privileges at St. Joseph and Silver Cross, paying her hospital dues, and introducing her to PRA patients and referral sources, particularly the physicians on staff at St. Joseph and Silver Cross. The employment agreement included a 2-year, 14-mile non-competition agreement in favor of PRA. *Id.* at ¶ 3.

Dr. Francis began working at PRA on April 16, 2012, moving to PRA from an office in Kankakee. She began developing clients in the Joliet area. The statistics presented showed that during her time with PRA, Francis treated 1,118 patients, with about 136 being patients who followed her from her Kankakee practice and 948 being new patients. According to PRA, less than 8% of the new patients Francis treated while working there had a prior relationship with PRA, and most of those new patients were referred by physicians. *Id.* at ¶ 4.

Dr. Francis gave notice in July 2013 that she was voluntarily terminating her employment with PRA effective November 22, 2013. Francis indicated that she would honor the non-competition agreement in her employment contract and informed PRA that she would be working at Hinsdale Orthopedics, which had offices in Hinsdale and New Lenox. Francis began working there in January 2014. Hinsdale Orthopedics' New Lenox office was adjacent to Silver Cross, one of the hospitals from which Francis received referrals when at PRA, and was nine miles from PRA's principal office. *Id.* at ¶¶ 5-6.

As a result, PRA filed a complaint for injunctive relief to enforce the restrictive covenant prohibiting Dr. Francis from practicing within a 14-mile radius of the office and the two nearby hospitals for two years after termination of her employment. The trial court entered a preliminary injunction, enjoining Dr. Francis from treating PRA's current patients but allowing her to treat patients she had prior to joining PRA as well as potential future patients. The trial court determined that the restrictive covenant was ancillary to the main employment contract and was supported by adequate consideration. The trial court also found the restrictive covenant reasonable as to PRA's current patients but unreasonable as to PRA's future patients and the public. The court concluded that PRA had a right in need of protection, would suffer irreparable harm, had no adequate legal remedy and had established a likelihood of success on the merits only as to its current patients. Both parties appealed to the Third District. *Id.* at ¶¶ 7, 9.

Third District's Decision

On appeal, the Third District Appellate Court determined that the restrictive covenant between PRA and Francis was invalid because it was not adequately supported by consideration. *Id.* at ¶ 19.

The Third District explained that Illinois courts have generally held that, with certain restrictions, continued employment can be sufficient consideration in support of restrictive covenants. The court explained that post-employment restrictive covenants have been an exception to the traditional rule that courts do not inquire into the adequacy of consideration, only its existence. Such agreements have been the exception due to the fact that a promise of continued employment may be an illusory benefit where the employment is at will. *Id.* at ¶ 14.

The Third District went on to explain that Illinois courts had generally required two years or more of continued employment to find that continued employment constituted adequate consideration for a restrictive covenant, even in situations in which the employee resigns on his or her own instead of being terminated. In this case, Dr. Francis announced she was leaving 15 months after the start of her employment and left her employment after 19 months, five months less than the general two-year rule of thumb that supports adequate consideration. *Id.* at ¶¶ 15-16.

In response to the argument regarding the two-year rule of thumb, PRA had argued that Dr. Francis received additional consideration that supported enforcement of the restrictive covenant, such as assistance in obtaining hospital membership and staff privileges, access to previously unknown referral sources, and opportunities for accelerated advancement. *Id.* at ¶ 17.

The Third District rejected this argument as well, finding that Dr. Francis received little or no additional benefit from PRA in exchange for her agreement not to compete. The court explained that the evidence at the preliminary injunction hearing indicated that PRA failed to assist Dr. Francis in obtaining her hospital

credentials and neglected to introduce Dr. Francis to referral sources. While PRA had provided Francis with credentialing applications, it did not pay the entirety of her credential fee, despite its contractual promise to do so. In addition, PRA had not implemented any procedure to introduce Dr. Francis to the doctors on staff at the two nearby hospitals, St. Joseph and Silver Cross. For example, during the hearing, the president of PRA, a rheumatologist herself, could not identify any doctor she introduced Dr. Francis to while Francis was at PRA. Instead, the evidence established that Dr. Francis marketed and developed community programs to increase her visibility on her own. The court also found that the claimed expedited advancement and partnership opportunities were illusory benefits at best. Although the employment agreement provided that Dr. Francis would be considered for partnership after 18 months, there was no guarantee she would become a partner and major shareholder. *Id.* at ¶ 18.

On these bases, the restrictive covenant was found to be unsupported by consideration and therefore unenforceable. Because there was no consideration for the restrictive covenant, the Third District did not consider the reasonableness of the agreement. *Id.* at ¶ 19.

Conclusion

In order to be enforceable, a post-employment restrictive covenant, also known as a non-compete agreement or a covenant not to compete, must satisfy several requirements. First, the agreement must be ancillary to a valid transaction or relationship, such as part of an employment contract. Second, the agreement must be supported by adequate consideration. Third, the terms of the agreement must be reasonable under the *Reliable* three-factor test.

When challenged, which is increasingly frequent, post-employment restrictive covenants are strictly construed by the court to ensure the reasonableness of the agreement. Because of this, for such agreements that are of the utmost importance to a business, it is crucial for the business to have such the restrictive covenant drafted by and approved by counsel. For those who may want to challenge such agreements on their own behalf or on the behalf of a new employee, a review of such agreement by counsel will help in determining if the agreement is one that a court may find invalid.

Brad Keller is an associate in the Peoria office. Brad concentrates his practice on civil litigation defense in the areas of trucking/transportation, product liability, trucking/transportation, sexual torts, toxic torts, premises liability, auto, and commercial litigation.

Heyl, Royster, Voelker & Allen
300 Hamilton Boulevard
PO Box 6199
Peoria, IL 61601-6199

For More Information

If you have questions about this newsletter, please contact:

Timothy L. Bertschy
Heyl, Royster, Voelker & Allen
300 Hamilton Boulevard
PO Box 6199
Peoria, IL 61601-6199
Phone (309) 676-0400 – Fax: (309) 676-3374
E-mail: tbertschy@heylroyster.com

Peoria, Illinois 61601-6199
300 Hamilton Boulevard
PO Box 6199
Peoria, IL 61601-6199
Phone (309) 676-0400 – Fax (309) 676-3374

Springfield, Illinois 62711
3731 Wabash Ave.
P.O. Box 9678
Phone (217) 522-8822 – Fax (217) 523-3902

Urbana, Illinois 61803-0129
Suite 300, 102 East Main Street
P.O. Box 129
Phone (217) 344-0060 – Fax (217) 344-9295

Rockford, Illinois 61105-1288
PNC Bank Building, Second Floor
120 West State Street
P.O. Box 1288
Phone (815) 963-4454 – Fax (815) 963-0399

Edwardsville, Illinois 62025-0467
Suite 100, Mark Twain Plaza III
105 West Vandalia Street
P.O. Box 467
Phone (618) 656-4646 – Fax (618) 656-7940

Chicago, Illinois 60603
33 N. Dearborn Street
Seventh Floor
Chicago, IL 60602
Phone (312) 853-8700

www.heylroyster.com