

1986

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Recommended Citation

Kathryn J. Yates, *Consideration for Employee Noncompetition Covenants in Employments at Will*, 54 Fordham L. Rev. 1123 (1986).

Available at: <https://ir.lawnet.fordham.edu/flr/vol54/iss6/5>

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CONSIDERATION FOR EMPLOYEE NONCOMPETITION COVENANTS IN EMPLOYMENTS AT WILL

INTRODUCTION

Covenants not to compete have become an increasingly frequent source of employment litigation. In many cases, the employment relationship has been for an unspecified term, that is, "at will."¹ Whether employment at will supplies consideration to support an employee's promise not to compete is a point of controversy that has persisted for decades.²

1. When the agreement does not specify a term regarding termination, courts imply a term allowing either party to terminate at will. E. Farnsworth, *Contracts* § 7.17, at 532 (1982). Many courts are departing from the traditional approach and supplying a term under which the employer cannot terminate employment in bad faith. *Id.* at 534; *see, e.g., Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 628 (Minn. 1983); *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 682, 406 A.2d 1310, 1312 (1979); *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 295, 491 A.2d 1257, 1260-61, *modified mem. on other grounds*, 101 N.J. 10, 499 A.2d 515 (1985); *K. McCulloch, Termination of Employment: Employer and Employee Rights* §§ 40,011-40,012 (1984); *Strasser, The Death of a Doctrine?*, *Nat'l L.J.*, Jan. 20, 1986, at 1. *But see Crain v. Burroughs Corp.*, 560 F. Supp. 849, 852 (C.D. Cal. 1983) (valid express contract for employment at will and a contradictory implied contract held improper).

2. *See Blake, Employee Agreements Not to Compete*, 73 *Harv. L. Rev.* 625, 669 & n.145 (1960); Note, *The Enforceability of a Promise Not to Compete After an Employment at Will*, 29 *Colum. L. Rev.* 347 (1929) [hereinafter cited as *Employment at Will*].

A number of jurisdictions are hearing these cases for the first time and their solutions to the problem are varied. In Tennessee, for example, no fewer than six cases were decided in 1984 and 1985 alone, with the state's lower courts very confused over what constitutes consideration in individual situations. Late in 1984, the Tennessee Supreme Court finally adopted a rationale—that of forging a binding unilateral contract out of an invalid bilateral contract. *See Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 34 (Tenn. 1984) (quoting *Hoyt v. Hoyt*, 213 Tenn. 117, 128-29, 372 S.W.2d 300, 305 (1963)). For 1984 cases in Tennessee struggling with the issue, *see Dearborn Chem. Co. v. Rhodes* (Tenn. Ct. App. Apr. 19, 1985) (available May 6, 1986, on LEXIS, States library, Omni file) (trial court decision reversed which had held that future employment was inadequate consideration for a noncompetition clause which was not part of the original employment agreement); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 30, 37 (Tenn. 1984) (court of appeals decision reversed because it held covenants signed two weeks after employment began unenforceable for lack of consideration); *Frank's Food Co. v. Parsons* (Tenn. Ct. App. June 15, 1984) (available May 6, 1986, on LEXIS, States library, Omni file) (case dismissed because covenant lacked any additional feature beneficial to the employee and therefore was without sufficient consideration; trial court had upheld covenant where employment continued for three years after execution of covenant); *Holt v. Cumberland Bolt & Screw, Inc.* (Tenn. Ct. App. Mar. 9, 1984) (available May 6, 1986, on LEXIS, States library, Omni file) (both trial and appellate courts found continued employment sufficient consideration to support a noncompetition covenant); *Corroon & Black, Inc. v. Lee* (Tenn. Ct. App. Feb. 16, 1984) (available May 6, 1986, on LEXIS, States library, Omni file) (trial and appellate courts found no consideration to support restrictive covenant where parties could terminate employment without any notice), *rev'd*, unpublished op. (Tenn. Apr. 1, 1985) (available May 6, 1986, on LEXIS, States library, Omni file) (lower courts were reversed because the continuation of employment for seven years after execution of the covenant provided adequate consideration).

There has been a similar flurry of litigation recently in Delaware, Indiana, Minnesota

The basic issue³ is whether the consideration given by the employer for a noncompetition covenant is illusory because of the employer's unrestricted right to terminate employment unilaterally at any time even without cause.⁴ If an employee signed a restrictive covenant and the employer terminated the employment agreement without cause either before employment had begun, or one day, one week or one month after employment had begun, is the employee bound by the covenant? If the employer's promise to employ is illusory, where is the consideration for the employee's promise not to compete? The cases do not directly address this issue.⁵

and Pennsylvania. See *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264 (8th Cir. 1978) (applying Minnesota law); *Gagliardi Bros. v. Caputo*, 538 F. Supp. 525 (E.D. Pa. 1982) (applying Pennsylvania law); *Comfort, Inc. v. McDonald*, No. 1066(S) (Del. Ch. June 1, 1984) (available May 6, 1986, on LEXIS, States library, Omni file); *Research & Trading Corp. v. Powell*, 468 A.2d 1301 (Del. Ch. 1983); *Hammermill Paper Co. v. Palese*, No. 712B (Del. Ch. June 14, 1983) (available May 6, 1986, on LEXIS, States library, Omni file); *Leatherman v. Management Advisors, Inc.*, 448 N.E.2d 1048 (Ind. 1983); *Woodward Ins., Inc. v. White*, 437 N.E.2d 59 (Ind. 1982); *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054 (Ind. App. 1980); *Advanced Copy Prods., Inc. v. Cool*, 173 Ind. App. 363, 363 N.E.2d 1070 (1977); *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626 (Minn. 1983); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982); *Davies & Davies Agency v. Davies*, 298 N.W.2d 127 (Minn. 1980); *Kari Family Clinic v. Bohnen*, 349 N.W.2d 868 (Minn. Ct. App. 1984); *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 471 Pa. 1, 369 A.2d 1164 (1977); *George W. Kistler, Inc. v. O'Brien*, 464 Pa. 475, 347 A.2d 311 (1975); *Maintenance Specialties, Inc. v. Gottus*, 455 Pa. 327, 314 A.2d 279 (1974); *Wainwright's Travel Serv. v. Schmolck*, 500 A.2d 476 (Pa. Super. 1985).

3. Past consideration may arise as an issue in covenants not to compete when the employer requests the covenant after the initial employment agreement was reached or after employment commenced. Courts hold that past consideration is not consideration, see *J. Calamari & J. Perillo*, *Contracts* § 4.2, at 135, § 5.14, at 192 (2d ed. 1977), but disagree about whether the covenant is ancillary to the employment agreement. See *infra* Part I.A.1. The covenants do not present a past consideration issue, however. The employee is not saying that in consideration for wages paid last week, he will not compete. Nor does the employer have a pre-existing duty to retain the employee. Past consideration would be an issue if the employee made the promise not to compete only after the employment relationship had ended, as where an employer offers an employee a pension after the employee has already retired.

4. See *Meurer Steel Barrel Co. v. Martin*, 1 F.2d 687, 688 (3d Cir. 1924) ("If for any reason the promise of one party is not binding upon him, it is not a sufficient consideration for the promise of the other and the contract is void for want of consideration."); *Pick Kwik Food Stores, Inc. v. Tenser*, 407 So. 2d 216, 218 (Fla. Dist. Ct. App.) (mutuality of obligation does not exist at outset of agreement where one party reserves the right to terminate without cause), *petition denied*, 415 So. 2d 1361 (Fla. 1981); 1 S. Williston, *A Treatise on the Law of Contracts* § 105, at 418 (3d ed. 1957 & Supp. 1985) ("an agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract").

5. One court that considered these questions was "troubled by the phrase 'terminable at will' that is employed in the . . . opinions in the absence of supportive analysis." *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 628 (Fla. Dist. Ct. App. 1982). Unfortunately, the court declined to provide an analysis, concluding instead that the opinions without analysis nevertheless "represent[ed] the governing law in Florida on which employers and employees have relied for over twenty years and appellee ha[d] not provided [the court] with argument sufficiently persuasive to disregard them." *Id.* See *infra* note 10.

Two important factors contribute to confusion in this employment at will area. First, courts are concerned that covenants not to compete may constitute restraints of trade.⁶ As such, the covenants not to compete are analyzed under a standard of reasonableness. The current analysis requires that an enforceable restraint of trade covenant be 1) ancillary to a valid existing employment contract or, alternatively, separately supported by adequate consideration; 2) specific as to time and territory; 3) necessary for protection of the employer's legitimate business interests; and 4) neither unduly harsh toward the employee nor injurious to the public.⁷

This analysis has led some courts to treat these cases as a separate class that need not follow only contract law, but instead should be viewed as "employment" cases or "restraint of trade" cases.⁸ Courts applying a restraint of trade analysis generally gloss over traditional contract analy-

6. See K. McCulloch, *supra* note 1, ¶ 40,011, at 40,023 n.(v). As part of the reasonableness analysis, courts closely examine the effect that enforcement of a restrictive covenant will have on both the employee and the employer. See 6A A. Corbin, *Contracts* § 1394, at 101-02 (1962) ("Disproportionate hardship to the party against whom enforcement is sought has always been regarded as reason for refusing equitable remedies.").

7. See J. Calamari & J. Perillo, *supra* note 3, § 16-20, at 602-03; 6A A. Corbin, *supra* note 6, § 1394, at 101-02; D. Dobbs, *Law of Remedies* § 12.26, at 934-35 (1973); *Restatement of Contracts* § 515 (1932); *Restatement (Second) of Contracts* § 188 & comments b, g (1981); Blake, *supra* note 2, at 643, 648-49; *Employment at Will*, *supra* note 2, at 348. *But see* Research & Trading Corp. v. Powell, 468 A.2d 1301, 1303 (Del. Ch. 1983) ("The elements necessary to constitute a valid restrictive covenant are the same as those required for a contract in general, namely, a mutual assent to the terms of the agreement by all parties and the existence of consideration.").

8. Blake, *supra* note 2, at 643-44 ("in the application of the reasonableness test, almost from the beginning more emphasis was placed on protecting the employee from overly heavy burdens and less on the conclusiveness of contractual terms"); cf. Pettit, *Modern Unilateral Contracts*, 63 B.U.L. Rev. 551, 561-62 (1983) ("Judges often decide these disputes without inquiry into questions of contract formation; frequently, they make no effort to explain the contracting process or even to use contract terminology.").

But the New Jersey Supreme Court in *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 491 A.2d 1257, *modified mem. on other grounds*, 101 N.J. 10, 499 A.2d 515 (1985), questioned whether it should analyze employment cases on a traditional contractual basis rather than in master-servant or special employment terms. See *id.* at 289-90, 491 A.2d at 1260. The eagerness of courts to look at employment at will in terms of an implied contract may lead to increased attention to contract law in evaluating restrictive covenants.

Many states have statutes regulating the enforcement of restrictive covenants. Most of the statutes prohibit covenants except under certain circumstances and where certain requirements are met. See K. McCulloch, *supra* note 1, ¶ 51,103. Alabama, for example, holds covenants not to compete void whether they are reasonable or not unless they are ancillary to the sale of the goodwill of a business or dissolution of a partnership. See Ala. Code § 8-1-1 (1975). Oregon's statute makes a noncompetition agreement in an employment contract void and unenforceable unless it is part of the original employment agreement or is entered into upon the subsequent advancement of the employee and meets other requirements. See Or. Rev. Stat. § 653.295 (1985). For additional state-by-state analysis of statutes and case law on employee covenants, see generally Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. Rev. 669 (1982) (summarizing precedents and public policy considerations of covenants in restraint of trade, and formulation by the Second Restatement).

sis and evaluate the overall reasonableness of enforcing the covenant.⁹ They often ignore the at will nature of the agreement as a distinguishing factor.¹⁰

The second source of confusion is that the vast majority of these actions are for equitable remedies.¹¹ Courts in such cases demand more than the minimum requisites of offer, acceptance and consideration needed to enforce a contract at law.¹² These cases draw on principles of both law and equity, further clouding the "difference . . . between the

9. See, e.g., *Olin Water Servs. v. Midland Research Laboratories, Inc.*, 596 F. Supp. 412, 414 (E.D. Ark. 1984), *appeal dismissed*, 774 F.2d 303 (8th Cir. 1985); *Barnes Group, Inc., v. O'Brien*, 591 F. Supp. 454, 460 (N.D. Ind. 1984); *Perthou v. Stewart*, 243 F. Supp. 655, 658 (D. Or. 1965); *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 682-83, 406 A.2d 1310, 1311-12 (1979); *Hogan v. Bergen Brunswick Corp.*, 153 N.J. Super. 37, 41, 378 A.2d 1164, 1166 (App. Div. 1977) (per curiam); see also 6A A. Corbin, *supra* note 6, § 1395, at 107 (although consideration is a factor in determining validity of a promise in restraint of trade, "reasonableness" is also a requisite for enforcement).

Where customer lists, trade secrets or confidential information are involved, courts focus on irreparable harm, and reasonableness often receives only passing attention. See, e.g., *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1338-40 (9th Cir. 1980) (customer lists and trade secrets); *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264, 1269-70 (8th Cir. 1978) (confidential business information); *Olin Water Servs. v. Midland Research Laboratories, Inc.*, 596 F. Supp. 412, 415 (E.D. Ark. 1984) (customer lists), *appeal dismissed*, 774 F.2d 303 (8th Cir. 1985); *Comfort, Inc. v. McDonald*, No. 1066(S) (Del. Ch. June 1, 1984) (available May 6, 1986, on LEXIS, States library, Omni file) (confidential information).

One judge explained the shallow treatment of consideration and courts' emphasis on reasonableness by stating that "[i]t has long been the rule at common law, that contracts in restraint of trade made independently of a . . . contract of employment are void as against public policy regardless of the valuableness of the consideration exchanged therein." *George W. Kistler, Inc. v. O'Brien*, 464 Pa. 475, 487, 347 A.2d 311, 317 (1975) (Roberts, J., concurring) (quoting *Morgan's Home Equip. Corp. v. Martucci*, 390 Pa. 618, 628-29, 136 A.2d 838, 844-45 (1957)); see also *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898) (no restraint of trade covenant can be enforced unless it is ancillary to the main purpose of a lawful contract), *aff'd as modified*, 175 U.S. 211 (1899); E. Farnsworth, *supra* note 1, § 5.3, at 336 (a nonancillary restraint is necessarily unreasonable; the promise that imposes the restraint is therefore unenforceable *per se*); Restatement (Second) of Contracts § 187 (1981) (courts focus on restraint of trade and rule of reason).

10. In typical reasonableness analysis there is no special treatment for at will employment. The reasonableness standard simply refers to employment relationships, regardless of the terms. See *supra* note 7 and accompanying text. One commentator suggested that the problem "has been made easier in the vast majority of cases by the presence of other factors whose importance, from a legalistic standpoint, completely overshadowed the fact that the employment was at will." *Employment at Will*, *supra* note 2, at 349.

11. See D. Dobbs, *supra* note 7, § 12.26 at 934-35 (reasonable restrictions are valid and enforceable by injunction); 11 S. Williston, *A Treatise on the Law of Contracts* § 1446, at 1008 (3d ed. 1968) (injunction is the usual method of enforcing covenants); Note, *Economic and Critical Analyses of the Law of Covenants Not to Compete*, 72 Geo. L.J. 1425, 1428 & n.23, 1432-33 (equitable remedy granted because of difficulty of computing damages and need to prevent future injury; court has no "market price" by which to measure the employer's damages); see also *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 682, 406 A.2d 1310, 1311 (1979) (even if the covenant is unreasonable, employer still may be entitled to equitable relief in the form of reformation or partial enforcement).

12. See *supra* note 8 and accompanying text.

validity of a contract [at law] . . . and the enforcement of such a contract in equity."¹³ A bilateral contract that is valid at law will not always be enforceable in equity because an equitable analysis goes beyond formal contract principles and requires compliance with doctrines of fairness.¹⁴ For example, in traditional contract cases at law, courts have refused to address the adequacy of consideration.¹⁵ The courts in employment at will cases, however, go beyond simply determining whether any consideration was given, and judge the adequacy of the consideration.¹⁶

The proper analysis of noncompetition covenants in employments at will should address two separate problems: whether there is consideration to support the covenant, and whether it is fair under the particular circumstances of the case to enforce a covenant that is presented after the employment relationship is already established. The first problem is one of contract formation, the second of unconscionability or avoidance due to coercion.

In 1960, Professor Harlan M. Blake claimed that employment covenants not to compete were a necessary, albeit "inefficient and often unfair device for allocating the burden of certain business risks."¹⁷ He concluded that "[t]here have been many cases of gross misuse of [employee] covenants [not to compete] in the past, in part because of the failure of many courts to engage in a discriminating analysis of their impact before enforcing them. There is evidence that this attitude is rapidly changing."¹⁸ This Note argues that, since 1960, the changes Professor Blake anticipated have not completely materialized. The courts do analyze the impact of covenants on employers and employees alike, but courts adjudicating covenants not to compete in employment at will cases often find little discriminating analysis to rely on as precedent. Instead, they analyze the issue under the guise of consideration, while their analyses actually focus on fairness, an element that has never been required for consideration.

Part I of this Note considers the three types of analyses courts typically apply to noncompetition covenants in employments at will. Part II argues that a plausible and more predictable doctrinal rationale justifies

13. *Meurer Steel Barrel Co. v. Martin*, 1 F.2d 687, 687 (3d Cir. 1924).

14. See *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 630 n.5 (Minn. 1983) (noncompetition covenants treated as special circumstance and therefore those cases are not decided strictly on formal contract principles). See *supra* note 8.

15. See *Spaulding v. Benenati*, 57 N.Y.2d 418, 423, 442 N.E.2d 1244, 1246, 456 N.Y.S.2d 733, 735 (1982); J. Calamari & J. Perillo, *supra* note 3, § 4-3, at 136-39; Restatement (Second) Contracts § 79, at 201 comment c.

16. See, e.g., *Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1305 (Del. Ch. 1983) (sufficiency); *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983) (adequacy); *Hogan v. Bergen Brunswig Corp.*, 153 N.J. Super. 37, 42-43, 378 A.2d 1164, 1167 (App. Div. 1977) (per curiam) (sufficiency); *Amdar, Inc. v. Satterwhite*, 37 N.C. App. 410, 414, 246 S.E.2d 165, 167 (sufficiency), *review denied*, 295 N.C. 645, 248 S.E.2d 249 (1978).

17. Blake, *supra* note 2, at 691.

18. *Id.*

finding consideration for a restrictive covenant in an employment at will. By articulating a broadly applicable underlying rationale, courts would better serve both parties. Employees at will would have a clearer notion of the circumstances under which such covenants will be enforced against them, and employers, particularly national employers, would have a more predictable means of protecting their legitimate expectations.

I. CURRENT ANALYSES OF THE CONSIDERATION THAT SUPPORTS THE RESTRICTIVE COVENANT

A. *The Requirement of Consideration Hinges on Whether the Covenant is Ancillary to Employment*

The first requirement of enforceability under the restraint of trade analysis is that the covenant not to compete be ancillary to a valid existing employment contract or, alternatively, separately supported by adequate consideration.¹⁹ Since consideration other than the employment is necessary only for a nonancillary covenant, the meaning of the term "ancillary" is important to the requirement of consideration.²⁰

1. The Dispute Over the Meaning of Ancillary

Courts generally hold that a covenant signed prior to, contemporaneously with, or any time during employment is ancillary to employment,²¹ and therefore is supported by the same consideration that supports the employment agreement.²² According to this majority analysis, consideration separate from the employment relationship is necessary only when the covenant is entered after employment terminates or when no employment relationship exists. This view is held to apply even in an employment at will.²³ The minority of courts have urged a different meaning of

19. See *supra* note 7 and accompanying text.

20. See *Jacobson & Co. v. International Env't Corp.*, 427 Pa. 439, 447-51, 235 A.2d 612, 617-19 (1967) (the ancillarity and consideration issues are closely intertwined).

21. See Restatement (Second) of Contracts § 188, comment a Reporter's note (1981) (covenant may be ancillary if signed contemporaneously with or soon after employment, or any time before termination). See *infra* note 32 and accompanying text.

22. See *Seaboard Indus., Inc. v. Blair*, 10 N.C. App. 323, 332-33, 178 S.E.2d 781, 787 (1971) (applying Georgia law); *Bouska v. Wright*, 49 Or. App. 763, 767-68, 621 P.2d 69, 71-72 (1980); see also *K. McCulloch*, *supra* note 1, ¶ 51,103.

Common law contract analysis assumes that a contract is not enforceable unless each party does, or promises to do, something he is not legally obligated to do, or refrains, or promises to refrain, from doing something he is legally privileged to do. See *J. Calamari & J. Perillo*, *supra* note 3, § 4-1, at 134; see also Restatement (Second) of Contracts § 71 (1981) In a bilateral contract, the promise of each promisor must be bargained for and given in exchange for the other's promise. See *J. Calamari & J. Perillo*, *supra* note 3, § 4-1, at 134-35; see also Restatement (Second) of Contracts § 71 (1981). In a unilateral contract, the performance must be bargained for and given in exchange for the promisor's promise. See *J. Calamari & J. Perillo*, *supra* note 3, § 4-15, at 157; see also Restatement (Second) of Contracts § 71 (1981).

23. See Restatement (Second) of Contracts §§ 187-188 & § 188 comment g (1981)

ancillary, arguing that a covenant is not ancillary when it is not reasonably contemporaneous with the initiation of employment.²⁴ Thus, when the at will employment relationship has been established for a significant period without a restrictive covenant, the covenant is not considered ancillary to the employment, and the employer must provide separate consideration to support the covenant.²⁵

This dispute over when a covenant is ancillary masks the important issue in these cases: whether the employment relationship alone can support such a covenant, no matter when in that relationship the covenant is executed, given the potentially illusory nature of an employment at will.²⁶ All of the employer's promises to pay salary, bonuses and the like are illusory because the employer has the unfettered right to discharge the employee at any time. The employer need not employ the employee for even one day. In an employment for a five-year term with a two-year noncompetition covenant, there is a bargained-for exchange. But in the case of an employment at will, is a two-year noncompetition covenant bargained for in exchange for an employment of one day, one month, one year, two years or a reasonable time? A separate analysis for at will employment is necessary to take this difference into account.

In an employment at will, a mere promise to employ is illusory and therefore is not consideration. However, if the employee's promise not to compete is supported by the employer's performance (for example, payment of salary) as long as the employment continues, then there is consideration for the covenant²⁷ regardless of whether it is presented after the commencement of employment and regardless of whether the employment continues for only one day after the covenant is made. In an employment for a term, a promise to employ is consideration for a covenant executed at the same time as the employment contract. However, a

(restraint may be ancillary to a relationship although, as in case of employment at will, no employment contract involved).

24. See, e.g., *Nooter Corp. v. Todd*, 687 S.W.2d 695, 697 (Mo. Ct. App. 1985) (restrictive covenant signed subsequent to employment at will is not ancillary and backdating subsequent restrictive covenant four months does not make covenant ancillary to employment) (interpreting Pennsylvania law); *James C. Greene Co. v. Kelley*, 261 N.C. 166, 168, 134 S.E.2d 166, 167 (1964) (any restrictive covenant agreed to after employment relationship established must be based upon new consideration); *George W. Kistler, Inc. v. O'Brien*, 464 Pa. 475, 484-85, 347 A.2d 311, 316 (1975) (valid restrictive covenant need not appear in initial contract, but if agreed on at later time, must be supported by new consideration); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 33 (Tenn. 1984) (court stated that a covenant signed prior to, contemporaneously with or shortly after employment begins is part of the original agreement); *Environmental Prods. Co. v. Duncan*, 285 S.E.2d 889, 890 (W. Va. 1981) (when covenant not to compete executed after employment has begun without such restriction, there must be new consideration to support it).

25. A nonancillary covenant requires separate consideration. See *supra* note 7, and accompanying text.

26. For a discussion of illusoriness, see *supra* note 4 and accompanying text.

27. Continued employment is consideration because the employer is refraining from exercising a legal privilege to terminate the employment. He has thereby provided consideration.

covenant executed after employment begins is unenforceable for lack of consideration because of the employer's pre-existing duty to continue employment.²⁸

Judicial analysis of noncompetition covenants in employment at will generally follows one of three views of what constitutes consideration. Depending on the view prevailing in a given jurisdiction, an employee's promise to refrain from competing will be considered binding if there is: 1) continued at will employment;²⁹ 2) consideration other than mere continued at will employment;³⁰ or 3) any consideration, so long as it is bargained for by the parties.³¹

2. Majority View: Ancillary Covenant Is One Entered Any Time During an Employment at Will Relationship

Courts in the majority of jurisdictions find continued employment to be sufficient consideration to support the noncompetition covenant no matter when during the employment relationship the covenant was signed.³²

Although no minimum period of continued employment has been established as adequate consideration for a restrictive covenant, covenants tend to be enforced when employment has continued at least several months after the covenant was executed.³³ Clearly, employment for one instant is not consideration. Nor will courts deem a promise of employ-

28. The pre-existing duty rule states that "where a party does or promises to do what he is already legally obligated to do or promises to refrain from doing or refrains from doing what he is not legally privileged to do he has not incurred detriment," J. Calamari & J. Perillo, *supra* note 3, § 4-7, at 145, and thus has not provided consideration for another's promise.

29. See *infra* Part I.A.2.

30. See *infra* Part I.A.3.

31. See *infra* Part I.B.

32. See, e.g., *Medtronic, Inc. v. Benda*, 689 F.2d 645, 654 (7th Cir. 1982) (applying Illinois law), *cert. denied*, 459 U.S. 1106 (1983); *Dickinson v. Auto Center Mfg. Co.*, 639 F.2d 250, 253 (5th Cir. 1981) (*per curiam*) (applying Florida law); *Olin Water Servs. v. Midland Research Laboratories, Inc.*, 596 F. Supp. 412, 415 (E.D. Ark. 1984) (applying Arkansas and Kansas law), *appeal dismissed*, 774 F.2d 303 (8th Cir. 1985); *Barnes Group, Inc. v. O'Brien*, 591 F. Supp. 454, 461 (N.D. Ind. 1984) (applying Ohio law); *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 92-93, 229 So. 2d 480, 483 (1969); *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 628 (Fla. Dist. Ct. App. 1982); *McQuown v. Lakeland Window Cleaning Co.*, 136 So. 2d 370, 371-72 (Fla. Dist. Ct. App. 1962); *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52, 54 (Fla. Dist. Ct. App. 1960); *Farm Bureau Serv. v. Kohls*, 203 N.W.2d 209, 212 (Iowa 1972); *Simko, Inc. v. Graymar Co.*, 55 Md. App. 561, 567, 464 A.2d 1104, 1107-08 (1983); *Reed, Roberts Assocs. v. Bailenson*, 537 S.W.2d 238, 241 (Mo. Ct. App. 1976); *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 683, 406 A.2d 1310, 1312 (1979); *Hogan v. Bergen Brunswig Corp.*, 153 N.J. Super. 37, 43, 378 A.2d 1164, 1167 (App. Div. 1977) (*per curiam*); *Matlock v. Data Processing Sec., Inc.*, 607 S.W.2d 946, 948 (Tex. Civ. App. 1980), *modified*, 618 S.W.2d 327 (Tex. 1981).

33. See, e.g., *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 92-93, 229 So. 2d 480, 483 (1969) (eight months' continued employment sufficient for two-year covenant); *Simko, Inc. v. Graymar Co.*, 55 Md. App. 561, 567, 464 A.2d 1104, 1107-08 (1983) (ten years' continued employment sufficient for one-year covenant); *Hogan v. Bergen Brunswig*

ment for as long as the employer wants it a bargained-for consideration. Employment must continue for at least a reasonable time.³⁴ This approach, based on an assessment of the reasonableness of enforcing the covenant, allows courts great flexibility.

In many cases the employee has been threatened with dismissal for refusing to sign the covenant.³⁵ This threat is viewed as reinforcing the argument that continued employment is consideration because it underscores the employer's freedom to terminate at any time³⁶ and tends to show that continued employment was bargained for. If the employer refrains from terminating employment in exchange for the covenant, that is valuable consideration.³⁷

The majority view that continued employment is consideration does not treat the parties unfairly, even though the reasoning behind the decisions is not always clear. The rationale may be that the employer has impliedly promised continued employment³⁸ or that the employee is estopped from arguing lack of consideration once he has accepted complete performance of the agreement as promised.³⁹ It may also be that the

Corp., 153 N.J. Super. 37, 43, 378 A.2d 1164, 1167 (App. Div. 1977) (per curiam) (three years' continued employment sufficient for one-year covenant).

34. See, e.g., *Simko, Inc. v. Graymar Co.*, 55 Md. App. 561, 567, 464 A.2d 1104, 1107-08 (1983) (what constitutes substantial performance depends on facts and circumstances of particular case); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 35 (Tenn. 1984) (it is possible that employment for only a short period of time would be insufficient consideration under the circumstances); *accord J. Calamari & J. Perillo, supra* note 3, § 2-13, at 45-46 (parties silent as to material term may intend that the term be supplied by implication; U.C.C. substitutes reasonable time, reasonable price); Restatement (Second) of Contracts § 33 comment d (the time for performance is a reasonable time); *id.* § 204 comment d (where there is in fact no agreement, the court should supply a term that comports with community standards of fairness and policy).

35. See, e.g., *Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1302 (Del. Ch. 1983); *Tasco, Inc. v. Winkel*, 281 N.W.2d 280, 282 (Iowa 1979); *Simko, Inc. v. Graymar Co.*, 55 Md. App. 561, 568-69, 464 A.2d 1104, 1108 (1983); *Kari Family Clinic v. Bohnen*, 349 N.W.2d 868, 869 (Minn. Ct. App. 1984); *Matlock v. Data Processing Sec., Inc.*, 607 S.W.2d 946, 948 (Tex. Civ. App. 1980), *modified*, 618 S.W.2d 327 (Tex. 1981).

36. A New Jersey court went further, stating that verbalized threat of immediate discharge was not necessary to find the consideration needed to support the restrictive covenant. "Such a consequence can be inferred from conduct." *Hogan v. Bergen Brunswick Corp.*, 153 N.J. Super. 37, 43, 378 A.2d 1164, 1167 (App. Div. 1977) (per curiam).

37. See *supra* notes 22, 32 and accompanying text.

38. See *Central Adjustment Bureau, Inc. v. Ingram Assoc.*, 622 S.W.2d 681, 685 (Ky. Ct. App. 1981). See *supra* note 1. The implied contract exception to employment at will creates a contract by operation of law, imposing on the employer an obligation to terminate an at will employee only in good faith and for just cause. See *Scholtes v. Signal Delivery Serv.*, 548 F. Supp. 487, 492 (W.D. Ark. 1982) (detrimental reliance on employer's assurance of continued employment by passing up other jobs results in implied contract exception to employment at will); *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 603, 440 N.E.2d 998, 1004 (1982) (oral promise of permanent employment is enforceable when employee consideration is giving up right to accept another job offer).

39. Complete performance does not mean that the employer can terminate unilaterally at will. See *supra* note 4 and accompanying text. Rather, it suggests that the employer promised to continue employment for a reasonable time beyond execution of the covenant. See *supra* note 34 and accompanying text. The employer may argue as well that the employee is estopped by the requirement to mitigate damages.

employee has made an offer to the employer looking to a unilateral contract.⁴⁰ The offer becomes irrevocable once the employer performs or begins performing, so the employee's resignation prevents the employer from completing performance. Under those circumstances the employer can enforce the employee's promise.

Because many jurisdictions are recognizing exceptions to the doctrine of employment at will and are limiting the employer's ability to terminate the employment relationship unilaterally without cause,⁴¹ a refusal to recognize continued employment as adequate consideration for a restrictive covenant executed after employment has begun may also develop. Continued employment is a pre-existing duty in employment contracts for a term and thus is inadequate consideration for a restrictive covenant entered into after the commencement of a fixed term employment contract. As the doctrine of employment at will erodes, more courts may adopt the view that because the employer is not really free to terminate employment at any time, continued employment is merely a pre-existing duty in at will employment as well. If so, those courts might no longer deem mere continued employment to be consideration.

3. Minority View: Ancillary Covenant Is One Entered Contemporaneously with or Shortly After Beginning the Employment at Will Relationship

Courts following the minority view distinguish between a noncompetition covenant agreed to as part of the terms of the original employment and one agreed to after the employment has already begun. Under this view, continued employment alone cannot support a noncompetition covenant that was not one of the terms of the original employment agreement.⁴² A few courts following this approach cite the pre-existing duty

40. See *Comfort, Inc. v. McDonald*, No. 1066(S) (Del. Ch. June 1, 1984) (available May 6, 1986, on LEXIS, States library, Omni file) (where employee voluntarily terminated employment, covenant enforceable because supported by employer's performance); see also *Scholtes v. Signal Delivery Serv.*, 548 F. Supp. 487, 491-92 (W.D. Ark. 1982) (implied contract analysis reaches same result as unilateral contract approach). See generally Note, *Challenging the Employment-at-Will Doctrine Through Modern Contract Theory*, 16 U. Mich. J.L. Ref. 449, 450 (1983) (advocating implied contract analysis that protects reasonable expectations of employees and employers). However, one court has held that where there is a valid written or express contract for employment at will, there cannot also be a contradictory implied contract embracing the same subject matter. See *Crain v. Burroughs Corp.*, 560 F. Supp. 849, 852 (C.D. Cal. 1983).

41. See *supra* note 1.

42. See *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740-41 (Minn. 1982); *Davies & Davies Agency v. Davies*, 298 N.W.2d 127, 130-31 (Minn. 1980); *Nooter Corp. v. Todd*, 687 S.W.2d 695, 696-97 (Mo. Ct. App. 1985) (decided under Pennsylvania law); *Forrest Paschal Mach. Co. v. Milholen*, 27 N.C. App. 678, 685, 220 S.E.2d 190, 195-96 (1975); *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 77, 185 S.E.2d 278, 282 (1971); *George W. Kistler, Inc. v. O'Brien*, 464 Pa. 475, 484-85, 347 A.2d 311, 316 (1975); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 38 (Tenn. 1984) (Brock, J., dissenting); *Associated Dairies, Inc. v. Ray Moss Farms, Inc.*, 205 Tenn. 268, 274-75, 326 S.W.2d 458, 460-61 (1959); *Schneller v. Hayes*, 176 Wash. 115, 118-19, 28 P.2d 273, 274-75

rule⁴³ and hold that consideration is lacking when the employer's obligation amounts to no more than that which he has already agreed to do: employ the employee.⁴⁴ Unless the employer incurs additional obligations or gives other consideration, the covenant is not deemed supported by valuable consideration.⁴⁵

This analysis, however, ignores the terms of the employment at will. The employer does not have a pre-existing duty to continue the employment relationship for a fixed term or for a reasonable time or for an instant.

Some of the minority courts have considered the circumstances under which the employee leaves in their evaluation of whether consideration has been provided.⁴⁶ When continued employment was held to be sufficient consideration, the employee usually had been threatened with loss of his job if he refused to sign.⁴⁷ When additional consideration was required of the employer, as under this second view, no such threat had been made.

For many courts following the view that something more than mere continued employment is necessary, adequate consideration may include

(1934); *Pemco Corp. v. Rose*, 257 S.E.2d 885, 890 (W. Va. 1979); see also *Worth Chem. Corp. v. Freeman*, 261 N.C. 780, 781, 136 S.E.2d 118, 119 (1964) (per curiam).

One court explained this as a requirement that "any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration." *James C. Greene Co. v. Kelley*, 261 N.C. 166, 168, 134 S.E.2d 166, 167 (1964).

The result is the same if the employee resigns or threatens to resign when asked to sign the covenant, and then is subsequently rehired or continues employment. See *Comfort, Inc. v. McDonald*, No. 1066(S) (Del. Ch. June 1, 1984) (available May 6, 1986, on LEXIS, States library, Omni file) (employee gave two weeks' notice of intent to resign, then prior to expiration of notice period, asked that employment be continued; employment was continued and covenant was executed at that time); *4408, Inc. v. Losure*, 175 Ind. App. 658, 659, 664, 373 N.E.2d 899, 900, 903 (1978) (agreement to rehire salesman who resigned when asked to sign covenant was valid consideration to support covenant he eventually signed).

43. See *supra* note 28.

44. See *Perthou v. Stewart*, 243 F. Supp. 655, 658 (D. Or. 1965); *Davies & Davies Agency v. Davies*, 298 N.W.2d 127, 130 (Minn. 1980).

45. These courts might view the newly-presented covenant as a modification of the original agreement. When the modification of the existing agreement adds a covenant not to compete, some courts view the covenant as a separate noncompetition agreement of the parties. See *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983) (modification adding covenant not to compete is separate agreement requiring separate consideration because it restrains trade); *James C. Greene Co. v. Kelley*, 261 N.C. 166, 168, 134 S.E.2d 166, 167 (1964) (noncompetition agreement after employment begins must be in form of new contract based on new consideration); *Farber & Matheson, Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. Chi. L. Rev. 903, 920 n.73 (1985) (use of the unilateral contract device to enforce one-sided modifications of ongoing relationships has found increasing favor).

46. See *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 35 (Tenn. 1984) ("[A] discharge which is arbitrary, capricious or in bad faith clearly has a bearing on whether a court of equity should enforce a non-competition covenant.").

47. See *supra* note 35 and accompanying text.

additional training,⁴⁸ receipt of confidential information,⁴⁹ a change in status or salary,⁵⁰ a notice of termination provision⁵¹ or some other immediate advantage to the employee.⁵² One such advantage might be the employer's promise to pay the employee his salary if he cannot find employment during the restrictive term solely because of the covenant.⁵³ If protection of the employer's interest is not worth the dollar amount represented by two or three years' salary, the courts may reason that the employer is unfairly restraining the employee and therefore cannot claim irreparable harm before an equity court.⁵⁴

a. *Change in Status or Salary*

A beneficial change in status or salary is usually sufficient to support a restrictive covenant agreed on after initial employment at will.⁵⁵ Consideration is found when, in addition to continued employment, employees obtain "substantial economic and professional benefits"⁵⁶ and advance to otherwise unattainable positions.⁵⁷ But even when there has been a salary increase and change in position after signing, a covenant has still been held unenforceable when the employer made no distinction in his treatment of signers and non-signers.⁵⁸

48. See *Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 466-67 (Del. Ch. 1977); *Davies & Davies Agency v. Davies*, 298 N.W.2d 127, 130-31 (Minn. 1980); *M.S. Jacobs & Assocs. v. Duffley*, 452 Pa. 143, 146-47, 303 A.2d 921, 923 (1973).

49. See *Davies & Davies Agency v. Davies*, 298 N.W.2d 127, 130 (Minn. 1980).

50. See *infra* notes 55-58 and accompanying text.

51. See *infra* notes 59-61 and accompanying text.

52. This may include a lump-sum bonus or a vested annuity contract. See *Stover v. Gamewell Fire Alarm Tel. Co.*, 164 A.D. 155, 149 N.Y.S. 650 (1914) (annuity contract). A profit-sharing plan under the sole control of the employer has been held not sufficient consideration for a covenant not to compete executed by an established employee. See *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 78-79, 185 S.E.2d 278, 283 (1971).

53. See, e.g., *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264, 1266-68 (8th Cir. 1978); *Amerace Corp. v. Markham*, unpublished op. (Tenn. Ct. App. Aug. 24, 1979) (cited in *Frank's Food Co. v. Parsons* (Tenn. Ct. App. June 15, 1984) (available May 6, 1986, on LEXIS, States library, Omni file)).

54. This may be justified by the economic inefficiency of enforcing a covenant when the employee's services and information are less valuable to his present employer than to a potential future employer. See generally Note, *Economic and Critical Analyses of the Law of Covenants not to Compete*, 72 Geo. L.J. 1425, 1429 (1984) (economic logic underlying the law is often implicit rather than explicit).

55. See, e.g., *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1339 (9th Cir. 1980) (interpreting Pennsylvania law); *Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1304-05 (Del. Ch. 1983); *Hammermill Paper Co. v. Palese*, No. 712B (Del. Ch. June 14, 1983) (available May 6, 1986, on LEXIS, States library, Omni file); *Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 466-67 (Del. Ch. 1977); *Davies & Davies Agency v. Davies*, 298 N.W.2d 127, 130-31 (Minn. 1980); *M.S. Jacobs & Assocs. v. Duffley*, 452 Pa. 143, 147, 303 A.2d 921, 923 (1973).

56. *Davies & Davies Agency v. Davies*, 298 N.W.2d 127, 131 (Minn. 1980).

57. See *id.*; see also *Hammermill Paper Co. v. Palese*, No. 712B (Del. Ch. June 14, 1983) (available May 6, 1986, on LEXIS, States library, Omni file) (beneficial change in status is enough; so is promise of employment with employer's successor business entity).

58. See *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983) (covenant unenforceable for lack of consideration where other employees who did not sign

b. *Notice Provision*

Written notice of termination provisions from either party⁵⁹ have been held sufficient consideration for an at will employee's noncompetition covenant.⁶⁰ Notice of termination is not technical consideration on the employer's part, and it probably is not bargained for by the employee in exchange for a noncompetition covenant. Some courts treat notice provisions as they do continued employment and impose an implied requirement of good faith on the employer's part which remedies the illusory nature of the employer's termination at will provision.⁶¹

The minority courts are misinterpreting the reasonableness requirement in restraint of trade agreements and mislabeling it as one that looks for additional consideration beyond continued employment.⁶² They do not separate the consideration question from the possibility of duress or coercion that arises when the covenant is presented after the employee

received same benefits as employee who signed). Although the court did not explain, its assumption must have been that the employer suffered no legal detriment when he gave benefits to the employee who signed.

59. A notice of termination provision is a promise that the party will continue employment at least for the period of notice before terminating. For example, if the parties have a 30-day notice provision, the employment must continue for 30 days beyond the date either party gives notice of termination. See J. Calamari & J. Perillo, *supra* note 3, § 4-17, at 161-62; 1A A. Corbin, *supra* note 6, § 164, at 83-85.

60. See *Wrentham Co. v. Cann*, 345 Mass. 737, 739-41, 189 N.E.2d 559, 560-61 (1963); *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 682, 406 A.2d 1310, 1312 (1979); J. Calamari & J. Perillo, *supra* note 3, § 4-17, at 161.

Although courts have found consideration in the requirement to give notice of termination, they agree that no consideration exists when a party has the unrestricted right to terminate the contract at any time without notice. See *Meurer Steel Barrel Co. v. Martin*, 1 F.2d 687, 688 (3d Cir. 1924); *Pick Kwik Food Stores, Inc. v. Tenser*, 407 So. 2d 216, 218 (Fla. Dist. Ct. App. 1981); see also *Maintenance Specialties v. Gottus*, 455 Pa. 327, 330 n.1, 314 A.2d 279, 281 n.1 (1974) (notice provision is not enough when employer has sole discretion to do away with notice). That party makes no promise at all and there is not sufficient consideration for the promise of the other. *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 626 (Fla. Dist. Ct. App. 1982) (quoting *Pick Kwik Food Stores, Inc. v. Tenser*, 407 So. 2d 216, 218 (Fla. Dist. Ct. App. 1981)). The notice provision therefore must be a requirement enforceable against both parties; it cannot be an obligation imposed only on the employer or the employee alone.

If, for instance, an entirely valid contract contain [sic] a provision for its termination by one party on notice to the other, though enforceable [sic] at law, courts of equity will not, because of such provision, enforce it by granting equitable relief, as specific performance, but will leave the aggrieved party to his remedy at law. This is because the court will not grant equitable relief on a contract where one party can nullify its action by exercising his reserved power to terminate it.

Meurer Steel Barrel Co., 1 F.2d at 688.

61. See *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 682, 406 A.2d, 1310, 1312 (1979); 3A A. Corbin, *supra* note 8, § 647, at 105-06 (1960). See *supra* note 38 and accompanying text.

In *Collier Cobb & Associates, Inc. v. Leak*, 61 N.C. App. 249, 300 S.E.2d 583 (1983), the court held that a notice provision creates no new rights. See *id.* at 253, 300 S.E.2d at 585. Rather, the mutual exchange of promises to give notice supports only the termination and modification portions and not the entire agreement. *Id.*, 300 S.E.2d at 585.

62. See *supra* notes 24-28 and accompanying text.

has changed his position in reliance on employment without such a covenant. Unfortunately, the vagueness of the restraint of trade analysis,⁶³ particularly its failure to identify employments at will as worthy of special treatment, may lead courts hearing these cases on first impression to engage in this mistaken analysis of consideration.

The distinction drawn by the minority courts is not a consideration issue, but a fairness issue. Treating covenants as supported by the employment agreement, even though they were not negotiated by the parties and were presented to the employee on the first day or within the first few months of employment, creates the impression of unfairness to the employee.⁶⁴ This result may be what leads the minority courts to look for additional consideration. They may be using the pre-existing duty rule and the doctrine of consideration to avoid coercion. In what the minority terms an ancillary covenant, there is no coercion because the employee knew about the covenant. This point is separate, however, from whether there was consideration.

B. *Only a Bargained-For Advantage Can Supply Consideration*

A small number of courts focus on a traditional bargain theory of consideration.⁶⁵ These courts reject the view that promotions and compensation increases are always consideration because they hold that in order for an act to constitute consideration for a promise it must have been "bargained for and given in exchange for the promise."⁶⁶ One judge, in a

63. See *Dearborn Chem. Corp. v. Rhodes* (Tenn. Ct. App. Apr. 19, 1985) (available May 6, 1986, on LEXIS, States library, Omni file) ("There is no inflexible formula. . . . Each case must stand or fall on its own facts."); *Frank's Food Co. v. Parsons* (Tenn. Ct. App. June 15, 1984) (available May 6, 1986, on LEXIS, States library, Omni file) (same); *E. Farnsworth, supra* note 1, § 5.3 at 336 ("This rule of reason is inevitably imprecise and leaves cases to be resolved on their particular facts, including general economic conditions. . . . The imprecision . . . is compounded because most claimants seek injunctive relief and, in denying such relief, courts often fail to indicate whether damages could have been recovered had they been sought."); *Blake, supra* note 2, at 649 ("formulation is so general as to throw little light on specific detailed problems").

64. See *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982) ("practice of not telling prospective employees all of the conditions of employment until after the employees have accepted the job . . . takes undue advantage of the inequality between the parties"); *E. Farnsworth, supra* note 1, at 338 ("Because post-employment restraints are often the product of unequal bargaining power and may inflict unanticipated hardship on the employee, they are scrutinized with more care than are covenants in the sale of a business.").

65. See, e.g., *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983) (covenant that is not bargained for and does not provide employee with advantages is unenforceable for lack of consideration); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740-41 (Minn. 1982) (covenant not bargained for unenforceable unless supported by independent consideration); *Pemco Corp. v. Rose*, 163 W. Va. 420, 427, 257 S.E.2d 885, 890 (1979) ("Common law principles governing employment contracts should not be employed to supply consideration for a non-competition covenant where such provision was not freely bargained for by the parties.").

66. *Restatement of Contracts* § 75 (1932); see *Collier Cobb & Assocs. v. Leak*, 61 N.C. App. 249, 253, 300 S.E.2d 583, 585 (1983) (notice provision for termination supports only the termination portion of the agreement, and is not consideration for a restric-

dissenting opinion, refused to acknowledge that a covenant executed years before promotions and salary increases were given could have been given in exchange for those promotions and salary increases.⁶⁷ He believed that the covenants were "merely imposed upon the employees after their employment began."⁶⁸

Courts requiring evidence of a traditional bargain stress that covenants signed soon after the start of employment are not supported by consideration as part of the original agreement because of the absence of free bargaining: "Even if [the employee] is notified of the restrictive covenant on the first day of his new employment, he has foreclosed his other options at that point and has little choice but to sign."⁶⁹ One way of viewing this is that the employee frequently has no bargaining power once he is employed and can easily be coerced.⁷⁰ This, however, is not an issue of consideration; it is one of fairness.

Noncompetition covenants signed a substantial period of time after the original employment agreement also have been held unenforceable because the parties did not bargain for the restrictions and the employees received no additional benefits for agreeing to them.⁷¹

II. RECOMMENDATION

The courts should expressly adopt the unilateral contract approach to noncompetition covenants in employments at will.⁷² Unilateral contract

five covenant); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 38-39 (Tenn. 1984) (Brock, J., dissenting) (citing Restatement of Contracts § 75 (1932)).

67. See *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 38 (Tenn. 1984) (Brock, J. dissenting).

68. *Id.* at 38-39.

69. *Id.* at 38.

70. See *Davies & Davies Agency v. Davies*, 298 N.W.2d 127, 130 (Minn. 1980) (restrictive covenant held to be unenforceable for lack of consideration because the employee was not advised that he was required to sign or would lose his job until 11 days after starting employment and 28 days after terminating employment with former employer. See *id.* at 132-33).

71. See *Kari Family Clinic v. Bohnen*, 349 N.W.2d 868, 869 (Minn. 1984); *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 627, 630 (Minn. 1983); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740-41 (Minn. 1982).

72. Unilateral contracts are an exception to the doctrine of mutuality of obligation. See *Meurer Steel Barrel Co. v. Martin*, 1 F.2d 687, 688 (3d Cir. 1924); *J. Calamari & J. Perillo*, *supra* note 3, § 4-15, at 157-58; 1A A. Corbin, *supra* note 6, §§ 152-154, at 2-26; cf. *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 626 (Fla. Dist. Ct. App. 1982) (mutuality of obligation is not essential where there is other consideration for a contract). If the offeree complies with the terms of the offer, he has provided consideration for a promise, even if there was no mutuality of obligation at the outset. *J. Calamari & J. Perillo*, *supra* note 3, § 4-15, at 157-58; 1A A. Corbin, *supra* note 6, §§ 152-154, at 2-26; Restatement (Second) of Contracts § 79(c) & § 79 comment f (1981).

Few courts, however, expressly apply unilateral contract theory to noncompetition covenants in employments at will. See *infra* note 74 and accompanying text. Florida is one jurisdiction that adopts the unilateral contract approach, though it does not specifically identify it as such. Florida courts hold that a promise lacking mutuality at inception becomes binding on the promisor after performance by the promisee. See *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 627 (Fla. Dist. Ct. App. 1982).

analysis would introduce an element of uniformity in the negotiating and contracting process without forcing an inequitable and unpredictable result on the employer.

Courts commonly apply a unilateral contract analysis to the employer's promise to pay stock options, a bonus or a pension to an at will employee in order to obtain the employee's continued employment for a specified period.⁷³ But few courts have so clearly and routinely extended the analogy to the employee's promises, such as the promise not to compete.⁷⁴ Treating these agreements as unilateral contracts alleviates some of the concern with illusoriness that pervades employment at will.⁷⁵

We start out with the proposition that, in this case, the parties entered into a bilateral contract containing mutual executory promises. Appellant agreed to continue to employ and pay appellee; appellee agreed to work for appellant and not to compete with it for a period of time in a certain area when his employment terminated. Appellant retained the right, however, to terminate the employment without cause. . . . Our inclination is that mutuality of obligation did not exist when the parties executed their agreement because appellant had a right to terminate without cause. . . .

Id. at 626.

This Note argues that precedents are less useful than they could be because courts following the unilateral contract approach do not identify the contract doctrine they are applying. *See, e.g.,* Scholtes v. Signal Delivery Serv., 548 F. Supp. 487, 491-92 (W.D. Ark. 1982) ("[w]hether Arkansas law recognizes this precise [unilateral contract] terminology or not, the same result is reached under Arkansas law by way of the 'implied contract'").

73. *See* Gronlund v. Church & Dwight Co., 514 F. Supp. 1304, 1309 (S.D.N.Y. 1981) (unilateral contract is the general present-day construction of employment stipulations for severance pay, bonuses or similar incentive plans); Langdon v. Saga Corp., 569 P.2d 524, 527-28 (Okla. 1977) (Personnel manual perceived as offer for a unilateral contract accepted by employee's continuing to work and foregoing option of termination. The court "thus conceive[d] personnel policies extending benefits as unilateral offers which are accepted by continued performance. The requirement of mutuality is met in that no benefits accrue under those policies until performance has occurred."); *see also* Research & Trading Corp. v. Powell, 468 A.2d 1301, 1305 (Del. Ch. 1983) (stock option rights limit the employer's otherwise absolute right to discharge employee at will without cause); Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 302, 491 A.2d 1257, 1267 (unilateral contract analysis is adequate to find implied promise by employer in personnel policy manual), *modified mem. on other grounds*, 101 N.J. 10, 499 A.2d 515 (1985).

74. Karl Llewellyn argued that unilateral contracts were rare and unimportant. K. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance (Pt. 1)*, 48 Yale L.J. 1, 36 (1938); *see* Pettit, *supra* note 8, at 551. This Note argues that the distinction between unilateral and bilateral is not irrelevant, and that too many courts treating these cases for the first time are straining to treat the agreements as bilateral. Those courts could benefit from a clear expression of the unilateral analysis that is in effect applied by the majority.

75. This is consistent with those courts that hold that when a modification adds a covenant not to compete to an existing employment agreement, the substituted contract is a separate agreement of the parties. *See supra* note 45 and accompanying text. *See also* Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (an original employment contract may be modified or replaced by a subsequent unilateral contract when employee retains employment with knowledge of changed conditions); Langdon v. Saga Corp., 569 P.2d 524, 527-28 (Okla. 1977) (new personnel manual listing benefits did not modify any prior contract but became a new contract which defined the employer-employee relationship during the period the policy was in effect and the employee performed).

The offer to refrain from competition should be viewed as an offer to a unilateral contract moving from the employee to the employer.⁷⁶ The unilateral contract analysis requires no distinction between covenants executed with commencement of employment and those executed well after commencement. Therefore, it should be an acceptable approach for both the majority and minority courts. The covenant becomes enforceable against the employee only after the employer has accepted the employee's offer by beginning or completing the requested performance.⁷⁷ The requested performance may include continuing the employment, paying the employee a flat stated sum or giving the employee some other immediate benefit.⁷⁸ Assuming the employee bargains for continued employment, how much continued employment is necessary? Either a stated time or, if no time is stated, a reasonable time should be sufficient. Even if a stated time is agreed on, the employment is not changed into employment for a fixed term. The stated employment term affects only the issue of whether the covenant is enforceable.

This unilateral contract approach has the added benefit of creating a consistent result among those states that recognize the implied contract exception to the doctrine of employment at will and those states that do not. If the employment agreement and the restrictive covenant are analyzed as a unilateral contract, states that do not recognize the implied contract exception may still honor the at will status of employment by treating the covenant portion under the unilateral contract theory. In that case, rather than fulfilling an implied promise by continuing the employee's employment, the employer, by exercising the *option* to perform, accepts the employee's offer to refrain from competition. The employer is free not to perform, but in that case he foregoes or rejects the employee's offer not to compete. By dismissing the employee before a reasonable time, the employer has not provided the consideration for the employee's promise. The covenant in that case fails for lack of consideration.

When the employer is deemed to have completely performed what was

76. The employee's promise can be characterized as an offer even though it was not initiated by the employee. When the employee agrees not to compete, the employee has offered to refrain from competition, when in fact the employee did not initiate such an offer. The same is true when the "offer" moves in the reverse direction, that is when the employer promises a pension or a bonus, so it should not be an obstacle here. See *Pine River State Bank v. Mettill*, 333 N.W.2d 622, 626 (Minn. 1983) ("Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions.").

77. The employer's performance is a condition precedent to the employee's duty of performance, that is, performance of the act is the acceptance of the offer. J. Calamari & J. Perillo, *supra* note 3, § 11-3, at 384-85.

78. The employee technically should be able to tell the employer what tendered performance will constitute acceptance. This is unlikely to happen in a real-life situation, however. The courts will have to imply the performance requested, basing their decisions on evidence of the negotiations between the parties at the time the covenant was executed. This is not substantially different from the current majority analysis.

requested in exchange for the employee's promise not to compete, the employee's promise becomes binding and enforceable.⁷⁹ If the employee resigns before a reasonable time, the employer may still enforce the covenant under the theory of an option contract:⁸⁰ the employer began performance, giving the employee consideration to make the employee's offer irrevocable, and giving the employer the option to perform. The employee's resignation constitutes prevention⁸¹—preventing the employer from accepting the offer by continuing employment—and thus the condition imposed on the employer to accept the employee's offer is excused. The employee still is bound to his promise under the covenant.

CONCLUSION

The courts' approaches toward noncompetition covenants in employment at will do not clearly explain how or why their results are achieved. Consequently, many employees may hesitate to bring their claims before the courts:

For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction.⁸²

Express adoption of the doctrinal rationale proposed here would remove the chilling effect these covenants have on employees by advising them that the covenant meets the preliminary requirements of contract formation only when the employer has provided consideration via performance or forbearance. If consideration is not provided, there is no fairness or reasonableness issue, and the covenant is unenforceable. If consideration is provided, the employee must expect that the court will go beyond and address the fairness requirements.

The employer would know that he can safely protect his legitimate business interests by providing certain advantages to the employee. The employer retains the freedom to terminate the employment at any time but is advised of the conditional nature of enforcing the restrictive covenant against the employee in the event he chooses to do so.

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79. See Restatement (Second) of Contracts § 79(c) & § 79 comment f (1981). See *supra* note 72. The offeree who performs under the terms of the offer has provided consideration for a promise.

80. See J. Calamari & J. Perillo, *supra* note 3, § 2-27, at 88-90 (option contract arises when the offeree begins to perform the act requested in an offer to a unilateral contract).

81. See *id.* § 11-32, at 441-42 (wrongful prevention, substantial hindrance or failure to cooperate may excuse the fulfillment of a condition precedent).

82. Blake, *supra* note 2, at 682-83.