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SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-00693

DONALD E. BROWN and
STANDLEE HAY COMPANY, INCORPORATED APPELLANTS

v.

CHARLES T. CREECH, INCORPORATED APPELLEE

AMICUS CURIAE BRIEF

On behalf of:
Greater Louisville Building and Construction Trades Council;
International Brotherhood of Electrical Workers, Local 369;
Kentucky AFL-CIO; Kentucky Jobs with Justice; Teamsters Local 783;
United Auto Workers; United Steelworkers of America

* * * * * * *

Kentucky Court of Appeals No. 2011-CA-000629-MR

On Appeal from Fayette Circuit Court Case No. 09-CI-000779

* * * * * * *

CERTIFICATE

It is hereby certified that a copy of the foregoing was served by mail this 10 day of July, 2013 on the following persons, and that the record in this matter has been returned to the clerk of court or has not been withdrawn: Jon A. Woodall, Esq., Ryan C. Daugherty, Esq., McBrayer, McGinnis, Leslie & Kirkland, PLLC, 201 E. Main St., Ste. 1000, Lexington, KY 40507; David R. Irvin, Esq., James M. Mooney, Esq. Moynahan, Irvin, & Moorney, P.S.C., 110 N. Main St., Nichloasville, KY 40356; Carroll M. Redford, Esq., Don A. Pisacano, Esq, Eliaabeth C. Woodford, Esq., Miller, Griffin & Marks, P.S.C., 271 West Short St., Ste. 600, Lexington, KY 40507; Hon. Kimberly N. Bunnell, Fayette Circuit Court Judge, 521 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, KY 40205; and Hon. Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

RESPECTFULLY SUBMITTED,

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STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF THIS BRIEF

Each of the seven parties to this brief is an organization purposed to protect working people regarding the terms and conditions of their employment. Together, they represent over 100,000 Kentucky workers. Full names for each, and some background information, are given in the footnote below.[1]

These parties wish to file this Amicus Brief to support the Appellants' argument concerning adequacy of consideration for a covenant not to compete, and to urge this Court to impose a high standard for consideration and other requirements in agreements restricting future employment, in light of the great hardships such agreements impose on employees, the coercive imbalance in negotiating positions between employers and employees, and the minimal benefit of such agreements to employers.

ARGUMENT

A. The Distinction Between Starting a Competing Business and Getting a Job

The widely-used terms, "covenant not to compete" and "non-competition agreement," do not accurately describe agreements prohibiting an employee from accepting work with another employer. An employee who installs home security systems for his employer (as in the real-life example in the ***Reynolds*** case discussed below) is not competing with his employer by accepting new employment in the same trade, even

[1] The Greater Louisville Building and Construction Trades Council comprises a group of 15 unions representing employees working in the building and construction industry in the Louisville area. The International Brotherhood of Electrical Workers Local 369 (a member of the GLBCTC) represents approximately 3,000 employees in the electrical industry, including employees working in building and construction, in much of Kentucky. The Kentucky Chapter of American Federation of Labor and Congress of Industrial Organization is an organization of over 50 unions together representing 100,000 employees in the Commonwealth. Kentucky Jobs with Justice has 16 member unions and more than 1,800 individual members. Teamsters Local 783 represents approximately 9,000 Kentucky employees in a variety of industries, including public employment. The United Automobile, Aerospace & Agricultural Implement Workers of America International Union represents approximately 11,500 Kentucky employees through 21 local unions. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union represents about 18,000 active and retired members in Kentucky through 90 local unions.

though his new employer may be. ***Black's Law Dictionary*** (9th ed. 2009) defines "competition" as "The struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties." A stock-room employee of Wal-Mart is not "competing" with Target—Wal-Mart is. An employee who starts a similar business may be competing with his former employer, but an employee who takes another job is not.[2]

An employee taking a job is neither a business entity competing with a former employer nor an equal with the employer in negotiating proposed restrictive covenants—which in fact are almost never negotiated but instead are simply demanded. A business is an enterprise which may be in competition with another business and which almost always can secure a replacement employee in short order. The vast majority of reported Kentucky cases where restrictions have been enforced have involved a former employee or part-owner, who started a competing business, and not an employee who took a job with a competitor.[3] This distinction is recognized broadly in American jurisprudence. See, e.g., ***Kladis v. Nick's Patio, Inc.***, 735 N.E.2d 1216, 1220 (Ind. App. 2000).[4]

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[2] Cases where employees leave an employer to establish a competing enterprise nearby are illustrative—see ***Lareau v. O'Nan***, 355 S.W.2d 679, 680 (Ky. 1962) ("within a few days" of termination "Lareau opened an individual office in the city of Henderson and undertook to engage in private practice of medicine"); and ***Daniel Boone Clinic, P.S.C. v. Dahhan***, 734 S.W.2d 488, 490 (Ky. App. 1987) ("Immediately following the cessation of his employment with DBC, Dr. Dahhan opened an office for the private practice of medicine in Harlan, and advertised the fact in the local newspaper"). Compare those decisions to a case where the employee changes from one employer to another, as in ***Crowell v. Woodruff***, 245 S.W.2d 447 (Ky. 1951), where the court distinguished between non-competition agreements entered in business transactions such as sales of a business, on the one hand, and agreements restricting an employee's right to future employment on the other.

[3] See the following decisions:

- ***Bradford v. Billington***, 299 S.W.2d 601 (Ky. 1957), where a younger doctor later left a joint practice with another physician, and opened his own in direct competition; in enforcing the non-compete provision there, the court, as it did in ***Crowell*** and ***Calhoun***, supra, was careful to distinguish cases involving employment.
- ***Central Adjustment Bureau, Inc. v. Ingram Associates, Inc.***, 622 S.W.2d 681 (Ky. Ct. App. 1981), where a group of former employees who formed a business (they did not simply go to work

Footnote continued next page.

Simply put, getting a job elsewhere is not "competing" with a former employer.

B. Continued Employment Is Not Adequate Consideration for Restrictions

It is certainly correct that in ***Higdon Food Service, Inc. v. Walker***, 641 S.W.2d 750 (Ky. 1982), more consideration ran to the employee than continuation of employment. However, the ***Higdon*** decision's language does indicate that mere continuation of employment is adequate consideration to enforce a restrictive covenant where the employment is terminable at will. A brief examination will demonstrate.

The ***Higdon*** opinion observes that Walker (the employee in question) had worked for the employer for four years when a contract of employment was presented. The

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for a competitor) and attempted to use their former employer's systems to compete with the former employer.

- ***Ceresia v. Mitchell***, 242 S.W.2d 359, 364 (Ky. 1951), a dispute between the seller and the buyers of a business: "In the case at bar the restraint imposed upon the seller of the business did not directly affect the competitive position of the public, because the buyers took over where the seller left off."
- ***Durham v. Lewis***, 21 S.W.2d 1004 (Ky. 1929), concerning the parties to the sale of a business—none of whom had ever been employed by the other—and one side's subsequent opening of a business in direct competition.
- ***Hammons v. Big Sandy Claims Service, Inc.***, 567 S.W.2d 313, 314 (Ky. App. 1978), concerning not an employee who went to work for a competitor, but an employee who "opened a [competing] claims service in Barbourville and actively solicited business from Big Sandy's clientele."
- ***Hodges v. Todd***, 698 S.W.2d 317, 319 (Ky. App. 1985), where the court took care to distinguish that "the sale of a business was involved, not simply the termination of an employer-employee relationship."
- ***Johnson v. Stumbo***, 126 S.W.2d 165 (Ky. 1938), a case that did not involve employees, but rather was a dispute between the buyers and sellers of a hospital.
- ***Martin v. Ratliff Furniture Co.***, 264 S.W.2d 273 (Ky. 1954), where no employees were involved, as the case was a dispute between former partners in a corporate enterprise.
- ***Porter v. Hospital Corp. of America***, 696 S.W.2d 793 (Ky. App. 1985), a challenge by citizens to a county's contract to lease and ulitimately sell the county's hospital to a private operator, and cease operating a hospital for at least ten years.

[4] That Court stated:

> Before addressing the protectable interest of this noncompetition agreement, we begin by distinguishing employment noncompetition agreements from noncompetition agreements involved in the sale of a business. Employment noncompetition agreements are in restraint of trade and not favored by the law. [Citation omitted.] They are strictly construed against the employer. *Id.* However, noncompetition agreements ancillary to the sale of a business are not as "ill-favored at law" as employee covenants. [Citation omitted.] The different treatment results, in part, from the disparate bargaining power enjoyed by one selling a business as compared to an employee who has only labor and skill to offer.

opinion notes that the company made it clear, without actually spelling it out, that an employee who refused to sign "wouldn't be there long[.]" Id.

The contract the ***Higdon*** employees signed provided among other things that for a year after leaving the company's employ, a signatory employee would not "engage as an agent" of any competitor of the company, and would not solicit company customers or divert customers to any competitor.

The ***Higdon*** opinion states that this new contract constituted "a new employment," and that the company "was under no more of an obligation to continue or renew the employment than Walker [the employee] was." 641 S.W.2d at 751. The opinion then brings the at-will concept into the discussion, stating:

> The hiring itself (or rehiring, if one prefers that word) was sufficient consideration for the conditions agreed to by Walker. It makes no difference that Higdon could have discharged him the next day. The point is that it did not have to hire him -- or keep him on -- at all.

641 S.W.2d at 751. ***Higdon's*** language thus seems to say that the employer's not cutting off the employment relationship at that moment is sufficient consideration for the restrictive covenant. As discussed below, this policy is enormously harmful to employees, and is inconsistent with the equitable application of contract law in the employment context.

C. Restrictive Covenants Destroy the Mutuality of "At-Will" Employment Status

"At-will" employment is most often described in terms of the right of an employer to terminate an employee: "[O]rdinarily an employer may discharge [an] at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible." ***Firestone Textile Co. Div., Firestone Tire & Rubber Co. v. Meadows***, 666 S.W.2d 730, 731 (Ky. 1983). However, attorneys representing employers

commonly (and correctly) point out that the right to terminate "at will" employment goes both ways—an employee is as free to quit as the employer is to terminate.[5]

This should not be seen as creating genuine balance—the loss of a job is "ordinarily" catastrophic for an employee who may struggle to find another job and may face great hardship in the meantime. But it is small potatoes for the employer who can quickly find a replacement employee and is unlikely to be hurt in the interim.

Nonetheless, an employee who quits or is fired is lawfully free to take such alternate employment as can be found. ***Unless***, that is, a restrictive covenant is in the picture. In an at-will employment relationship, not only may an employer terminate an employee, but the employer also may unilaterally reduce an employee's pay, eliminate employee benefits, re-assign an employee to an undesirable position, or transfer the employee to another locality regardless of the employee's family ties. On the employee's side, in each of those scenarios, the at-will employee at least has the legal right (if not always the practical ability) to say, "If you do that, I will quit and find work with another employer."

But all is changed when a non-compete agreement is involved. The employee's right to take alternative work is curtailed, perhaps effectively eliminated. Meanwhile, the employer, under the theory that continuation of employment is alone sufficient for enforcement of the non-compete, retains full at-will rights, and may still reduce pay, eliminate benefits, re-assign, or transfer the employee, or otherwise make the employee's employment undesirable—and the employee now will have little or no practical ability to leave, if the restrictive covenant is enforced.

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[5] See also the ***Higdon*** passage stating that the at-will employer "was under no more of an obligation to continue or renew the employment than [the employee] was." 651 S.W.2d at 751.

> In the case of noncompetes, the content of the writing goes to what is perhaps the most critical unwritten term of the relationship—the freedom to exit. If employers can insist on broad restrictions on an employee's ability to compete post-employment, [they] can control the employee's right to terminate at-will, substantially changing the balance of power in the relationship.

Rachel Arnow-Richman, ***Cubewrap Contracts and Worker Mobility: the Dilution of Employee Bargaining Power via Standard Form Noncompetes***, 2006 Mich. St. L. Rev. 963, 974. (This journal article hereinafter cited as "Arnow-Richman.").[6] See also, n ***Curtis 1000, Inc. v. Suess***, 24 F.3d 941, 946 (7th Cir. 1994),where the Seventh Circuit spelled out the problem posed by restrictive covenants, in the at-will setting.[7]

It follows that once a contract restricting future employment has been entered, the employer cannot change a term or condition of employment and still be able to enforce the restrictive covenant. ***A meaningful change in term or condition of employment must be held to void or render unenforceable a contractual restriction on future employment.***[8] Such contracts should not be used as inescapable traps.

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[6] See also the passage from ***Kladis v. Nick's Patio, Inc.***, quoted in n. 4 above. And see Louis Altman & Malla Pollack, ***Callmann on Unfair Competition, Trademarks and Monopolies*** vol. 2 § 16.41 (4th ed. West 2009), stating:

> When a current employee is required to sign a non-compete agreement, the employer and employee are not on equal bargaining ground: the employee is vulnerable to heavy economic pressure to sign the agreement in order to keep his job.

[7] That court stated:

> The courts' willingness to depart in this area from the traditional refusal to inquire into the adequacy of consideration displays a sensitivity to the argument... that continued employment is an illusory benefit when employment is at will. The minute after [the employee] signed the covenant not to compete, [the employer] could have fired him and then he would have had received nothing in exchange for the fresh promise represented by his signing of a new covenant. The new covenant was the modification of an existing contract and hence required consideration to be enforceable. [Citations omitted.]

[8] See, e.g., the Missouri holdings in ***Luketich v. Goedecke***, 835 S.W.2d 504 (Mo. App. 1992), affirming grant of injunction prohibiting employer from threatening to enforce a non-compete covenant against a former employee and any prospective employer of him, where the employee quit after the employer unilaterally changed the employee's compensation; and ***Forms Mfg., Inc. v. Edwards***, 705 S.W.2d 67 (Mo. App. 1985), holding that the employer was barred from enforcing a non-compete agreement where the employer had failed to continue the employee's compensation arrangement.

D. The Inequity of Disparate Bargaining Positions

A key element in any analysis of an effort to enforce a restrictive employment agreement is the imbalance in bargaining position between the employer and the employee. The ***Restatement (2d) of Contracts*** states in § 188, comment g, that post-employment restraints "are often the product of unequal bargaining power[.]"

The bargaining-position disparity is recognized in current legal scholarship:

> Employment relationships are perhaps the paradigmatic example of inequality of bargaining power in contract law. Workers are like consumers, the prototypical weaker party in commercial transactions, only more so. Their immediate access to income and benefits; their long term financial security and that of their families; and, in many instances, their personal identity and emotional well-being are all inextricably entwined with the "good" being offered—a paying job. For this reason, the law of employment contracts is replete with allusions to the risks of exploitation and overreaching by firms, and courts have articulated numerous idiosyncratic rules and exceptions to basic contract doctrine in the context of employment relationships.

Arnow-Richmond, at 963-64.

E. The Inequity When Restrictive Agreements Are Presented Post-Hire

The presentation of a restrictive covenant after the start of an employment relationship (as in ***Higdon***) is inherently inequitable:

> By providing noncompetes on a delayed basis, employers prevent meaningful assent to these additional terms of the relationship, while their imposition of broadly worded formal documents has in terrorem effects that prevent conscientious workers from invoking or acting on their contractual right to terminate employment.

Arnow-Richman, at 966-67 See also, ***Labriola v. Pollard Group, Inc.***, 100 P.3d 791, 794 (Wash. 2004):

> There is no consideration when "one party is to perform some additional obligation while the other party is simply to perform that which he promised

> in the original contract." [Citations omitted.] Independent consideration may include increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to protected information. [Citations omitted.] Independent consideration involves new promises or obligations previously not required of the parties.

F. Restrictive Covenants' Harmful Consequences to Employees

Research in the fields of economics and business management shows the harmful results of restrictive employment agreements—some of them a consequence of the above-discussed elimination of an at-will employee's freedom to leave a job. A 2009 study of patent holders in Michigan found that job mobility rates fell 8.1% relative to other states following repeal of a longstanding statute prohibiting non-competes. Matt Marx, et al., ***Mobility, Skills, and the Michigan Non-Compete Experiment***, 55 Management Science 875, 876 (2009).

Employees who do change jobs after signing a non-compete will be excluded from their areas of expertise. A 2011 study of employees in technology fields found that non-competes often caused involuntary "career detours" to different industries for the duration of the agreement. Matt Marx, ***The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals***, 76 Am. Sociological Rev. 695, 702 (2011). (Hereinafter cited as "Matt Marx, Sociological Rev.") These detours hurt employees in several ways:

> First, although informants who changed fields looked for jobs in which they could utilize some of their skills, they lost the ability to develop and enhance expertise specific to the industry they had just abandoned. Moreover, non-competes restricted use of not just the training provided by the employer but also expertise developed prior to joining the firm, including during one's education. … Second, the inability to use their existing skills led informants to take jobs with compensation lower than they could earn if they were to continue to work in their chosen field.

Id. at 704-705.

G. Employee Lack of Awareness of Potential Consequences

Another factor—related to the disparity in bargaining position—is the practical reality that at the time a restrictive employment covenant is entered, "the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood. This is especially so where the restraint is imposed by the employer's standardized printed form." ***Restatement (2d) of Contracts***, § 188 comment g. New employees typically must sign a plethora of forms and documents upon hire—tax withholding, insurance information, citizenship verification, application forms, and the like. A restrictive covenant may go unnoticed as just another page in a bureaucratic paper pile.

We have noted above the inequities present in post-hire presentations of restrictive covenants. Inequities of equal weight inhere in presentation at the time of hire. A job hunter may turn down other opportunities upon accepting one job, and may move to a new location—all before learning that a restrictive covenant would be demanded. The Matt Marx, Sociological Rev. study found that employers "strategically manage the process of obtaining compliance and do not present employees with non-competes until their bargaining power is minimized." 76 Am. Sociological Rev. at 696. Employees surveyed reported that nearly 70% of requests to sign non-competes were made after they had accepted the job offer (and turned down any others). Id. at 706. Those asked to sign the agreement on the first day of work "were considerably less likely to have a lawyer review the contract before signing it than were those who received the non-compete at other times (4.6 versus 15.3 percent)." Id. Compliance rates ranged from 89% for the most experienced employees to 95% for those less experienced. Id. at 695, 708.

H. Minimal Benefit of Restrictive Covenants to Employers

Our research for this Brief unearthed no scholarly support for the proposition that restrictive employment covenants have significant value to employers.[9] But current scholarship clearly highlights the adverse consequences for the economy generally:

> Corporations claim that non-competes are needed to spur investment by enabling them to protect proprietary information, including trade secrets and customer lists, but this claim is not supported empirically. Research and development investment per capita is lower, not higher, where firms are not prohibited from using non-competes.

Matt Marx, Sociological Rev., at 698. That study also notes that "To the extent that workers are aware of and concerned about having to take career detours, they may strategically relocate to states where non-competes are illegal in order to preserve their career flexibility." Id. at 709.

Further, that an employee may possess valuable skills is not by itself an employer interest supportive of a restrictive agreement—only if the employer has invested significant resources into the employee's acquisition of such skills is there any justification for limiting the employee's ability to take work elsewhere:

> The fact that the employee has exceptional skill and that the employee's services are unique or extraordinary should seldom be regarded as having any direct bearing on the question of the enforceability of a restraining provision. … The fact that an accountant is a lightning calculator who never makes a mistake and whose judgment as a business adviser is extraordinary does not justify restraining that employee from using these qualities in another's service after termination of employment. The accountant's skill is a sound reason for hiring the accountant for a long period and for paying a high rate. That skill does not justify a provision that requires the accountant to remain unproductive and out of a job for any period other than that included within the first employment.

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[9] The dictum in ***Hammans v. Big Sandy Claims Service, Inc.***, 567 S.W.2d 313, 315 (Ky. App. 1978), that a covenant "not to engage in competition is a valuable business tool," was applied not to an employee who took work with a competitor, but rather to an employee who opened a competing business.

Grace McLane Giesel, ***Corbin on Contracts*** vol. 15, § 80.16, 143-146 (Joseph M. Perillo ed. rev. ed. LexisNexis 2003).

Also illustrative of the meager value to employers of restrictive employment covenants is the availability of less restrictive alternatives, including non-disclosure agreements, trade secret laws,[10] and training-cost repayment agreements. Repayment agreements, to choose one example, solve a critical policy problem with non-competes:

> Under a traditional noncompete, the employee will be bound from competing against the employer even after the employer has safely recouped its investment. Because an important justification for upholding a traditional noncompete is to foster investment in training by helping employers protect that investment, a noncompete barring an employee from competing once the investment has been recovered seems patently unfair. Put differently, traditional noncompete agreements provide a windfall to the employer when they continue in force after the training investment has been repaid.

Brandon S. Long, ***Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements***, 54 Duke L.J. 1295, 1315 (2005). Far more equitable would be simply to "compute the cost of training and the revenue generated from that employee's use of the training," and create a plan in which "the repayment amount at each step would reflect the break-even point at which the employee's repayment would fully compensate the employer." Id. at 1319. Because repayment agreements allow full compensation without restricting the employee's subsequent employment options, "more so than traditional noncompetes, [they] are an equitable means of making the employer whole." Id.

I. *Reynolds v. Sonitrol*—a Case Study

The horrific ramifications to an employee who signs a covenant restricting future employment—whether without considering the potential consequences, or simply

[10] Kentucky has enacted the Uniform Trade Secrets Act. See KRS 365.880 et seq.

without full awareness of what he is signing—are illustrated in ***Reynolds v. Sonitrol of Lexington, Inc.***, 2010 Ky. App. Unpub. LEXIS 338 (Ky. App. 2010), disc. rev. den. 2011, and in the Circuit Court record in that case, Fayette Cir. Ct. No. 07-CI-04813.

Todd Reynolds had worked for 16 years as an installer and servicer of alarm systems when in 2003 he took a job with Sonitrol of Lexington, Inc. Sonitrol did not have to train him because he came with the necessary skills.

In August 2006, Reynolds left Sonitrol for a job with ADT Security Services, Inc., doing the same kind of work in the same region. He took the ADT job because it offered better pay and benefits and (unlike at Sonitrol) the protected of a union contract.

A year later, in September 2007, Reynolds received a letter from an attorney for Sonitrol, asserting that when he began working for Sonitrol in 2003, Reynolds had signed a "Noncompete Agreement" and that his employment with ADT violated that agreement. The letter demanded that Reynolds terminate his ADT employment, and threatened suit.

Sonitrol's putative Noncompete Agreement provided that the signatory employee would not, for three years after any separation from Sonitrol employment, "engage" in Sonitrol's business or any business in competition with Sonitrol, "within a radius of one hundred (100) miles from Lexington, Kentucky."[11] The agreement also provided for liquidated damages of $10,000 upon breach, as well as recovery by the employer of "reasonable attorney's fees through the appellate level."[12] The covenant appeared to be a boilerplate form.

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[11] That radius was sufficiently large to encompass both Louisville and Cincinnati, even though Sonitrol of Lexington did not do business in those areas.

[12] Provision for liquidated damages is common in restrictive employment covenants, as noted in ***Reynolds***, 2010 Ky.App. Unpub.LEXIS 338 at *12. Attorney-fee recovery is also a common provision.

Reynolds advised his new employer, ADT, which thereupon fired him. Reynolds' union (one of the Amicus parties to this Brief) processed a grievance under the applicable collective bargaining agreement. In addition Reynolds filed suit alleging tortious interference by Sonitrol with his employment. The grievance resulted in an arbitrator's decision ordering that Reynolds be reinstated with back pay. ADT complied and returned Reynolds to work.

Sonitrol meanwhile brought a counterclaim in Reynolds' court case, alleging breach of the putative non-compete agreement, and brought a third-party claim against ADT alleging interference with Sonitrol's contractual rights. Sonitrol alleged, without explanation, loss of good will and reputation, but identified no other form of actual damage. ADT soon removed Reynolds from its payroll, again.

Reynolds averred in responsive pleading to Sonitrol's claim, and in an affidavit of record, that he had no recollection of executing a non-compete agreement, and he therefore denied doing so, although acknowledging that the signature appeared to be his.

The Circuit Court denied Reynolds' requests to take any form of discovery. Instead, without ever conducting an evidentiary hearing, the court ultimately imposed an injunction prohibiting Reynolds from working for ADT during the covenant's three-year term, and entered judgment against him for liquidated damages of $10,000 (no actual damages ever having been shown), plus an attorney fee award against him in the amount of $9,680. The record contained no evidence regarding either of the two elements necessary to support a claim for liquidated damages: proof that the liquid damages

amount is a reasonable approximation of anticipated or actual damages, and proof that the amount of actual damages is uncertain or difficult of ascertainment.[13]

The Kentucky Court of Appeals affirmed that judgment in all respects, concluding that the terms were not unconscionable, leaving Reynolds for a time without employment in his field of 20 years, and permanently saddled with a $20,000 judgment.

CONCLUSION

The Amici respectfully submit that, in light of the foregoing, this Court should issue an opinion containing the following:

- Holding that the standard of proof for enforcement of a contract restricting future employment (as distinct from actual business competition) is a heightened one: an employer must present ***clear and convincing evidence*** that the restriction is narrowly tailored to protect the employer's interests, and that it faces serious and irreparable harm if the covenant is not enforced.[14]
- Holding that the burden is on the employer to demonstrate that an employee, against whom enforcement of a contract restricting future employment is sought, was made fully aware of the nature of the contract and its potential consequences at the time the employee signed the contract, and advised and given time to consult with counsel.
- Holding that, except in extraordinary circumstances, no contract restricting future employment is supported by sufficient consideration unless either (a) it can be construed to provide for "for cause" protection (as distinct from at-will status) or other new

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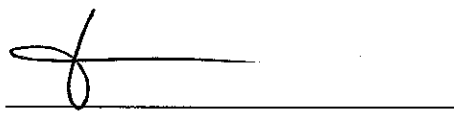
[13] See, ***Mattingly Bridge Co., Inc. v. Holloway & Son Construction Co.***, 694 S.W.2d 702 (Ky. 1985), adopting ***Restatement (2d) of Contracts*** § 356(1).

[14] See, Kate O'Neill, ***"Should I Stay or Should I Go?" – Covenants Not to Compete in a Down Economy: A Proposal for Better Advocacy and Better Judicial Opinions***, 6 Hastings Bus. L.J. 83, 86 (2010):

> To the extent that state courts now have discretion to specify burdens of production and proof, they should do so in order to mitigate the burden on the employee of defending a contract claim that may not be meritorious were it to reach trial. The employer ought to have the burden to produce ***clear and convincing evidence*** [emphasis added] for the legitimacy of its business interest if it seeks injunctive relief before a trial on the merits and it should have the burden of proof on this issue if either party moves for summary judgment and at trial.

consideration of equivalent value, or (b) a "substantial period" of continued employment has elapsed since the contract was entered.[15]

- Holding that a contractual restriction on future employment cannot be enforced where changes in a term or condition of employment occur after entry into the contract.
- Holding that an employee's possession of special skills is not an employer interest supporting enforcement of a contract restricting future employment unless either (a) the employer contributed significant resources toward the employee's acquisition of those skills, or (b) the employee is both highly compensated and so closely identified with the employer's good will or reputation that the employee's taking employment with another employer would harm the employer, or other unique and compelling circumstances exist.
- Holding that restrictions on future employment will not be enforced to the extent that less restrictive alternatives—such as non-disclosure agreements, the Trade Secret Act, and training-cost repayment agreements—are available to protect the employer's interests.
- Holding that an employer must elect between seeking injunctive relief, or seeking any form of damages (including liquidated), since availability of damages ordinarily eliminates the "irreparable harm" required for an injunction or restraining order. See, e.g., ***Sturgeon Min. Co. vs. Whymore Coal Co.***, 892 S.W.2d 591, 592 (Ky. 1995), stating "The first prerequisite, mandatory under Rule 65.04, is a showing of irreparable injury."
- Overruling of the decisions in ***Hidgon*** and ***Reynolds*** to the extent they are not consistent with the foregoing.



[15] See, ***Curtis 1000, Inc. v. Suess***, 24 F.3d 941, 946 (7th Cir. 1994):

> The judicially devised requirement of a "substantial period" of postcovenant employment avoids the need to investigate the employer's intentions; it does this by in effect creating an irrebuttable presumption that if the employee was fired shortly after he signed the covenant the consideration for the covenant was illusory. We can assimilate this approach to the general law of contracts, albeit imperfectly, by noting that inadequacy of consideration is always possible evidence of fraud or unconscionability. [Citations omitted.]