University of St. Thomas Journal of Law and Public Policy

Volume 8
Issue 2 *Spring 2014*

Article 2

Non-Compete Agreements Made after an At-Will Employee Has Commenced Employment: Toward a Good Faith Standard for the "Afterthought" Agreement

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NON-COMPETE AGREEMENTS MADE AFTER AN AT-WILL EMPLOYEE HAS COMMENCED EMPLOYMENT: TOWARD A GOOD FAITH STANDARD FOR THE "AFTERTHOUGHT" AGREEMENT

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INTRODUCTION - THE CASE OF PAR RIDDER

When you mention "the newspaper" in the Twin Cities, two names come to mind. The St. Paul Pioneer Press and the Minneapolis Star Tribune have been long-time rivals with intense competition for readers and advertisers. Shockwaves were created when P. Anthony "Par" Ridder, whose family had been involved with the Pioneer Press for four generations, left to become the publisher at the Star Tribune. Walker Lundy, who served as the Pioneer Press editor from 1990 to 2001, and later became editor of the Philadelphia Inquirer, said, "It's a little like the president of South Korea going to be the president of North Korea."[1]

The Pioneer Press is the oldest newspaper in Minnesota, tracing its origin back to 1849.[2] Ridder Publications[3] acquired the morning Pioneer Press in 1927, and St. Paul served as its headquarters.[4] In 1974, Ridder Publications and Knight Newspapers merged to become Knight-Ridder, and for a time, became the largest newspaper chain in the country with over 35 daily newspapers.[5]

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1. Jennifer Saba, *Twin Cities Intrigue Sign of Larger Issue*, EDITOR & PUBLISHER, Sept. 12, 2007, http://www.editorandpublisher.com/Article/Twin-Cities-Intrigue-Sign-of-Larger-Issue.

2. St. Paul Dispatch-Pioneer Press, *St. Paul Dispatch-Pioneer Press: An Inventory of its Records at the Minnesota Historical Society*, MINN. HISTORICAL SOC'Y (2009), http://www.mnhs.org/library/findaids/00530.xml.

3. Ridder Publications was founded in 1892 when Herman Ridder acquired the German-language Staats-Zeitung. Knight Newspapers was founded by John S. Knight, who inherited the Beacon Journal from his father in 1933.

4. St. Paul Dispatch-Pioneer Press, *supra* note 2.

5. Jay P. Pederson, International Directory of Company Histories, (Thomas Derdak et al. eds., 2005), *available at* http://www.fundinguniverse.com/company-histories/knight-ridder-inc-

The Ridder family was intimately involved in running the Pioneer Press for four generations. Bernard H. Ridder Jr., the father of Tony Ridder and grandfather of Par Ridder, served in various positions from publisher to chief executive officer and chairman of the board from 1958 to 1982.[6] "Several members of the Ridder family worked their way through the Pioneer Press, ultimately stamping that paper with the Ridder name [. . .]"[7] Par was the sixth Ridder to run the Pioneer Press.[8]

Across the Mississippi River in Minneapolis, the dominant paper is the Star Tribune which traces its roots back to the Minneapolis Tribune, a paper founded in 1867.[9] The Cowles family, another institutional name in newspaper reporting, bought the Star Tribune in 1935, which served as the jewel in the crown of the Cowles' newspaper empire.[10] According to Ken Doctor, a former editor with the Pioneer Press, "Legend has it, for years the Ridder family and the Cowles family had a gentlemen's agreement they wouldn't cross the river."[11]

In one of the largest newspaper company sales ever, The McClatchy Company bought the Star Tribune in 1998, ending 62 years of ownership by the Cowles family.[12] McClatchy has been in the newspaper business since 1857 starting with the Sacramento Bee.[13]

In 2006, The McClatchy Company announced it was going to sell the Star Tribune to Avista Capital Partners, a private investment group, for $530 million (a sharp decline from the $1.2 billion it paid nine years earlier).[14] At the time, the Star Tribune Publisher and President Keith

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history/ (last visited Jan. 10, 2014).

6. Carissa Wyant, *Publisher Ridder Ordered Out of Minneapolis Job*, SAN FRANCISCO BUSINESS TIMES, Sept. 18, 2007, *available at* http://www.bizjournals.com/eastbay/stories/2007/09/17/daily23.html?page=all.

7. Jennifer Saba, *Trouble in the Twin Cities: How Par Ridder Drew Fire*, EDITOR & PUBLISHER, Sept. 19, 2007, http://www.editorandpublisher.com/Article/Trouble-in-the-Twin-Cities-How-Par-Ridder-Drew-Fire.

8. Matt McKinney, *Star Tribune Publisher Forced to Step Down*, STAR TRIBUNE, Sept. 18, 2007, http://www.startribune.com/business/11224996.html?page=all&prepage=1&c=y#continue.

9. *Id.*

10. *Id.* In 1935 the Cowles family purchased The Minneapolis Star (an evening paper); in 1941 The Minneapolis Tribune (a morning paper); and in 1982 the papers merged into The Minneapolis Star Tribune, later known simply as the Star Tribune. *Id.*

11. *Id.*

12. *The Media Business; McClatchy in $1.4 Billion Cowles Deal*, N.Y. TIMES BUSINESS DAY,Nov. 14, 1997, http://query.nytimes.com/gst/fullpage.html?res=9803E4D61438F937A25752C1A961958260.

13. THE MCCLATCHY COMPANY, *Overview*, ABOUT, http://www.mcclatchy.com/100/story/179.html (last visited Mar. 8, 2014).

14. Press Releases, McClatchy to Sell the Star Tribune to Avista Capital Partners: Sale Provides Tax Advantages, Lowers Debt and Enhances Flexibility and Competitive Position for McClatchy, The McClatchy Company (Dec. 26, 2006), http://www.mcclatchy.com/176/story/1820.html.

Moyer told Star Tribune employees in an e-mail, "Avista is a company that believes in the future of newspapers and is strongly committed to the success of the Star Tribune . . . I have had the opportunity to get to know Avista leadership quite well recently, and I can say this without hesitation: They are progressive, very smart, good-hearted people."[15]

However, two months later, Moyer announced that he would leave the Star Tribune when ownership changed from McClatchy to Avista.[16] A search for Moyer's replacement began immediately.[17] It did not take long to find a publisher. On March 5, 2007, less than a month later, Par Ridder, 38, scion of the Knight-Ridder family and president and publisher of the rival Pioneer Press was named as the publisher and CEO of the Star Tribune Company.[18]

The high profile appointment of Ridder was short lived. Allegations immediately surfaced that not only had Ridder violated his non-compete agreement with the Pioneer Press but that he also had intentionally misappropriated sensitive trade secrets. Before he left the Pioneer Press, in a March 30, 2007 statement, Ridder stated, "I highly respect the confidentiality of any sensitive Pioneer Press information I was exposed to over the years as its publisher. [. . .]I haven't used and wouldn't use any confidential Pioneer Press information to create an unfair advantage for the Star Tribune."[19] Ridder later admitted, however, to copying sensitive information from his Pioneer Press computer and then transferring it to his new computer at the Star Tribune, and sharing some of the important documents with key Star Tribune executives.[20]

When Ridder announced his resignation from the Pioneer Press, Dean Singleton, CEO of MediaNews Group, Inc., who runs the Pioneer Press, said he was not worried about trade secrets.[21] Singleton felt much differently later. "I didn't know at that time the magnitude of the heist. . . I thought at the time that Par would make a gracious exit, and would be

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15. Brian Bakst, *McClatchy Co. Flagship Newspaper Star Tribune Sold to Private Equity Group for $530Million*, USA TODAY Dec. 27, 2006, http://www.usatoday.com/news/nation/2006-12-26-star-trib_x.htm.

16. Carissa Wyant, *Ridder Leaves Pioneer Press for Star Tribune*, MINNEAPOLIS/ST PAUL BUSINESS JOURNAL, Mar. 5, 2007, http://twincities.bizjournals.com/twincities/stories/2007/03/05/daily2.html.

17. *Id.*

18. *Id.*

19. Amy Forliti, *St. Paul Pioneer Press Sues Ex-Publisher*, USA TODAY: MONEY, Apr. 13, 2007, http://usatoday30.usatoday.com/money/economy/2007-04-13-1089155732_x.htm.

20. ASSOCIATED PRESS, *Star Tribune Publisher Testifies that He Took Data from Competitor*, THE WASHINGTON POST, June 26, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/25/AR2007062501732.html.

21. ASSOCIATED PRESS, *AP Looks at Ridder's Alleged "Espionage"*, EDITOR & PUBLISHER, Apr. 15, 2007, http://www.editorandpublisher.com/Archive/AP-Looks-at-Ridder-s-Alleged-Espionage-.

honorable, and I didn't know he had stolen everything we had."[22] According to a Star Tribune story, Ridder had not only kept confidential information on a Pioneer Press laptop computer that he took with him to the Star Tribune, but also took financial information stored on a USB drive.[23] This secret information included budgets, monthly profits, employee wage data, and perhaps most important, the amounts advertisers were paying.[24] After the Pioneer Press asked Ridder to return the USB drive, Ridder, in his deposition, stated that he sent back a new USB drive in an unopened package; "I returned *a* USB drive, not *the* USB drive."[25]

The Pioneer Press sought an injunction to enforce the non-compete agreement against Ridder and to enjoin the Star Tribune and Avista from employing Ridder, in order to protect trade secrets and confidential information that Ridder allegedly misappropriated.[26] Because Ridder had signed the non-compete agreement two weeks after he started at the Pioneer Press, he asserted that it could only be enforced if he was provided "independent" consideration - some consideration in addition to continued employment.[27]

Following Minnesota law, the court found the non-compete unenforceable because it was not supported by independent consideration.[28] However, because of Ridder's audacious taking of trade secrets, the court barred Ridder from working for the Star Tribune based on his violation of the Minnesota Uniform Trade Secrets Act[29] and his common law duty of confidentiality. "Given Ridder's past conduct and his cavalier attitude toward his use and disclosure of confidential Pioneer Press information, it seems to the Court that his past actual misappropriation is a good indicator of possible future misappropriation or use of confidential Pioneer Press information."[30] On December 7, 2007, Par Ridder, as part of a settlement agreement, resigned from the Minneapolis Star Tribune,[31] and the Star

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22. *Id.*

23. Matt McKinney, *Ridder Says He Took Private Data to Job at Star Tribune*, STAR TRIBUNE, June 26, 2007, http://www.startribune.com/535/story/1266979.html.

24. *AP Looks at Ridder's Alleged "Espionage"*, *supra* note 20.

25. McKinney, *supra* note 22.

26. Final Brief in Support of Plaintiff's Motion for a Temporary Injunction, Northwest Publ'n et al. v. Star Tribune Co. et al., No. 62-C6-07-003489, 2007 WL 2814555 (Minn. Dist. Ct., July 16, 2007) [hereinafter Plaintiff's Motion].

27. *Id.*

28. Northwest Publ'n, L.L.C. v. The Star Tribune Co., No. C6-07-003489, 2007 WL 2791691 (Minn. Dist. Ct. Sept. 18, 2007) [hereinafter Order and Memorandum].

29. *Id. See generally*, Uniform Trade Secrets Act, MINN. STATS. §§ 325C.01–08 *et seq.*

30. Order and Memorandum, *supra* note 27

31. *See Braking Par: Ridder Out at 'Star Tribune' After Legal Settlement*, EDITOR & PUBLISHER, (Dec. 7, 2007), http://www.editorandpublisher.com/Article/Braking-Par-Ridder-Out-at-Star-Tribune-After-Legal-Settlement; *see also* Business Wire, *Clear Channel Outdoor Appoints Par Ridder to Branch President of Chicago Division,* BUSINESS WIRE, Dec. 16, 2010,

Tribune embarked upon a journey to find a new publisher.

Interestingly, Par Ridder was not the only former-Pioneer Press employee to have been presented with a non-compete agreement after his employment had already begun. One of Par Ridder's co-defendants was Kevin Desmond, who served as Vice President of Operations at the Pioneer Press.[32] When he was interviewing for the position, Desmond was never told that he would have to sign a non-compete agreement, and in his original letter of offer of employment from Par Ridder, there was no reference to a non-compete agreement or the requirement that he sign one.[33] After he accepted the position, moved to the Twin Cities, and started his position, he was approached by Karen Clary, Vice President of Human Resources and Labor Relations at the Pioneer Press to sign a non-compete agreement. Desmond was told "as a part of [his] continued employment" and that he "didn't have a choice in the matter."[34] The court concluded that the non-compete agreement was unenforceable since it was not supported by independent consideration.[35] Desmond continued to work at the Pioneer Press for approximately two and a half years during which time he was allowed "access to confidential information, participation in strategy development, raises, participation in executive bonus program, and a stay bonus [. . .]."[36] However, neither the continued employment nor the benefits were tied to the requirement that he sign the non-compete agreement and thus did not provide the bargained-for consideration that would have rendered the afterthought agreement enforceable.[37]

The *Par Ridder* case presents the important policy issue of what constitutes sufficient consideration for the so-called "afterthought" agreement[38]—a non-compete agreement signed sometime after an at-will

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http://www.businesswire.com/news/home/20101216005188/en/Clear-Channel-Outdoor-Appoints-Par-Ridder-Branch#.Us8LW_bm9Ns.

32. The other co-defendant, Jennifer Parratt, served as Director of Targeted Publications at the St. Paul Pioneer Press. Order and Memorandum, *supra* note 30. Parratt's initial letter of offer of employment at the Pioneer Press for that position was contingent upon her signing a confidentiality and non-compete agreement. *Id.* Parratt signed the agreement on March 27, 2006, began employment at the Pioneer Press on June 5, 2006 and worked for there for approximately nine months. *Id.* The court noted that when she accepted the position and signed her non-compete agreement it was "ancillary to her initial employment agreement, the offer of employment was sufficient consideration to support her Non-Compete Agreement, and no additional consideration was required." *Id.*

33. *Id.*

34. *Id.*.

35. Order and Memorandum, *supra* note 27.

36. *Id.*

37. *Id.*

38. See Jordan Leibman & Richard Nathan, The Enforceability of Post-Employment Noncompetition Agreements Formed after At-Will Employment has Commenced: The "Afterthought" Agreement, 60 S. CAL L. REV. 1465 (1987) (coining the "afterthought" agreement phrase).

employee has commenced work. Frequently, employees are presented with and execute non-compete agreements days or even years after their initial hiring date. Sometimes afterthought agreements are connected with a promotion or other advancement, while in other cases an employee will receive no change in status or benefits.

The afterthought context includes what one commentator refers to as "cubewrap" contracts, non-compete agreements presented to new employees a short time after the employee has agreed to and commenced employment.[39] There is empirical evidence that some firms strategically manage the process of securing the consent of new employees to non-compete agreements by intentionally delaying the presentment of such agreements until after employment has commenced, when the employee's bargaining position is weaker.[40] The practice of "springing" non-compete agreements on unsuspecting employees after employment has started, rather than during the negotiation process, deserves particular attention as a potential bad faith practice.[41] Thus, our analysis of the afterthought agreement includes, but is not restricted to, the "cubewrap" scenario.

Part I of this article provides an overview of the policy interests underlying employee non-compete law and implicated by the afterthought agreement. The proper regulatory approach to the afterthought agreement, as with the approach to employee non-compete agreements in general, involves a delicate balance of competing employer, employee, and societal interests. Part II of this article examines the balance of those competing interests under the majority rule by critically examining one of the leading cases adopting that approach, the Maryland Court of Special Appeals' decision in *Simko, Inc. v. Graymar Company* (*Simko*).[42] Our analysis suggests that the majority approach provides a practical resolution of the consideration issue consistent with the employment-at-will doctrine. However, the forbearance and continued employment rationales underlying

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39. Rachel Arnow-Richman, Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes, 2006 MICH. ST. L. REV. 963, 966 (2006) (coining the "cubewrap contracts" phrase). The phrase "cubewrap contracts" refers to non-compete agreements presented to employees—or left in their cubicles—after the employee has already accepted the employment offer and started work; analogous to the delayed disclosure of license terms under "shrinkwrap" agreements. Id.

40. Matt Marx, The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals, 76 AMER. SOC. REV. 695, 700–06 (2011) (survey of 1,029 engineers and interviews with 52 patent holders in automatic speech recognition industry found that non-compete was included with the employment offer fewer than one-third of the time and that employees not presented with non-compete at time of offer were less likely to have a lawyer review the non-compete terms).

41. See Rachel Arnow-Richman, Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements, 49 ARIZ. L. REV. 637 (2007) (arguing for mandatory pre-employment disclosure of non-compete agreements).

42. Simko, Inc. v. Graymar Co., 464 A.2d 1104 (1983) [hereinafter Simko].

the majority approach do not effectively discourage and may actually encourage bad faith in the afterthought setting. Part III of this article provides similar analysis of the minority approach through the window of the Minnesota Supreme Court opinion which adopts that position in *Davies & Davies Agency, Inc. v. Davies* (*Davies*).[43] The minority rule provides a substantial check on unfair bargaining tactics by employers in the afterthought context, but the requirement of independent consideration is over-inclusive and may result in abuse of employers by employees, as the *Par Ridder* case illustrates.

We conclude in Part IV by suggesting that an alternative good faith standard would be a preferable policy approach. As under the majority rule, a good faith requirement would allow employers to freely modify the terms of employment to protect their interests in trade secrets and customer relationships. However, it would necessitate adherence to good faith practices in securing the employee's consent to the afterthought agreement. At the same time, a good faith standard would provide a check on employer bad faith, as under the minority approach, but without the necessity of independent consideration. We believe that a good faith standard could provide the courts and parties with a more flexible and workable standard, a standard that fairly and effectively balances the competing interests in the afterthought context. We intend to offer a detailed policy rationale for a good faith requirement and develop the specifics of our proposed good faith standard in a subsequent article on the afterthought agreement.

I. THE REGULATION OF EMPLOYEE NON-COMPETE AGREEMENTS AND THE AFTERTHOUGHT AGREEMENT

The proper regulation of employee non-compete agreements involves a delicate balance of competing employer, employee, and societal interests.[44] Employers have a need to protect their trade secrets and business goodwill from misappropriation by former employees.[45] Although competition by former employees is inevitable, and non-compete agreements should not be the means by which open competition or new market entrants are stifled, employers have an interest in protecting the informational and relational interests of the firm.[46] Thus, preventing unfair competition through the

43. Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127 (1980) [hereinafter Davies].

44. This paper is an extension of our recent research and writing on employee non-compete agreements. *See* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107 (2008). For a historical and policy discussion of employee agreements not to compete with employers after termination of employment, see Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960), and see also T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1 (2005).

45. Blake, *supra* note 42, at 653.

46. Leibman & Nathan, *supra* note 36, at 1483–90.

improper exploitation of an employer's assets is the primary employer interest justifying restraints on post-employment competition.

Former employees have a legitimate property interest in their own human capital development.[47] They should be free to use the intellectual capital acquired at work in competition with their former employers—including the general knowledge, skills, and experience gained in the industry—so long as they do not misappropriate the employer's property rights.[48] Non-compete agreements implicate employee interests in mobility and professional advancement.[49]

Society has an interest in protecting intellectual property rights and in preventing unfair competition. The enforcement of employee non-compete agreements, particularly in the protection of trade secrets, is part of an intellectual property law regime that is designed to provide incentives for the commercial development of new products, services, and ideas.[50] Conversely, society needs to ensure that unnecessary barriers to entry into the marketplace are minimized to ensure a robust, competitive environment—the underlying driver of any capitalistic economy.[51] Moreover, society has an important interest in the efficiency of markets for scarce human resources.[52] To the extent that non-compete agreements impose unreasonable restrictions on labor mobility, they result in an inefficient allocation within labor markets.[53] Thus, non-compete agreements implicate conflicting societal interests in free and fair competition, but the overriding policy concern is with ensuring competitive markets that support and encourage innovation and entrepreneurship.

The issue of consideration for an afterthought agreement also involves a balance of competing employer, employee, and societal interests. Employers need the flexibility to adjust the terms and conditions of

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47. *See* Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2002).

48. *Id.* at 763.

49. *See, e.g.*, Standard Brands Inc. v. Zumpe, 264 F.Supp. 254, 259 (E.D. La. 1967) (an employee "must be afforded a reasonable opportunity to change jobs without abandoning the ability to practice his skills").

50. *See generally* Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 705–06 (1985) (explaining the grounds upon which courts examine the reasonableness of post-employment restraint agreements).

51. Reed, Roberts Assoc., Inc v. Strauman, 353 N.E.2d 590, 593 (N.Y. 1976) ("[O]ur economy is premised on the competition engendered by the uninhibited flow of services, talent and ideas.").

52. *Standard Brands Inc., 264 F.Supp.* at 259 ("[T]he employee who possesses the employer's most valuable confidences is apt to be highly skilled. The public is interested in the reasonable mobility of such skilled persons from job to job in our fluid society, which is characterized by and requires the mobility of technically expert persons from place to place, from job to job and upward within the industrial structure.").

53. Blake, *supra* note 44, at 627.

employment relationships as the needs of the business change, including changes in the knowledge and experience of employees justifying the request for mid-stream non-compete agreements.[54] For example, an employer may request a non-compete agreement when an employee is promoted to a sensitive managerial position or when an employee has developed client or customer relationships that could be exploited if the employee works for a competitor or establishes a competing business.[55]

On the other hand, employees presented with an agreement after employment has commenced are placed in a weakened bargaining position, particularly when they have changed their own positions by terminating an existing position or passing on other opportunities.[56] Employers may be able to exploit their superior bargaining position and secure a non-compete on terms that are more favorable than they would have secured had the negotiations on the non-compete agreement been open and transparent.[57] Moreover, employers may be able to use the power to terminate an employee to coerce an afterthought agreement since almost all courts refuse to provide a remedy for an employee discharged for refusing to sign a non-compete agreement,[58] even when the proposed non-compete agreement is patently unreasonable.[59]

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54. *See, e.g.*, Poole v. Incentives Unlimited, Inc., 548 S.E.2d 207 (S.C. 2001) (employee of travel agency requested to sign non-compete agreement three and one half years after employment commenced).

55. *See, e.g.*, Guidant Sales Corp. v. Baer, No. 09-CV-0358, 2009 U.S. District LEXIS 15630 (D. Minn. Feb. 26, 2009) (non-compete agreement adjusted to reflect promotion to regional sale manager).

56. *E.g.*, PEMCO Corp. v. Rose, 257 S.E.2d 885, 890 (W.Va. 1979) ("The employee . . . terminated the lease in the Washington, D.C. area and thereafter, in reliance on the agreement, signed a contract to purchase a home located in Bluefield, West Virginia. The record conclusively establishes that it was not until he actually arrived at the employer's plant to commence actual work that he was first presented a purported 'Employment Agreement.' Under the circumstances in which the employee found himself, it is beyond cavil that his ability to negotiate with respect to the post-employment restraint was markedly diminished. At the very least, the employee was not as freely able to bargain concerning the provision as he was at the time the oral contract of employment was formed. The covenant not to compete was not freely bargained for term or condition of employment, but rather was a term or condition of employment extracted from or imposed upon an employee under circumstances which deprived him of any fair ability to negotiate. Perhaps, as the record strongly suggests, plaintiff's employment practices were not such that the belated presentment of the 'Employment Agreement' was a deliberate, intentional bargaining tactic, designed to effectively take this economically valuable bargaining item off the table. Nonetheless, the effect is in the same direction.").

57. *Id.*

58. *See* Michael J. Garrison & Charles D. Stevens, *Sign This Agreement Not to Compete or You're Fired! Noncompete Agreements and the Public Policy Exception to Employment at Will*, 15 EMP. RESPONSIBILITIES & RIGHTS. J. 103 (2003).

59. *E.g.*, Maw v. Advanced Clinical Communications, Inc., 846 A.2d 604 (N.J. 2004). For a critique of the Maw decision, *see* Michael J. Garrison, *Limiting the Protection for Employees from Compelled Noncompete Agreements Under State Whistleblower Laws: A Critical Analysis of* Maw v. Advanced Clinical Communications, 20 LAB. LAW. 257 (2005).

Generally, the law of employee non-competes balances these interests through the application of the common law reasonableness test, the prevailing judicial standard in most jurisdictions.[60] Under that standard, courts strictly analyze the terms of employee non-compete agreements, both the business justification for and the scope of such restrictive covenants.[61] Employers must demonstrate a legitimate protectable interest served by an agreement not to compete, ordinarily an interest in protecting trade secrets or customer relationships,[62] and establish that the restriction is no more extensive than necessary to serve that interest in terms of the restricted activities.[63]

But how that balance should be struck in the so-called "afterthought" agreement—a non-compete agreement signed sometime after an employee has commenced work—has divided and perplexed both courts and commentators.[64] To resolve the conflicting interests in the afterthought context, courts have developed two approaches to the consideration issue. The majority rule holds that the continued employment of the employee or the employer's forbearance from terminating the employee is sufficient consideration for an afterthought agreement.[65] Courts adopting the majority rule generally require the continued employment to exist for a substantial period of time to avoid bad faith on the part of the employer securing a new

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60. *See, e.g.*, Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531 (Wyo. 1993). Although the common law standard is employed in most states, California and other jurisdictions restrict or prohibit employee non-compete agreements under restraint of trade statutes. Garrison & Wendt, *supra* note 36, at 120–22. Other jurisdictions have adopted standards that are more permissive than the common law. *Id.* at 122–35. For the most comprehensive and systematic analysis of state non-compete laws, see Norman D. Bishara, *Fifty Ways To Leave Your Employer: Relative Enforcement of Covenants Not To Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751 (2011).

61. Garrison & Wendt, *supra* note 36, at 119–20 ("The probing examination of the terms of noncompete agreements under the common law approach [is] a form of strict judicial scrutiny . . . . In effect, employee agreements not to compete come to the court with a heavy presumption of invalidity. The burden is on the employer to justify the need for and the reasonableness of the terms of the agreement.").

62. *See* Blake, *supra* note 37,at 653–74 (discussing interests in customer relationships and trade secrets).

63. The type of activities the employee is prohibited from engaging in under the non-compete agreement must be tied to the legitimate interests the employer is seeking to protect. *See, e.g.* , Bridgestone/Firestone, Inc. v. Lockhart, 5 F.Supp. 2d 667 (S.D. Ind. 1998) (covenant overbroad because it limited former employee from working for competitor in any capacity and precluded him from selling products that were not directly competitive).

64. *See* Leibman & Nathan, *supra* note 31 at 1484–85 (arguing for statute requiring that afterthought agreements be in writing, that employees not be subject to discharge for refusing to sign such agreements, but no new consideration should be necessary); *see also* Kathryn J. Yates, Note, *Consideration for Employee Noncompetition Covenants in Employments at Will*, 54 FORDHAM L. REV. 1123, 1130 (1986) (arguing that continued employment is sufficient consideration based on unilateral contract approach to issue).

65. Yates, *supra* note 63, at 1130.

promise not to compete.[66] The majority rule is sensitive to the interests of employers and consistent with the employment-at-will doctrine.

The minority approach rejects the notion that mere continuation of employment is sufficient consideration for an afterthought agreement. Courts adopting the minority rule require separate or independent consideration for an afterthought agreement to be enforceable.[67] This independent consideration can be a promotion, an increase in salary, a bonus, a fixed term of employment, or something of value beyond the continuation of employment.[68] The minority rule is primarily concerned with the unfair bargaining position of employees in the afterthought context,[69] and it is consistent with the common law pre-existing duty rule that generally requires new consideration for a modification of a contract to be binding.[70]

In the next sections, we present two of the leading afterthought cases; one adopting the majority "continued employment" approach and the other adopting the minority "independent consideration" rule. A critical analysis of the cases, and the rationales underlying the divergent judicial approaches, reveals the weaknesses of either approach to the afterthought agreement. This analysis suggests the need for an alternative standard for the afterthought agreement.

II. THE MAJORITY APPROACH TO THE AFTERTHOUGHT AGREEMENT

One of the leading cases for the majority approach to the afterthought agreement is the opinion of the Maryland Court of Special Appeals in *Simko,*.[71] In 1971, Graymar—a company engaged in the sale and maintenance of business machinery and office equipment—demanded that Paul Smith, one of its existing employees, sign a non-compete agreement.[72] The non-compete agreement prohibited Smith from competing with Graymar for one year post-employment, within a 50-mile radius of Baltimore.[73] Smith initially refused to sign the agreement but relented when

66. *Id.* at 1130–31.

67. *E.g.*, Poole v. Incentives Unlimited, Inc., 548 S.E.2d 207 (S.C. 2001); *see also* Yates, *supra* note 63, at 1132.

68. Labriola v. Pollard Group Inc., 100 P.3d 791, 794 (Wash. 2004).

69. *See, e.g.* Davies, 298 N.W.2d 127, 130–33 (Minn. 1980) (noting that "[m]ere continuation . . . could be used to uphold coercive agreements" and refusing to enforce non-compete agreement without independent consideration where employee did not have an opportunity to examine restrictive covenant until after quitting his old job and starting employment).

70. *See* George W. Kistler, Inc. v. O'Brien, 347 A.2d 311, 316 (Pa. 1975) (citing James C. Greene Co. v. Kelley, 134 S.E.2d 166, 167 (N.C. 1964)).

71. 464 A.2d 1104 (Md. App. 1983).

72. *Id.* at 1105.

73. *Id.*

he was threatened with discharge if he did not.[74] According to the court, "Because his wife was pregnant with their first child and he was facing embarrassment, he knuckled under and signed the agreement."[75]

As a salesperson for Graymar, Smith was paid on a commission and bonus basis.[76] In 1981, he had difficulties collecting his bonuses and decided to leave the company.[77] He started his own business, Simko, Inc., with another former Graymar employee.[78] Initially, the post-employment relationship between Smith and Graymar was amicable.[79] Graymar later commenced suit, however, to enforce the non-compete agreement when Smith and Simko refused to cease their competitive activities, and an injunction was granted that prevented Simko and Smith from doing business with certain Graymar customers.[80]

On appeal, Simko and Smith contended that the agreement not to compete was unenforceable, arguing that mere continuation of the employment of an at-will employee is insufficient consideration to support a post-employment covenant not to compete.[81] The *Simko* court treated this as a case of first impression, although it found support for the majority position in the Maryland Court of Appeals' decision in *Dahl v. Brunswick Corporation*.[82] There, the court enforced a severance pay policy against an employer reasoning that such "policy directives" become contractual obligations when employees, with knowledge of the policy, either start or continue working for the employer.[83] The *Simko* court was not convinced that *Dahl* could be distinguished:

> The employees' continued service was determined to be consideration for the employer's promise of severance pay in *Dahl*. In the case at bar, the employer consented not to terminate the employment relationship in return for the employee's covenant not to compete. The employment at-will relationship is mutual in that, generally, either party may terminate the relationship at any time. Given the inherent mutuality, we see no basis for distinguishing the employee's consent to continue from the flip side of the coin—the

74. *Id.*
75. *Id.*
76. Simko, 464 A.2d at 1105.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 1105–06.
81. *Id.* at 1106.
82. 356 A.2d 221 (1976).
83. *Id.* at 224.

employer's consent not to terminate.[84]

Nevertheless, the court proceeded to analyze the competing approaches and resolve the issue of continued employment as consideration in the afterthought context.

The *Simko* court noted that the minority view—continued employment is not consideration for an afterthought agreement—is a "distinct" minority position that is unpredictable.[85] However, it recognized the most persuasive argument for the minority approach is the illusory nature of the employer's promise of continued employment.[86] The *Simko* court cited *Kadis v. Britt*, A consideration cannot be constituted out of something that is given and taken in the same breath—of an employment which need not last longer than the ink is dry upon the signature of the employee, as where the performance of the promise is under the definite threat of discharge."[87] It rejected, however, the minority rule's requirement of independent consideration as a "bright line but inequitable" doctrine.[88]

The court embraced the dual rationale for the majority approach; that is, sufficient consideration for an afterthought agreement exists "in either the agreement not to discharge or in the continued employment for a substantial period of time after execution of the restrictive covenant."[89] Although the court believed that a threat to discharge is not necessary, since it can be inferred, it found that "the threat of discharge was the express and galvanizing force which prompted Smith's acquiescence."[90] Since Smith continued to be employed for another ten years after the agreement, the court concluded that "both forms of consideration recognized by the majority courts were present in this case."[91]

In response to the illusory promise rationale underlying the minority rule, the court adopted the qualification that the continued employment must exist for a substantial period of time.[92] The court reasoned that such a qualification to the majority rule is necessary to avoid injustice:

> Were an employer to discharge an employee without cause in an unconscionably short length of time after extracting the employee's signature to a restrictive covenant through a threat of discharge, there would be a failure of the consideration. An

84. Simko, 464 A.2d at 1106.
85. *Id.* at 1107.
86. *Id.*
87. 29 S.E.2d 548 (N.C. 1944).
88. Simko, 464 A.2d at 1107.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*

> employer who bargains in bad faith would be unable to enforce the restrictive covenant.[93]

How long employment must continue was not specified, nor did the court adopt standards to determine this matter. The court was of the mind that this determination would be made on an *ad hoc* basis under the facts and circumstances of particular cases.[94] It did note, however, "that continuance of employment for a period of ten years imparts sufficient consideration."[95]

Finally, the court rejected Smith's argument that the agreement was entered into under duress. It recognized that "under appropriate circumstances the threat of discharge to induce an employee to sign a restrictive covenant may constitute duress."[96] But it found no duress since any threat was legitimate and necessary to protect Graymar's interests, and there was no evidence that Smith was deprived of free will.[97] Since Smith was a successful salesman with other job opportunities had he left Graymar, the court found that Smith was not left without reasonable alternatives when Graymar threatened to fire him if he did not sign the non-compete agreement.[98]

The *Simko* case demonstrates the strengths and weaknesses of the majority approach. From a practical perspective, the majority approach has considerable value. It provides employers with the freedom to modify the terms and conditions of the employment relationship at-will, just as the employment-at-will doctrine allows them the power to terminate the relationship at-will. Changes in the employment contract can be done without unnecessary formalities and without the need for independent consideration. This is important in highly competitive environments with evolving, ever-changing employment relationships. From a pragmatic standpoint, the majority rule also offers greater assurance compared to the minority rule which adopts legitimate protectable interests in trade secrets and customer relationships will be protected and unfair competition by former employees will be prevented.

From a contract doctrine perspective, the rationale underlying the majority approach creates some inconsistencies. In reality, the employer's promise of continued indefinite employment is illusory. From the perspective of the employee, his or her position is unchanged after the non-

93. Simko, 464 A.2d at 1107.
94. *Id.* at 1107–08.
95. *Id.* at 1108.
96. *Id.*
97. *Id.*
98. Simko, 464 A.2d at 1108.

compete is signed while the employer's position has been enhanced by the post-employment restrictions on the employee. The forbearance rationale is an attempt to bolster the finding of consideration, but it too creates some issues of logical consistency. If the consideration the employer provides is a commitment not to immediately discharge the employee, then why would the continued employment need to exist for a substantial period of time? The logical extension of the forbearance rationale would suggest that employers are free to terminate an employee the day after the agreement is signed, but this was troubling to the court. Thus, the argument is advanced that an immediate termination would be a failure of consideration. But if the employer gives up the present legal right to terminate and retains the future right to terminate, how is there a failure of consideration if an employee is terminated after the afterthought agreement is signed? And if good faith is the rationale for the substantial continued employment rule, then why is good faith not required in the bargaining for an afterthought agreement?

The qualification to the majority approach that employment must exist for a substantial period of time also creates additional practical issues. How long must the continued employment last to satisfy the court's standards and what are the factors that go into such an analysis? Courts have held that "several years" is substantial but seven months is not.[99] This after–the-fact determination obviously creates uncertainties for employers. Does this rule apply if the employee voluntarily terminates the relationship? Some courts have so held,[100] but others have rejected this on the basis that the rationale of the qualification to the majority rule is to prevent employer bad faith.[101] And there is a more fundamental problem with this requirement of substantial continued employment. By determining whether consideration was substantial enough, courts are in effect assessing the adequacy of consideration for the afterthought agreement contrary to fundamental contract law principles.[102]

The *Simko* case also highlights another negative aspect of the majority rule. Rather than encourage good faith negotiation, the forbearance

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99. *Compare* Woodfield Group, Inc. v. DeLisle, 693 N.E.2d 464, 469 (Ill. App. Ct. 1998) (citing Agrimerica, Inc. v. Mathes, 557 N.E.2d 357, 362 (Ill. App. Ct. 1990) (two years considered substantial)) *with* Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221, 1227 (Ill. App. Ct. 1993) (seven months not substantial).

100. Diederich Ins. Agency, LLC. v. Smith, 952 N.E.2d 165, 169 (Ill. App. Ct. 2011) ("[T]hree months of continued employment did not constitute sufficient consideration. The fact that defendant quit does not change the analysis.").

101. *See* LKQ Corp. v. Thrasher, 785 F. Supp. 2d 737, 742–43 (N.D. Ill. 2011) (questioning whether the substantial continued employment rule applies to voluntary departure of employee since the rule is intended to prevent employers from terminating shortly after an afterthought agreement is signed).

102. *See* McGough v. Nalco Co., 496 F. Supp. 2d 729, 747–48 (N.D W. Va. 2007) (noting that "weighing the adequacy of consideration" is something "traditional contract law warrants against").

rationale actually encourages employers to threaten discharge to secure an afterthought agreement. To clearly establish that the employer gave up its legal right to immediately terminate the employee in exchange for the non-compete agreement, an explicit threat, although not necessary according to the *Simko* court, may be advisable.

On balance, the majority rule provides a pragmatic approach to the afterthought agreement, one that is consistent with the at-will employment relationship and provides substantial protection for an employer's legitimate business interests. The majority approach, however, does not effectively address all forms of bad faith in the afterthought context, particularly those relating to negotiation process. Rather than insist upon a *voluntary* agreement, the hallmark of any true contract, the majority approach may actually encourage unfair bargaining by employers, practices that have driven some courts to adopt the minority rule.

III. THE MINORITY APPROACH TO THE AFTERTHOUGHT AGREEMENT

A leading case for the minority approach is the opinion of the Minnesota Supreme Court in *Davies*,[103] a consolidated appeal in which Davies & Davies Agency, Inc., an insurance agency, sought to enforce two afterthought non-compete agreements against former employees Richard Davies and Robert Buckingham.[104] In sum, the *Davies* court found that the non-compete agreement executed by defendant Richard Davies was enforceable (as modified by the trial court)[105] but the agreement signed by defendant Buckingham was unenforceable due to a lack of consideration.[106]

The non-compete dispute in *Davies* was particularly acrimonious because it arose out of a family business. Everett Davies owned an insurance agency and hoped his sons would come into and eventually take over the business.[107] His eldest son, Richard, was twenty years old and a senior at the University of Minnesota when he joined the business in 1967 and started doing general office and clerical work.[108] About four months after Richard started working and just before his 21st birthday, he was presented with and signed a non-compete agreement that precluded him from working in the insurance business for five years within a 50-mile radius of the cities of Minneapolis, St. Paul, or Duluth. [109]

Everett Davies argued that he did not require Richard to sign the

103. 298 N.W.2d 127 (Minn. 1980).
104. *Id.* at 128.
105. *Id.* at 131.
106. *Id.* at 133.
107. *Id.* at 129.
108. Davies, 298 N.W.2d at 129.
109. *Id.*

agreement at the time of Richard's hire because Richard was a minor and believed that because of his minor status the agreement would be void.[110] However, Everett also stated that he would not support Richard's application for a license, nor would Richard be permitted to assume more duties than his clerical work, unless Richard signed the agreement.[111] Richard continued to work in the agency gaining an expertise in the sale of probate and court bonds, which were a significant part of the agency's business.[112]

Over the years Everett gradually phased himself out of the bonds portion of the business.[113] The relationship between Everett and Richard became strained when they could not see eye-to-eye concerning the management decisions and their respective involvement within the agency's operations. After Richard left the agency, he went to work for a competitor, the Pat Thomas Agency.[114] The Davies & Davies Agency sued to enforce the non-compete agreement based on the diversion of clients to Richard's new employer.[115]

The *Davies* court noted that decisions in other jurisdictions regarding the enforceability of an afterthought agreement are quite evenly divided.[116] But the court was sensitive to the rationale for the minority rule, specifically the potential for unfair bargaining by employers in the afterthought setting:

> Those cases which have held that continued employment is not a sufficient consideration stress the fact that an employee frequently has no bargaining power once he is employed and can easily be coerced. By signing a noncompetition agreement, the employee gets no more from his employer than he already has, and in such cases there is a danger that an employer does not need protection for his investment in the employee but instead seeks to impose barriers to prevent an employee from securing a better job elsewhere.[117]

The court rejected the notion that continuation of employment, standing alone, was sufficient for the afterthought agreement. As the court stated, "Mere continuation of employment as consideration could be used to

110. *Id.*
111. *Id.*
112. *Id.*
113. Davies, N.W.2d at 129.
114. *Id.* at 129–30.
115. *Id.* at 130.
116. *Id.*
117. *Id.*

uphold coercive agreements."[118]

The court adopted a two-part standard under the minority rule, indicating that an afterthought non-compete must be "bargained for and provide the employee with real advantages,"[119] a determination that will depend on the facts of each case.[120] In Richard's situation, the court found the necessary independent consideration in his position with the agency:

> Richard derived substantial economic and professional benefits from the agency after signing the contract: He [sic] continued his employment for 10 years and advanced to a selling position within the agency which would not have been open to him if he had not signed the contract. He received informal training from Everett Davies, was supported by the agency in his license applications, and had sole responsibility for many of the agency's customers. Richard's brother, John, who refused to sign an agreement, was limited to a largely clerical position during his tenure with the agency.[121]

In Richard's appeal, the *Davies* court found that his employment agreement, which allowed him to advance in the company and basically made him a successor to his father, gave him "real advantages," more than just continued employment.[122] Also, these benefits were "bargained for" since they were tied to his successor position and not something that he would have been entitled to otherwise.[123] This was supported by the fact that his brother, John, did not receive the same benefits and was limited to a clerical position.

In contrast, the *Davies* court found that the non-compete agreement was unenforceable in the Buckingham appeal.[124] Near the end of Richard's tumultuous tenure at the agency, Everett was looking for a successor. Buckingham, already successfully employed elsewhere, was recruited, not to be an employee, but rather with promises for majority ownership, an agreement that was memorialized by a non-binding letter of intent signed by Everett.[125] Relying on those promises, Buckingham resigned from his company and joined the Davies & Davies agency in February of 1977.[126]

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118. Davies, N.W.2d at 130
119. *Id.* at 131.
120. *Id.* at 130.
121. Davies, 298 N.W.2d at 131.
122. *Id.*
123. *Id.*
124. *Id.* at 133.
125. *Id.* at 132.
126. Davies, 298 N.W.2d at 132

Eleven days after he started working for the agency, Everett presented Buckingham with a non-compete agreement that he reluctantly signed with the proviso that his consent was based on the letter of intent.[127] However, despite Buckingham's continued requests for Everett to honor the letter of intent, Everett never completed the sale to Buckingham.[128] Frustrated, Buckingham left Davies & Davies in June of 1978 and went to work for a competitor, the Ed Arnold Company.[129] Though there was no evidence that Buckingham actively solicited any of the Davies' clients, several did contact Buckingham to handle their insurance business.[130]

The *Davies* court found that there was no independent consideration for the non-compete agreement that Buckingham had signed, stating:

> The issues in the Buckingham case are the same as those in the Davies case. The trial court found, and the evidence is clear, that while Buckingham had been made aware of the existence of the Restrictive Covenant during employment negotiations, he was not given an opportunity to examine or inspect the document, although he requested it, nor advised that he was required to sign or lose his job until 11 days after he commenced employment with the Davies agency and 28 days after he terminated his employment with his former employer.[131]

Unlike Richard Davies, Buckingham did not receive any consideration other than continued employment, which was deemed insufficient to enforce the non-compete signed eleven days after employment commenced.

The *Davies* case demonstrates the advantages of the minority approach from a policy standpoint. By requiring independent consideration for an afterthought agreement, the minority approach protects the employee from the negotiating leverage that employers have in the afterthought setting. It provides some protection from the "cubewrap" scenario in which employers fail to disclose the requirement of a non-compete agreement until after employment has commenced. The threat of discharge is still a potent weapon for employers, but by requiring some negotiated benefit to an employee, the power of an employer to coerce a one-sided, non-compete agreement is lessened.

From a purely contract doctrine perspective, the minority rule can be viewed as consistent with the common law pre-existing duty rule that

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127. *Id.* at 133
128. *Id.*
129. *Id.*
130. *Id.*
131. Davies, 298 N.W.2d at 133.

modifications of a contract require new consideration to be binding. On the other hand, courts adopting the minority rule and finding consideration for a non-compete at the inception of the employment relationship, but not during the course of that relationship, are faced with an inherent inconsistency. In either situation, the employee's promise not to compete is supported only by the employer's promise of indefinite employment. If one is analyzing the issue from a strictly contract doctrine perspective, it is unclear why the law should recognize the employer's promise of indefinite employment as consideration at the beginning of, but not during, the relationship. The employment-at-will doctrine presents a similar problem of logical consistency. It does not necessarily make sense to say that an employer can terminate a contract of employment-at-will but does not have the right to change the terms of the contract at will!

The practical problems with the minority approach are two-fold. First, the requirement of independent consideration is over-inclusive in terms of the rationale of preventing coerced non-compete agreements. It not only protects an employee like Buckingham in the *Davies* case, where there was substantial evidence of bad faith conduct by the employer, but it also shields someone like Par Ridder from non-compete obligations that were voluntarily assumed. Certainly, Ridder should have known that a non-compete agreement would be expected of the publisher of the Pioneer Press, and there was no evidence of bad faith on the part of the newspaper or a lack of bargaining power by him. The agreement was deemed unenforceable under the minority approach simply because it was executed two weeks after Ridder started working for the paper. Had his misappropriation of trade secrets not been so blatant, Ridder could have joined the Star Tribune as its publisher and conceivably exploited his inside knowledge to unfairly compete with the Pioneer Press.

Second, the minority approach takes an extremely formalistic approach to the afterthought agreement. Under the two-part standard in *Davies*, an employee must receive "real advantages," something in addition to what the employee was already receiving.[132] Conceivably, even an increase in pay or promotion would not be sufficient if the employee would have received the benefits with or without the non-compete agreement. This is reinforced by the requirement that any independent consideration must be the bargained for in exchange for the non-compete promise. Thus, the minority rule may create difficulties for unsuspecting employers, a trap for the unwary employer who either does not provide adequate separate consideration, or does not adequately document an employee's change in status as the price paid for in exchange for the employee's consent to a non-compete

132. *Id.* at 131.

agreement.

Overall, the minority rule tempers the unfair bargaining position employers have in the afterthought context by providing an incentive for employers to negotiate in a transparent manner and at the inception of the employment relationship. However, the requirement of independent consideration is too blunt and formalistic of a judicial instrument to regulate the afterthought agreement and may upset the delicate balance of competing interests under employee non-compete law.

IV. CONCLUSION AND RECOMMENDATION: A GOOD FAITH STANDARD FOR THE AFTERTHOUGHT AGREEMENT

Our analysis of the competing policy approaches suggests that neither provides a proper resolution of the competing interests implicated by the afterthought agreement. Both standards recognize the potential for bad faith in the afterthought context. The majority approach resolves that potential problem by imposing a requirement that employment continue for a substantial period of time. In this way, an employee is ensured of some tangible benefit in exchange for the post-employment restrictions imposed upon the employee under the non-compete agreement. But this requirement is artificial and inconsistent with the logic of the underlying forbearance rationale. Substantial continued employment is not bargained for consideration between the parties to an afterthought agreement, and this requirement is a legal fiction that requires the courts to ultimately determine the adequacy of consideration—which is categorically contrary to fundamental contract law principles.

The existing framework thus creates results in uncertainty and potential inequities, particularly in situations where bad faith practices occur in the negotiation process. The *Davies* case highlights one of those bad faith practices that is not addressed by the majority approach. The tactic of delaying the disclosure of non-compete requirements until employees have detrimentally changed their bargaining positions, and started work, is a bad faith practice that should be discouraged but that is permitted under the majority approach. The pragmatic and simple solution that the majority approach offers is consistent with the employment-at-will doctrine, and it allows employers protection for their trade secrets and customer relationships as the at-will relationship evolves over time. But it may permit employers to unfairly utilize their bargaining position to impose a non-compete on employees or to impose post-employment restrictions that are broader than would have been agreed to by the parties, had the negotiating process been clean and transparent from the very beginning.

The minority approach also recognizes the potential for bad faith in terms of the employer's bargaining power. To ensure a good faith agreement, and some tangible benefit to an employee in exchange for the

non-compete covenant, the minority rule requires independent consideration. Again, this judicial construct creates a number of logical inconsistencies under contract and employment law. Why the law should recognize the employer's promise of indefinite employment as sufficient consideration at the inception of the employment relationship, but not during the relationship, is not apparent.

Moreover, the minority rule conflicts with the practical realties of the modern employment relationship. Employees develop knowledge, experience, and training over time. At the beginning of the relationship, there may be no need for—and in fact no legal justification for —insisting upon post-employment restrictions. However, as the employment relationship continues, an employee may be exposed to trade secrets or develop personal relationships with customers or clients. The minority rule does not allow the employer to secure a non-compete covenant mid-stream without some additional consideration even if the agreement is truly voluntary and necessary to protect the employer's interests. And the consequences are potentially severe, since an employee that had not been provided with additional, independent consideration—yet nevertheless gained knowledge of trade secrets during the course of their employment—could potentially exploit the information acquired or relationships developed. The *Par Ridder* case provides an illustrative example of the potential for unfair competition resulting from a strict application of the minority rule requirement of independent consideration.

Rather than address the potential for bad faith in the afterthought agreement by requiring either independent consideration or substantial continued employment, we contend that a requirement of good faith be required in the afterthought context to *directly* address the problem of bad faith practices in this setting. There are a number of advantages of a good faith standard. First, it continues to permit employers the flexibility they need to protect their business assets by securing non-compete covenants as employment relationships develop over time. Second, it would provide an incentive for employers to be open and transparent in the negotiation process for a non-compete covenant at the inception of and during the course of the employment relationship. Third, the good faith requirement would provide a more flexible framework for courts to determine the consideration issue in the afterthought context. Finally, consistent with contract law, the ultimate issue in these cases would be the *voluntariness* of the afterthought agreement—the fundamental hallmark of an enforceable contract.

Obviously, thought must be given to the contours of such a good faith standard. We intend to offer a detailed and persuasive policy rationale for a good faith standard and fully develop the specifics of our proposed good

faith standard in a subsequent article on the afterthought agreement.