

LAW WEEK

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Colo. Supreme Court Decides Case Affecting Noncompetition Agreements

By Jessica Brown
and Brian C. Baak
GIBSON DUNN & CRUTCHER

Is continued employment of an at-will employee adequate consideration to support a noncompetition agreement? Last week, in an opinion with ramifications for employers and employees across Colorado, the Colorado Supreme Court answered this question in the affirmative. In a unanimous decision delivered by Justice Eid, the Court in *Lucht's Concrete Pumping, Inc. v. Horner* held that "an employer that forbears from terminating an existing at-will employee forbears from exercising a legal right, and that therefore such forbearance constitutes adequate consideration for a noncompetition agreement." This decision, which reverses the court of appeals, allows employers to breathe a sigh of relief regarding noncompete agreements they may have imposed on at-will employees after the time of hire.

The Man in the Middle

Imagine you have been working at your company as an at-will employee for a couple of years when you are asked to sign a noncompete agreement. Certain that you will be fired if you refuse, you sign the agreement. But a year later, unhappy and concerned about your future with your employer, you decide to resign. Or your employer decides to fire you. Should you be bound by the noncompete agreement you signed, even though you did not receive a promotion, pay increase, or any other benefit at the time?

This, in essence, is the issue that confronted the Colorado Supreme Court after Tracy Horner, a manager at Lucht's Concrete Pumping ("LCP"), resigned, only to take a similar manager position days later at a competitor, Everist Materials, notwithstanding the agreement that sought to preclude him from competing with LCP for one year following his termination.

LCP sued Horner and Everist on a variety of legal theories, but the case reached the Colorado Supreme Court on just one question: Whether the court of appeals erred in concluding—like the trial court had—that Horner's noncompete agreement was unenforceable because Horner's continued employment at LCP was not adequate consideration to support the noncompete. In other words, did Horner receive anything of value in return for his post-hire promise not to compete with LCP?

The Competing Contentions

Horner's and Everist's primary argument was straightforward: the lack of pay raise, promotion, or other benefit in return for signing the noncompete rendered the agreement void for lack of consideration. LCP countered that Horner did receive something of value: the forbearance of LCP's right to fire Horner, an at-will employee. Some jurisdictions have adopted LCP's reasoning in upholding noncompete agreements under similar circumstances.¹ But other jurisdictions have

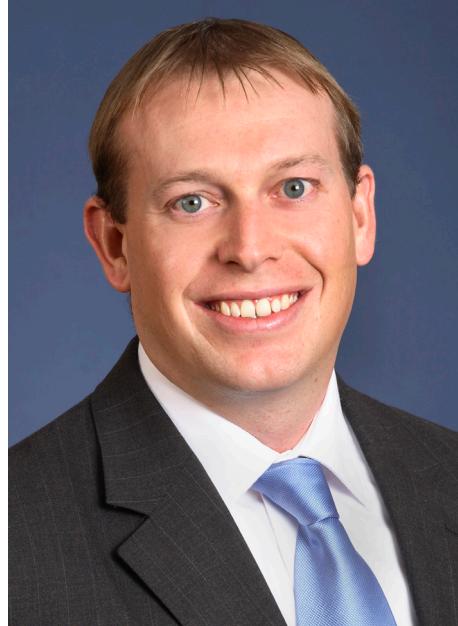


rejected the notion that forbearance of the right to fire an at-will employee is adequate consideration, finding that the mere promise of continued at-will employment is illusory.² After all, nothing prevented LCP from firing Horner, an at-will employee, for any reason or no reason, at any future date, presumably including the day after he signed the noncompete agreement. As explained by the Court of Appeals, "[T]he employer's promise requires nothing more than was already promised in the original at-will agreement."³

But LCP, in arguing that forbearing from the right to terminate Horner constituted sufficient consideration, noted that Horner did in fact remain employed by LCP for close to another year after signing the noncompete, and then left of his own accord. Thus, the consideration provided to Horner had not been illusory; he received the benefit of continued employment. Some courts have adopted this reasoning, whether by characterizing the promise of continued employment as a good-faith requirement or by finding that actual and substantial continued employment can serve as after-the-fact consideration. In response, Horner and Everist contended that, under Colorado law, "retroactive" consideration cannot save a contract that was invalid when signed, and that such a "good faith" requirement would create too much unpredictability for employers and employees: Just how much continued employment is required to save the noncompete agreement?

Also relevant to the Court of Appeals' determination was a perceived Colorado public policy disfavoring noncompetition agreements.⁴ Recognizing that employers and employees may not have equal bargaining strength, C.R.S. § 8-2-113(2) provides, subject to four statutory exceptions, that "[a]ny covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void."

LCP contended that C.R.S. § 8-2-113(2) provides sufficient protection to employees,



and that the Court of Appeals overreached by requiring additional, separate consideration to support Horner's noncompete agreement. Furthermore, LCP, and the Colorado Civil Justice League in an amicus brief, noted that other public policy considerations supported upholding the noncompete at issue. First, the law should strive for predictability in its application, and the Court of Appeals ruling, if upheld, would create unpredictability as it suddenly called into question the enforceability of an untold number of previously executed agreements. Second, the Court of Appeals decision would actually hurt employees by creating an incentive for employers to fire at-will employees and rehire them the next day with a noncompete. Such a result would have a deleterious effect on employees' vesting rights or other benefits conferred based on seniority.

The Outcome

The Supreme Court, in siding with LCP, began its analysis by noting that courts should generally avoid assessing the adequacy of the consideration supporting a contract. What matters is that there is some consideration—even a "peppercorn" will do. Here, LCP's forbearance from terminating Horner, which it had a legal right to do, constituted adequate consideration to support the noncompetition agreement.

The Court also explained that it had used this same reasoning in 1987. In *Continental Air Lines, Inc. v. Keenan*, the Court held that an employee could sue an employer for breach of contract where the employer failed to follow termination procedures in its employee manual. To do so, the employee had to show that, in promulgating the procedures, the employer was making an offer to the employee, and that "his initial or continued employment constituted acceptance of and consideration for those procedures."⁵ The Lucht's Court reasoned, "If an at-will employee's continuation of work constitutes adequate consideration for the acceptance of an employer's benefit, ... an employer's forbearance from terminating the at-will employee constitutes adequate consideration for an employee's acceptance of

an employer's noncompetition agreement."

The Court found no distinction between a decision to accept a noncompete at the initial hiring period and a decision to accept such an agreement later because, as noted by another court, "[a]s a practical matter every day is a new day for both employer and employee in an at-will relationship." The Court recognized that a contrary decision would "create a perverse incentive" in which employers would be "induced to terminate an employee and then rehire them the next day with a covenant not to compete."

Finally, while not speaking directly to any state public policy disfavoring restrictive covenants, the Court noted that, unlike most contracts, "all noncompetition agreements must be assessed for reasonableness." In this way, an employee could gain protection where an employer enters into a noncompete with an employee, only to fire him immediately afterwards. Because the trial court had found the noncompetition agreement invalid for lack of consideration, the Court remanded so that the trial court could assess the agreement for reasonableness.

Concluding Thoughts

Lucht's reaffirms the sometimes harsh nature of at-will employment. With an at-will employee, the terms of employment can be "renegotiated" at any time. If unsatisfactory to the employee, he is free to seek employment elsewhere.

While the decision vindicates the right of employers to impose noncompetes on at-will employees post-hire—even without an accompanying pay raise or promotion—employers must still bear in mind some important limitations. First, as noted by the Court, any noncompete is subject to a reasonableness inquiry. In the past, this inquiry generally has focused on the geographic and temporal scope of the noncompete, not the circumstances surrounding its execution. But that may change in light of the Lucht's opinion. How much continued employment is "reasonable" remains unclear, but asking an employee to sign a noncompete when the employer already intends to discharge the employee probably would not be considered reasonable.

Second, employers should not lose sight of C.R.S. § 8-2-113(2), which still restricts the circumstances under which a noncompetition agreement will be enforceable. Many at-will employees will not fit the categories of exceptions set forth in the statute.

Finally, the Lucht's decision does not apply to employees who cannot be terminated at-will. Such employees will be entitled to additional consideration beyond continued employment, since the employer does not have the legal right to terminate them for any reason or no reason at any time. •

— Jessica Brown is a partner at Gibson, Dunn & Crutcher LLP specializing in noncompete and trade secret matters, among other intersecting employment and intellectual property law issues.

JBrown@gibsondunn.com, 303-298-5944. Brian C. Baak is a litigation associate at Gibson Dunn. *BBaak@gibsondunn.com*, 303-298-5781.

¹ See, e.g., *Lake Land Emp. Group of Akron v. Co-lumber*, 804 N.E.2d 27, 31-32 (Ohio 2004); *Ackerman v. Kimball Int'l, Inc.*, 652 N.E.2d 507, 509 (Ind. 1995);

² Brignull v. Albert, 666 A.2d 82, 84 (Md. 1995).

³ See, e.g., *Access Organics v. Hernandez*, 175 P.3d 899, 903 (Mont. 2008); *Labriola v. Pollard Group, Inc.*, 100 P.3d 791, 794 (Wash. 2004).

⁴ 224 P.3d 355, 358 (Colo. App. 2009).

⁵ Id. at 358-59.