CARLTON FIELDS

# Restrictive Covenants: A Cautionary Tale

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A recent California decision reinforces the importance of confirming the enforceability of restrictive covenants before they are tested by a departing employee, or, as in that case, by more than a hundred. In February of this year, Timothy W. Turner, then president of CRC Insurance Services, Inc., left to take a position as president and CEO of R-T Specialty LLC., a competing insurance wholesaler. More than 120 CRC employees followed him from CRC's offices in Chicago, Philadelphia, and California. Multiple suits resulted from this departure, all relating to the enforceability of the restrictive covenants in those employees' contracts with CRC. Although several of those suits remain pending, the Superior Court of California in Los Angeles ruled on July 13, 2011 that Mr. Turner is under no duty to abide by his agreement with CRC because one or more of its provisions were invalid under California's Business and Professions Code. The Court separately found that, for this same reason, the 28 California employees who followed Mr. Turner to R-T Specialty are under no duty to abide by the non-solicitation agreements they signed with CRC.

The mass departure of employees to a competitor could be devastating to any company and particularly to companies operating in relationship-based industries. Given this all-too-possible result, careful attention should be paid to the enforceability of restrictive covenants before they are tested. In Georgia, restrictive covenants that were in place prior to May 11, 2011 are subject to a strict scrutiny standard which provides that where any aspect of a covenant is found to be unenforceable, as in the California case, the entire provision will be invalidated. Georgia law changed, effective May 11, 2011, to make both the standard for what is enforceable more clear and to make the standard of review applied to such covenants much less stringent.

The harsh standard applied to agreements pre-dating the change in Georgia law – as most do – makes it imperative that Georgia employers perform a careful review of agreements containing restrictive covenants to confirm their enforceability.

Furthermore, because agreements entered into on or after May 11, 2011 are given the benefit of Georgia's new, more employer-friendly law which, among other things, allows courts to simply "modify a covenant that is otherwise void and unenforceable," leaving the remainder of the

agreement intact, it greatly benefits Georgia employers to enter into new restrictive covenants with employees where possible. (O.C.G.A. §§ 13-8-53(d) & 13-8-54(b).)

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