

## Brokers, Underwriters Find Noncompete Agreements Tricky

While it may be hard to win a lawsuit that accuses a competitor or former employee of stealing clients, that does not stop insurance carriers and brokers from trying, experts said.

Lawsuits involving restrictive employment agreements, often including a noncompete or nonsolicitation component, are fairly common in the insurance industry, and a couple have made headlines this year.

Especially notable was a lawsuit CRC Insurance Services filed against Ryan Specialty Group, saying it had lost 120 employees to Ryan Specialty, the company formed by Patrick G. Ryan, the former chairman and chief executive officer of Aon (BestWire, June 23, 2010).

"Going back many years, there's always been groups of employees who jump because a senior person jumps and takes the team with them," said Evelyn Wolovnick, senior insurance adviser with Diamond Management and Technology Consultants. The team can be a group responsible for an unusual or new product at an underwriter, or a broker moving to greener pastures.

Senior executives or key personnel are often asked to sign employment agreements that attempt to stop them from moving business should they leave the company, she said, "and that can result in big lawsuits."

In February, Liberty Mutual filed suit accusing Aspen Insurance Holdings and nine former Liberty Mutual employees of raiding Liberty's professional liability insurance business.

Filing a lawsuit is one thing, winning it is another.

"Enforcing a noncompete agreement is very difficult," Wolovnick said. Most such lawsuits are often negotiated before they go to trial "because both parties recognize a poaching of a team -- for whatever reasons -- and they try to mitigate the damage to each other to allow the business to go along. No one can stop a client from moving his business whenever he wants to," she said.

Restrictive covenants prevent people from conducting business freely, "so courts do not like them," said Steven J. Thayer, an attorney and founding partner with Chicago-based Handler Thayer. "The last thing most people do is wait for a court to render an opinion because both sides can lose. You'll see most people settle."

Tim Cunningham, a principal with Optis Partners, a Chicago-based investment banking and financial consulting firm specializing in the insurance distribution industry, said nonpiracy restrictive covenants are generally enforceable.

"We're seeing many firms that may not have all employees bound by employment agreements with restrictive covenants, but they all have employees bound by confidentiality, nondisclosure, nonpiracy agreement," Cunningham said.

Sometimes the contracts are enforced without even filing a lawsuit, Thayer said.

"I get a lot of calls from clients who ask me to write a threatening letter," Thayer said. "You can imagine when an employee gets this letter, by registered certified mail, asking them to cease and desist any further unlawful conduct... hopefully that works, and has a chilling effect."

Most restrictive covenants have two components: a geographical limitation and a time limitation, Thayer said. If the court views either the geographical or time constraints as too broad, the restriction will be denied, he said.

"A court has to find a legitimate business interest [for the contract] beyond restraining trade," Thayer said. Also, the agreement has to be signed by the employee before they start working, and the employer has to offer the

employee adequate compensation for signing the agreement, he said.

But even without an agreement, former employers can have grounds to take legal action against employees who leave to go to competitors, depending on their actions.

"The worst thing you can do as an employee is steal from your employer," Thayer said. "That's illegal no matter where you are. There are just as many cases that revolve around theft of confidential information, say an employee walked out with a database or printed it out. Without them having signed anything, you can protect that."

However, Wolovnick said senior people tend to have a lot of knowledge that's not on paper.

"You can't stop people from using what is in their head. I don't see how a noncompete agreement can ever be enforced against that," she said.

The CRC/Ryan case is extreme in that 120 CRC employees allegedly jumped ship to work for Ryan.

"When you take an entire office, that's a raiding claim," Thayer said. In addition to claims of violating a restrictive covenant and violation of confidential information, a former employer could also accuse the former employee of violating a fiduciary duty, he said.

A better solution, Thayer said, would have been to make a fair offer to acquire the office.

Cunningham agreed. "Don't be stupid about it," he said. "Make a decent offer for it. In some cases, that will work."

(By Meg Green, senior associate editor, BestWeek: Meg.Green@ambest.com)