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### ***THE COURTHOUSE PERSONNEL DEPARTMENT***

#### **EMPLOYERS SHOULD EXPECT THE DOG TO BARK**

##### **ABOUT RESTRICTIVE COVENANTS**

A concurring opinion in the November 2007 case of *Lifetec, Inc. v. Edwards* should make restrictive covenants significantly easier for Illinois employers to enforce.

When Peter Edwards (“Edwards”) accepted a sales representative position with Lifetec, Inc. (“Lifetec”), a medical devices and products dealer, he executed a written employment agreement which contained the following restrictive covenants:

6.02 Competition. Employee will not, for a period of twenty-four (24) months after the termination of this Agreement, directly or indirectly, on Employee's own account or in the service of others or through a spouse or affiliate, compete with the Company or engage in the sale and/or lease of the Product or competitive medical devices and/or products in the Territory. For the purposes of this provision, Product and Territory includes only the Product and Territory assigned to the Employee during the most recent eighteen (18) months prior to the termination of this Agreement.

6.01 Solicitation. Employee will not, for a period of twenty-four (24) months after the termination of this Agreement, directly or indirectly, on Employee's own account or in the service of others or through an affiliate or spouse, engage in the solicitation of purchase orders for, or assist in the sale and/or lease of, the Product or competitive medical devices and/or products in the Territory. For the purposes of this provision, Product and Territory includes only the Product and Territory assigned to the Employee during the most recent eighteen (18) months prior to the termination of this Agreement.

Approximately ten years later, Edwards accepted a sales position with Patterson Medical Supply, Inc. (“Patterson”), a direct competitor of Lifetec. When he accepted the position, Edwards knew he would be selling the same products as Lifetec, to the same customers he sold to while employed at Lifetec, and in the very same territory.

Lifetec sued Edwards and Patterson, alleging Edwards breached his employment contract and Patterson tortiously interfered with Edwards’ contract with Lifetec. Lifetec sought and was granted an

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injunction prohibiting Edwards from competing with Liftec for a period of 24 months consistent with the restrictive covenants in his employment agreement. Edwards and Patterson appealed.

In upholding the injunction, the Appellate Court noted that because restrictive covenants are a restraint on trade, they are scrutinized carefully to ensure their intended effect is not to prevent competition *per se*. Such an analysis includes whether the restrictive covenant is reasonable in time and scope, and whether it is necessary to protect a “legitimate business interest” of the employer. A “legitimate business interest” arises if (1) the employee acquired confidential information through his employment with the employer and later attempted to use it for his own benefit, or (2) if the employer’s customer relationships are near permanent and the employee would not have had the contact with the customer absent this employment.

Applying the above analysis, the Appellate Court upheld the injunction, but, in a special concurring opinion, one of the Appellate Court Judges concluded that the “legitimate business interest” test is no longer valid law in Illinois, if it ever was. The Judge explained that, although the “business interest test” first appeared in an Appellate Court’s analysis of a restrictive covenant more than 30 years ago, it has *never* been used by the Illinois Supreme Court. In fact, in the Supreme Court’s most recent analysis of a restrictive covenant in 2006, it only analyzed whether the restrictive covenant was reasonable in time and scope and never even mentioned the “legitimate business interest” test.

Thus, the Judge stated: “As Sherlock Homes would observe, this is the case of the dog that did not bark.” The Judge concluded:

Courts at any level, when presented with the issue of whether a restrictive covenant should be enforced, should evaluate *only* the time and territory restrictions contained therein. If the court determines that they are not unreasonable, then the restrictive covenant should be enforced.

The employer has no additional burden to prove a ‘protectable’ or ‘legitimate’ business interest to support enforcement...[the ‘legitimate business interest’] test constitutes nothing more than a judicial gloss incorrectly applied to this area of law by the appellate court.

The majority of the Appellate Court acknowledged that the Judge’s special concurrence was “persuasive”; however, since no attorney in this case made the arguments or presented the analysis found in the special concurrence, the Appellate Court affirmed the lower court’s opinion for other reasons. The majority of the Appellate Court stated: “if we are to reject three decades of precedent based upon an argument never made, perhaps we should wait for the dog to bark.”

Once the dog barks, which should be relatively soon now that the “cat is out of the bag,” Illinois employers should be able to easily dismiss the “legitimate business interest” challenge to enforcement of the restrictive covenants in the Employer’s employment manuals and contracts. In addition, employees are advised to scrutinize more carefully any time and territory provisions they may agree to or be subject to, as they will likely be forced to comply with reasonable restrictions.

We represent both employers and employees in the types of issues discussed in the Liftec case. Please do not hesitate to telephone us if you have any questions about restrictive covenants.

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Be sure to visit our website at [www.riECKcrotty.com](http://www.riECKcrotty.com) to read prior issues of *The Courthouse Personnel Department* and *A Potpourri*.