
Court backs trade secret laws

By Thomas E. Peisch

Employers who value their trade secrets and rely on the loyalty of their employees will applaud a recent decision by the U.S. Court of Appeals for the First Circuit in Boston. At the end of September, it upheld the criminal convictions of a Maine chemist and a California scientist who conspired over an eight-month period to steal confidential information from the chemist's employer and set up a competing company.

Caryn Camp was a chemist at IDEXX Inc., a Portland, Maine manufacturer of animal health test kits and other veterinary products. At the outset of her employment in 1995, she signed a series of standard noncompete and nondisclosure agreements.

Three years later, Camp began a series of e-mails with a California scientist, Dr. Stephen R. Martin who had earlier discussed a research proposal with IDEXX and signed a limited confidentiality agreement in connection with those talks.

Eventually the e-mails led to Camp sending Martin two packages containing items of IDEXX's confidential product and marketing information.

In August 1998, as she was preparing to leave IDEXX, she mistakenly forwarded to her supervisor one of her e-mails to Martin. IDEXX then apparently downloaded her other e-mails with Martin and reported the conspiring team to the FBI.

Camp pleaded guilty to various criminal charges and agreed to testify against Martin in return for leniency. A federal jury in Portland convicted Martin of multiple counts of conspiracy, violations of the Economic Espionage Act, mail and wire fraud, and interstate transportation of stolen property. He was acquitted of several other charges, then appealed the case to the Court of Appeals in Boston, claiming that the prosecution had failed to prove any of the charges.

The Espionage Act

The Economic Espionage Act (EEA) of 1996 criminalizes conduct that previously might only have been in a civil suit. It punishes "the knowing theft of trade secrets" and defines the term "trade secret" broadly to include tangible and intangible property. It also requires proof of an intent to harm the owner of the trade secret.

Martin argued that the government had failed to prove a conspiracy, that Camp's information constituted a protected trade secret, or that he and Camp had intended to harm IDEXX.

The Court of Appeals rejected all of these arguments. It pointed out that while the Act was not intended to punish legitimate competition, it did cover the dishonest conduct of Camp and Martin.

The court also ruled that even if Martin had not actually received trade secrets, he still could have been convicted because federal criminal law punishes the crime of conspiracy even if its goals are not realized.

Martin was also convicted of conspiracy to transport stolen property via interstate commerce, a second federal criminal offense rarely invoked in trade secret or employee loyalty litigation. The charge related to Camp's having agreed to send him IDEXX-owned software and test kits.

Martin argued that these materials did not constitute the type of tangible property covered by the law, and that their value did not exceed the statutory minimum of \$5,000. He also said that some of the materials sent to him were given free-of-charge to IDEXX's customers.

The court rejected all of these arguments. First, the court agreed that "intangible, 'purely intellectual' property" cannot be the subject of an interstate transportation charge. However, it concluded that the value of such property could contribute to the \$5,000 requirement. Accordingly, it ruled that the government had proved its case and that Martin had been properly convicted of

this offense.

The last group of offenses involved the federal mail and wire fraud statutes. For decades, federal criminal law has punished use of mail or wire facilities as part of fraudulent schemes involving property. In 1988, Congress amended these laws to criminalize schemes "to deprive another of the intangible right of honest services."

The court held that Martin was properly convicted under either or both fraud theories. It observed that the confidential trade secret information Camp passed on to Martin constituted IDEXX's property.

The court then pointed out that the e-mails between the two clearly showed a scheme to defraud IDEXX. It concluded that even if Martin's offense had not involved property, he was appropriately convicted of a scheme to deprive IDEXX of Camp's honest services.

Finally, the court held that while mere examination of confidential trade information might be insufficient to support a conviction, the conduct here clearly involved its use.

Protect your trade secrets

What are the lessons in this case for business owners and corporate employees?

First, federal law enforcement has responded to the EEA and tightening of mail and wire fraud statutes. The application of federal criminal law is intended to have far greater impact on offenders than any civil action.

Second, employers who wish to guard their trade secrets must continue to use confidentiality and non-competition agreements. In Martin's case, the Court pointed out that the EEA required evidence that IDEXX had sought to protect its confidential trade secrets. The prosecution's success was due in part to IDEXX's regular reminders to employees about their confidentiality and fidelity obligations.

Third, there may be instances when employers prefer not to have the criminal authorities involved. However, once a federal criminal investigation has begun, it cannot be curtailed or terminated based on the wishes of the alleged victim.

Finally, both Martin and Camp are now convicted felons, and Martin served nearly a year in federal prison. Their fates should serve as a warning that employees must carefully consider their contractual and common law

obligations to their employers when thinking about tantalizing proposals from competitors.

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