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Court Ruling Helps Define Factors Used in Trade Secret Classification

Published May 23, 2012

What is an allograph? And why doesn't a company's sterilization process violate the trade secrets of another company that allegedly invented and protected the sterilization protocol? And why, you might ask, do these questions appear on our blog? First, an allograph is a transplant of tissue from one person to a genetically dissimilar person. To successfully complete this transplant, you must sterilize the human tissue. In April 2012, Florida's Fifth Circuit of Appeal ruled on a case involving allographs: *Duane Duchame, Tai T. Huynh, et al. v. Tissuenet Distribution Services, LLC, et al., 37 Fla. L. Weekly D875a*. This case established several factors that Florida courts now use in determining whether to uphold injunctions enforcing trade secrets. These factors are important when recognizing the undeniable link between success with a trade secret claim and the existence of a valid non-compete agreement. The court ultimately decided in a reversal of the lower court's temporary injunction in this sterilization case, based on several things.

The chemicals used in the case were well-known in the industry and therefore use of them did not constitute qualities of a trade secret.
The former employee who created the sterilization protocol did not use a direct replica of the system for a new employer. Rather, he "used his education, knowledge, skill, and experience" to formulate a protocol for his new employer, indicating it was a new creation instead of a stolen trade secret.
And most importantly, if the plaintiff wanted to prevent the departed employee from working for a competitor, then the plaintiff should have issued a non-compete agreement to the former employee- which they did not do.

This case stands demonstrates two propositions that all employers seeking to protect trade secrets should remember. First, if a trade secret exists, it should be kept secret. Additionally, verify that it does qualify as a trade secret. If you use industry-known materials and use them in a special or untraditional manner (i.e. the sterilization protocol in this case), make sure you can prove in court that your methods are significantly different enough to classify them as trade secrets, and not merely a variation of a widely-accepted process. Second, if you have a key employee capable of taking their

talents to a competitor which could adversely impact your business, then you should always consider executing a valid non-compete agreement to protect your company. In the *Tissuenet* case discussed above, it is impossible to say whether or not a valid non-compete agreement would have justified the plaintiff's claims, but it is likely that the lack of a valid non-compete agreement caused the fatal blow. Are trade secret claims and non-compete claims different? Of course! However, as this example has demonstrated, they are often compatible tools working with sensitive information and skilled employees. For more information, if you have any questions about trade secrets or non-compete agreements, or if you have an unfair competition issue, please contact any of the Burr & Forman's Non-Compete & Trade Secrets team members and we will be happy to assist you. *Other articles you may be interested in:* What is a Trade Secret? Key Ingredients for an Effective Non-Compete Agreement

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