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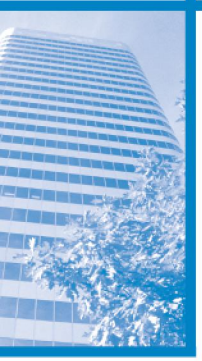

Business Law Newsletter

THE PROTECTION OF TRADE SECRETS

by Scott J. Spooner

A plaintiff asserting a trade secrets claim in Virginia must show that the alleged trade secrets are not generally known in the industry in which the plaintiff competes. This requirement flows directly from the definition of a trade secret under the Virginia Uniform Trade Secrets Act. Specifically, Virginia Code § 59.1-336 defines a trade secret as:

> information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The "not generally known" requirement can defeat a trade secrets claim where the information has been disclosed within the relevant industry or has been injected into the public domain. In Religious Technology Center v. Lerma, (E.D. Va. 1995), the federal district court examined the question of whether documents disclosed on the Internet could satisfy the "not generally known" requirement for a protected trade secret under Virginia's Uniform Trade Secrets Act. While the litigation was pending in the Eastern District, a Washington *Post* reporter copied a public court file in connection with related litigation before a California federal district court. The public court file contained the disputed trade secrets, and no sealing or protective order had been entered in the case pending in California federal district court. The Washington *Post* then published an article regarding the disputed trade secrets, and the article was posted on the Internet.

The federal district court in Lerma held that the plaintiff was not likely to succeed on its trade secrets misappropriation claim because the "plaintiff cannot establish that the AT documents are 'not generally known.'" The court ruled that the public disclosure of the information on the Internet was fatal to the plaintiff's claim because the plaintiff could not show that the information was "not generally known."

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"Getting It Done"

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NEW OVERTIME RULES

by James V. Irving

The Department of Labor has adopted new overtime regulations governing white collar professionals. The revised regulations are effective as of August of 2005. Among the new regulations are the following:

- Salaried workers who make $23,660 per year or less are entitled to overtime pay for all hours in excess of 40 hours per week. This is true whether or not their duties would otherwise make them exempt.

- Employees making more than $100,000 per year (including commissions and bonuses) are not eligible for overtime pay.

- For the purpose of determining eligibility for overtime pay "Primary Duties" is defined as that job that an employee regularly does at least half the time.

- Executive employees may be exempt from overtime pay if they have the power to hire and fire, or at least have input into these decisions.

- An employee who holds a "position of responsibility" may be exempt from the overtime regulations under the Administrative Employee Exemption. A Position of Responsibility is defined as either performing work of substantial importance or performing work requiring a high level skill or training.

- Qualification for the Professional Employee Exception focuses on academic degrees. Although, the regulation also takes into account work experience and on the job training, an individual must have more than a high school education to qualify.

- These regulations are not retroactive, but will govern a company's overtime policies beginning August 23, 2005.

MEET OUR LAWYERS - Mitchell B. Weitzman

Mitchell Weitzman is a member of the District of Columbia, Maryland, and Virginia bars. He is engaged in the practice of civil litigation and bankruptcy, with a particular focus on the representation of commercial landlords. Mitch has tried numerous contested real estate disputes in the local state and federal Courts. His representation of commercial landlords also involves litigation in national retail bankruptcy matters, concerning issues such as assumption and assignment of leases, leasehold auctions, enforcement of administrative obligations of debtors and relief from the automatic stay.

Mr. Weitzman is a member of the Maryland State Bar Association Litigation, Real Property Planning and Zoning sections; Virginia State Bar Civil Litigation, Real Estate sections; Arlington and Fairfax County Bar Associations; Northern Virginia Bankruptcy Association; and has served on the District of Columbia Bar's Superior Court Digest Committee, reporting new decisions from that court.

Mitch obtained an undergraduate degree from the University of South Florida in Tampa and law degree from the Sheppard Broad Law Center at Nova Southeast University in South Florida. From 1989-1995 Mr. Weitzman was the Law Clerk to Honorable John G. Ferris, Sr., 17th Judicial Circuit of Florida. Away from work, Mr. Weitzman enjoys living in downtown Washington, D.C., in the Foggy Bottom. He travels frequently to New York, Florida, Northern California, Italy, England and France.

Non-Competition in Government Contracts

by James V. Irving

The reluctance of Virginia courts to enforce non-competition arrangements was again demonstrated on September 6, 2005 when the case of *Omniplex World Services Corporation v. US Investigations Services, Inc.* was handed down in the Supreme Court of Virginia. Omniplex arose in the context of a Government Contract called Project Eagle. Defendant Schaffer had worked for MVM, Inc when that company was the incumbent on the contract. When Omniplex succeeded to the contract, they employed Schaffer by way of a written contract including a provision prohibiting her from performing Aany services... for any other employer in a position supporting Omniplex=s Customer.@

When Schaffer left Omiplex to accept a position with another contractor on the same project, Omniplex sought to enforce the non-competition agreement against Schaffer, while at the same time suing her new employer for tortious interference with its business relations.

The Supreme Court sustained the trial court=s dismissal of Omniplex=s claim, holding that the Omniplex- Schaffer non-competition arrangement was overbroad, because it prohibited Schaffer from providing *any* service at the Project through her new employer.

Omniplex is particularly interesting because it was decided 4 to 3 with a very strong dissent. The minority recognized that Schaffer had not engaged in dissimilar services, but had committed precisely the act that Omniplex had sought to prevent. The case reminds us, however, that technicalities often trump practicalities in the non-competition arena.

Divorce Privacy Act

By James V. Irving

Newly enacted Virginia Code §20-121.03 establishes several important new rules designed to protect the privacy and economic security of the parties in divorce actions.

The new law states that in divorce cases, no petition, pleading, motion, order, or decree including any agreement or transcript shall contain the social security number, any financial information or provide identifying account numbers for specific assets, liabilities, accounts, or credit cards.

While the statute does not identify evidence as a protected class of documents, most local jurisdictions appear to be taking a broad interpretation of the statutes' intention; including all documents within ambit of the statute.

Currently, federal courts permit the use of partial social security numbers, for example, XXX-XX-1234. The Fairfax Circuit Court has taken the position that no account numbers or social security numbers can be used in property settlement agreements or orders. At trial un-redacted documents must be given to the opposing counsel, but the court will only receive evidence if the objectionable information has been blacked out.

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Other cases have addressed the question of whether disclosing trade secrets information in open court files can defeat a trade secrets claim. In Hoechst Diafoil Co. v. Na Yan Plastics Corp., (4th Cir. 1999), the Fourth Circuit Court of Appeals (applying the South Carolina Uniform Trade Secrets Act) held that information did not lose its trade secrets status as a result of being available in the court's public files. More recently, the federal district court in Microstrategy, Inc. v. Business Objects, S.A., (E.D. Va. 2004), held that "the mere fact that documents are filed unsealed and are available in public court filed does not destroy the secrecy of such documents in the absence of evidence of further publication."

Nevertheless, the Lerma case teaches that the owner of a trade secret must be vigilant in ensuring that the information does not become "generally known" in the relevant industry or injected into the public domain. Disclosure on the Internet, whether or not the trade secret owner is at fault, will doom a trade secrets claim under this requirement.

This paper was prepared by Bean, Kinney & Korman, P.C. as a service to clients and friends of the firm. The purpose of this paper is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney & Korman, P.C. 2005.

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