



Confidential Information that isn't a Trade Secret?

Insights

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One question that often arises in the trade secret practice is what information, if any, can be protectable as confidential information even if it does not qualify under state law as a trade secret. In other words, what is the value of having a non-disclosure of confidential information provision in an agreement? What does that type of provision do that statutory or common law trade secret protections don't already provide?

A recent case from the 6th Circuit illustrates the value of non-disclosure provisions. Put simply, Texas law allows employers to enforce nondisclosure provisions covering "confidential information" that does not qualify for protection as a trade secret. That is the holding from a recent 6th Circuit Court of Appeals decision reversing a district court holding and finding liability against a former medical device salesman for breach of a non-disclosure agreement with his former employer, even though the information he disclosed was not a trade secret. The case is *Orthofix, Inc. v. Hunter*, No. 15-3216, 2015 WL 7252996 (6th Cir. Nov. 17, 2015).

Orthofix and DonJoy are competitors in the medical device market for bone growth stimulators. At the start of his employment with Orthofix, Hunter signed a non-disclosure agreement that stated he would never use or disclose any "confidential information" that he acquired during his employment with the company. Like a bad horror movie, we know what happens next.

After twelve years of working for Orthofix, Hunter decided to defect to DonJoy. Before and after his defection, Hunter shared much of the information he learned during his employment at Orthofix with DonJoy. This information included customer lists, pricing information, and physician schedules, preferences, and prescribing habits. Unfortunately for Hunter, his non-disclosure agreement specifically expanded the definition of "confidential information" beyond trade secrets to also specifically include customer lists, business strategies, and "other confidential information pertaining to [Orthofix's] business or financial affairs." The 6th Circuit held that such a non-disclosure agreement is enforceable under Texas law even if it protects against information that is beyond the scope of a trade secret.

The court also rejected Hunter's argument (and the district court's ruling) that the non-disclosure agreement was an unenforceable non-compete clause. In doing so, the court noted that as long as a non-disclosure agreement does not cover a former employee's general knowledge and experience, then it does not function as a non-compete restriction and is not subject to the normal temporal and

geographic limitations. Because the 6th Circuit found that Hunter breached his agreement with Orthofix by; (1) disclosing to DonJoy an account-by-account breakdown of his Orthofix bone growth stimulator sales; (2) failing to return to Orthofix forty-six converted customer orders; and (3) drawing upon his knowledge of his former customers' prescribing habits, schedules, and contact information in introducing DonJoy representatives to these very customers; he could be on the hook for nearly \$4 million in lost sales and profits when the district court calculates damages.

The irony here is that Hunter did not have a traditional non-compete agreement with Orthofix. He could have gone to work for DonJoy without any repercussions if he had not used his knowledge of his former customers' schedules, contact information, and prescribing habits when he went to work for DonJoy. Instead, he now faces a new phase before the District Court in Ohio where the sole question will be "how much is the bill?"

[Orthofix Inc v Hunter.pdf \(77.67 kb\)](#)

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Corey J. Goerd
Director of Pro Bono & Community Engagement
404.240.4212
Email