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GOT A SECRET? THAT'S WHAT YOU THINK!

Do you believe that your proprietary products or business practices, that give you something of an edge in competition, are well protected? Are you convinced that you have taken enough steps to protect your business methods, whether or not you label them as trade secrets, from being poached, especially where you might have revealed some of them in connection with a now-failed cooperative business deal? It may be necessary to carefully reexamine the steps you have taken, thanks to a very recent case that has just been decided by the U.S. Court of Appeals for the Seventh Circuit, sitting in Chicago.

Key to any claim that material is a trade secret is the effort by the owner of the material to treat it as secret. Companies often do this by having others with whom they might share their proprietary information sign a "CDA," a Confidential Disclosure Agreement, in which the party to whom information is disclosed promises to keep the information confidential. A further safe step is to place on all communications involving the information a label, often at the top of correspondence, stating that the information is to be treated as confidential or a trade secret.

Failure to take any steps to indicate that the information is special will usually result in courts turning a deaf ear to claims that confidential or trade secret information has been stolen. And that's what happened in this case.

The bottom line of the court's decision in this case, *Fail-Safe, LLC v. A.O. Smith Corporation*, is that "where one company fails to take any protective steps to shield its proprietary information, it cannot then expect the law to protect it when the relationship sours." Coming up from that bottom line, the facts here were that these two companies began talks about together developing anti-entrapment devices for artificial swimming pool drains. Fail-Safe manufactures anti-entrapment devices, and A.O. Smith manufactures motors for pool and spa pumps.

During several years' worth of talks concerning a joint effort whereby A.O. Smith would develop a pump motor for Fail-Safe's pool suction entrapment prevention, Fail-Safe shared a list of features it thought would be important, and details about how to test the resulting device. Fail-Safe also shared test results from a previous pump design. Fail-Safe did not identify or label any of that information as confidential.

After the relationship soured, A.O. Smith introduced two pump motors that Fail-Safe claimed incorporated its trade secrets, disclosed during the negotiations. Fail-Safe sued, and lost. The court was totally unsympathetic to Fail-Safe's arguments that its designs and working information were proprietary, because Fail-Safe never indicated that in any communications with A.O. Smith.

The lesson to be learned here is that, where a company has important information that it does not want stolen, it must take reasonable steps to inform those with whom it deals that the information is confidential. Better yet, it should have a form of CDA that it uses in all situations where that information might be disclosed to others.

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