COURT RULES FORMER EMPLOYEE CAN BE PREVENTED FROM WORKING FOR A COMPETITOR IF THE EMPLOYMENT WILL LEAD TO THE DISCLOSURE OF TRADE SECRETS

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In Electro Optical Industries, Inc. v. Stephen White, 76 Cal.App. 4th 653 (1999), the California Court of Appeal for the first time adopted the "inevitable disclosure" rule used by courts in other jurisdictions in connection with trade secrets cases where a former employer is working for a direct competitor. This ruling will give California employers greater protection against the possibility of the misuse of trade secrets by former employees.

The Uniform Trade Secrets Act (UTSA) defines a trade secret as information that "(1) Derives independent economic value, actual or potential, from not being generally known to the public or to 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." (California Civil Code §§3426-3426.11) Although the UTSA permits a trial court to enjoin any actual or threatened misappropriation of trade secrets, prior California cases had focused only on the actual misuse of the protected information. The inevitable disclosure rule adopted by the Electro Optical Industries court allows a former employer to enjoin an employee from working for a direct competitor where the "new employment will inevitably lead the employee to rely on the former employer's trade secrets." Put differently, where it would be "impossible for an employee to perform his or her new job without using or disclosing" trade secrets, the court may issue an injunction preventing the employee from working for the competitor.

In order to merit protection under the inevitable disclosure rule, the former employer must demonstrate that the information at issue is a trade secret, that the employment by the employee is "likely to result" or "impossible" not to result in disclosure of its trade secrets and that the former employer is likely to suffer greater harm than that of the employee if an injunction is not issued. These standards are not easily met; Electro Optical Industries was unable to

obtain the preliminary injunction it sought from the trial court, and did not convince the Court of Appeal that the trial court had abused its discretion when it balanced the hardships in favor of Stephen White.

While the standards set by the court may be difficult to meet, the Electro Optical Industries case does offer new hope for California employers seeking to protect their trade secrets. These employers should continue to protect this information using appropriate measures, including confidentiality agreements and security devices. Employers should remind departing employees of their obligations not to disclose information. Where the employee is going to work for a direct competitor, employers should consider the extent of the similarities between the businesses and should collect information concerning the frequency which the companies compete for the same customers. Absent sufficient demonstration of the harm which could be suffered by the former employer, a California court will not interfere with an employee's right to change employers in pursuit of a chosen career.