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SAFEGUARDING COMPANY TRADE SECRETS WITH NON-COMPETE AND NON-DISCLOSURE AGREEMENTS IS ESSENTIAL

By Robert F. ("Ted") Barron

The Supreme Court of Arkansas ruled last month that Tyson Foods, Inc.'s failure to protect confidential information with a non-competition agreement between the company and three former executives doomed its misappropriation of trade secrets lawsuit against ConAgra, Inc., the competing poultry producer to which the executives defected. Arkansas has adopted the Uniform Trade Secrets Act (as has Indiana), which defines trade secrets as "information... that: (a) 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 (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Ark. Code b 4-75-601(4)) Tyson had sued ConAgra alleging that it raided Tyson when it hired away three of its top management officials, the corporate senior vice president, senior vice president and general manager of consumer products, and division manager. The executives had access to confidential information including pricing, pricing programs, cost of goods sold, profit margins, and marketing strategies. Tyson argued that this information constituted trade secrets that would be inevitably disclosed by the executives and that ConAgra would use the information to its competitive advantage.

The Supreme Court found that Tyson failed to take steps to guard the secrecy of pricing information as evidenced by the lack of any confidentiality language in its customer contracts requiring customers to keep pricing information secret. More importantly, however, the Court found that Tyson failed to guard its secrets by not entering into any type of agreement with the executives that would have prevented them from competing with Tyson or from disclosing confidential information after they left the company. The Court concluded that "the failure of a business to protect against the disclosure of information it considers to be secret following employment is critical to our analysis and ultimate decision regarding whether the information is in fact a trade secret." The case demonstrates the importance of entering into written agreements to protect the company's confidential information. If you would like us to assist you in drafting non-competition and non-disclosure agreements, please contact us.

INDIANA COURT OF APPEALS EXPANDS ECONOMIC LOSS DOCTRINE AND DEFINES OTHER PROPERTY UNDER INDIANA PRODUCT LIABILITY ACT

By Christopher D. Lee and Todd C. Barsumian

In a handful of cases rendered within the last year, the Indiana Court of Appeals has narrowed the application of the Indiana Product Liability Act (the "Act"). First, the court ruled that plaintiffs may not recover under the Act for damage a plaintiff has sustained to a product when no other persons or property (other than the product itself) are damaged. Because the Act is the exclusive tort remedy for plaintiffs who bring product based actions, plaintiffs must look to the express or implied warranties for recovery. Second, the Court ruled that to show damage to property other than the product, a plaintiff must demonstrate that the other property was wholly outside the product. In *Interstate Cold Storage*, 720 N.E. 2d 727 (Ind. Ct Appl. 1999), trans. Denied and *Progressive Ins. Co. v. General Motors Corp.*, 730 N.E. 2d 218 (Ind. Ct. App. 2000), trans. Pending, the Court of Appeals addressed plaintiffs' claims arising out of vehicles that had essentially self-destructed through engine fires or otherwise. No person or other property were injured or damaged as a result of the fires. The Court relied on an earlier Indiana Supreme Court ruling in *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E. 2d 1078 (1993), in holding that a plaintiff may not recover

under the Act when only the product itself has been damaged. The Court extended the holding of *Martin Rispens* (which had involved allegedly defective watermelon seeds) to damage that is sudden, major and potentially injurious to persons and other property. A plaintiff's sole remedy in such a case is in enforcing the express or implied warranty.

In *I/N Tek v. Hitachi, Ltd.*, 734 N.E. 2d 534 (Ind. Ct. App. 2000), trans. Denied and *Hitachi Constr. Mach. Co., Ltd. v. Amax Coal Co.*, 737 N.E. 2d 450 (Ind. Ct. App. 2000), pet. For reh. Pending, the Court of Appeals ruled that to constitute other property under the Act, the "other property" alleged to be damaged must be wholly outside and apart from the product itself. In *Hitachi v. Amax*, a Hitachi excavator equipped with a fire suppression system caught fire and burned. No one was injured as a result of the fire. The Court held that the fire suppression system made by Ansul and supplied by Hitachi's dealer, Rudd, was bargained for by Amax at the time of purchase and was physically integrated into the excavator. The court held that the excavator and fire suppression system constituted, for purposes of the Act, one product. Thus, the Court held that Amax was not entitled to recover under the Act for damage to the excavator and remanded the case for a determination of Amax's warranty claims. Attorneys at KDDK were a part of the Hitachi defense team making the successful argument to the Court of Appeals.

In these recent cases, the Court of Appeals has reinforced the old adage "you get what you pay for." By limiting plaintiffs to warranty claims in product-based actions unless harm is done to persons or property other than the product, the Court of Appeals has drawn a line against tort claims. The act of bargaining for warranties in substantial purchases is no longer of questionable importance.