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HEWLETT-PACKARD V. HURD – A CHALLENGE TO CALIFORNIA'S DELICATE EMPLOYER/EMPLOYEE BALANCE…OR JUST A FACE-SAVING MONEY GRAB?

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What was *that* all about?

On September 7, 2010, Hewlett-Packard sues its former CEO and current Oracle chief Mark Hurd in a California lawsuit that most practitioners here agree is untenable under current California law. (See here and here for just a few of the head scratchings.) In the complaint, HP seeks to enjoin its former head honcho from working for a competitor relying on what appears to be the discredited *inevitable disclosure* doctrine.

It is a lawsuit poised to challenge the very balance of power between employers and employees in California. At issue is whether a California employer can find a creative way to make a non-compete actually *stick* in this State. The facts are perfect -- a high ranking official whose head is brimming with HP trade secrets, including high level corporate strategies, is ousted for alleged indiscretions and soon finds himself at the helm of arch rival Oracle. How can Hurd possibly do his job steering the strategic course of HP's key nemesis without HP's secrets bouncing around in his head like a superball causing havoc with Hurd's synapses? On top of these great facts, the lawyers for each side are top notch, and they come equipped (presumably) with a legal war chest capable of funding a spritely battle.

And what a battle we have in store for ourselves! ***In this corner***, we have the venerable Business and Professions Code Section 16600, 138 years old and still going strong, knocking down non-competes left and right, raising employee mobility onto a pedestal few other doctrines can share. Will 16600 once again wipe away those upstart efforts to curtail employee mobility, even at the highest levels of the corporate world, even where trade secrets are at risk (but without evidence of any actual or threatened trade secret disclosures), even when billions of dollars are at stake (fine, this may be a slight exaggeration)?

And in this corner, we have California's paternal statutory trade secret protections – the esteemed California Uniform Trade Secrets Act (affectionately known as CUTSA), supported by decades of unmistakable case law, providing California employers with the ammunition they need to keep their secrets secret. And just about everything qualifies as a secret here, including the make of the boss' toothpaste. (O.k., not really.)

These two important public policies have done battle before: *The interests of employee mobility v. the interests in protecting company secrets*. (See here.) This time, will the CUTSA be strong enough to encroach into the non-compete world (if even slightly) and allow for a pre-emptive strike! Taking a page from the pre-cogs in Philip K. Dick's *Minority Report*, can an employer prevent the disclosure of trade secrets *before it happens*? (I was going to make an *oracle* reference, but I could hear the groans already.) When you know -- you just *know* -- that those trade secrets are going to be used -- the former employee is going to *have* to access those secrets in his brain in order to do

his new job at the rival -- in other words, the misuse is *inevitable*, won't the CUTSA provide some protection?

Inevitable disclosure has not found a happy audience yet in California. In fact, poor Flir Systems, Inc. got tagged for $1.6 million in *sanctions* just for trying to press inevitable disclosure in a California court. (See here for the blog on that interesting case.) But that doesn't mean that the inevitable disclosure doctrine is inherently *wrong*. After all, what is the law if not a big wad of PlayDoh in the hands of the Supreme Court, capable of being molded into new shapes as changes in society demand? Maybe society now looks like HP -- a high tech company needing to protect its secrets of the highest order. Maybe those interests now demand the application of the inevitable disclosure doctrine even at the very slight expense of employee mobility.

So let's find out already. The lawsuit is two weeks old, I've got my tub of popcorn handy, my feet are up on the seatback in front of me. **LET THE BATTLE BEGIN!**

Round One would be predictable. Try as it might to argue it was seeking something other than application of the rejected inevitable disclosure doctrine, HP can't avoid the fact that it is seeking an injunction preventing Hurd from taking over as Oracle's chief; and that the basis for this attempted non-compete is the *risk* that Hurd will use HP's secrets when he runs the arch rival. (See here for a copy of HP's complaint in the aciton.) Presumably HP tried mightily -- and unsuccessfully -- to find evidence of some *actual* or *threatened* misuse of HP's secrets by Hurd which would unquestionably support an injunction. But lacking such evidence, HP will lose Round One because the law is clear – today – that inevitable disclosure is not applicable here in California. (*See Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1462 [125 Cal.Rptr.2d 277].) Absent actual or threatened misuse of trade secrets, one cannot enjoin an employee from working for a competitor based on a future theoretical misappropriation. HP's case should be thrown out right smack on its demurrer.

Round Two would likely be the same. The Appellate Court would rely on the same judicial opinions discrediting the doctrine, and the trial court's order would be upheld.

Which leads to *Round Three*, the Supreme Court. And here it would get interesting. Here, the competing policies could be addressed, argued, massaged, and squished like that handful of PlayDoh. Here, we could see if "society" is ready for a new rule. Is CUTSA ready to grow up and stand toe-to-toe with 16600?

How fun would this be?

Well, we may never know. HP and Hurd had to go and selfishly ruin everything.

A mere two weeks after the case was filed, 14 lousy days after California trade secret and restrictive covenant aficionados had their hearts set for a battle of epic proportions, a fortnight after HP declared war on Hurd and Oracle claiming its trade secrets were going to be used and abused by its arch rival ... the parties kissed and made up. Apparently, it was nothing a little money couldn't fix. According to news reports, HP gave up its fight after Hurd returned about $13 million worth of HP stock.

What happened to the secrets? Presumably, Hurd still has those in his brain. Presumably, Hurd is still going to run Oracle. Presumably, if HP's complaint is to be believed, Hurd can't run Oracle without trading on HP's secrets. What does the return of $13 million in stock have to do with protecting those priceless crown jewels?

Was it simply that HP and Oracle actually learned something from the decade-long Great Legal War down south between Barbie and Bratz – that even the winner of that one (assuming there ever is a winner) is already a loser? The only question is who will lose more by the time the thing is said and done. (If ever a legal dispute cried out for an alternative method of dispute resolution, it is that one!)

Or was this dispute never really about secrets at all? HP is being attacked left and right for its handling of the Mark Hurd fiasco: The employment termination following disputed allegations of sexual harassment and expense report improprieties, followed by an unbelievable golden parachute, followed by the slap in the face when Hurd took the Oracle job, followed by the near stockholder revolt and lawsuits. Maybe HP was just looking for a face saving way

out of the fracas.

But maybe I'm looking at this too selfishly. If you look at it another way…when was the last time you heard of a company recovering $13 million in settlement a mere two weeks after filing what is by all appearance a meritless lawsuit? Not bad for a few day's work.

I'll have some comments about the employment agreement HP attached to its complaint – it's a creative example of how one California employer tried to get as much non-compete protection as possible under existing law. But first, I need to figure out what to do with all this popcorn.