

## In This Issue:

June 2010

The Arizona Court of Appeals issued a ruling that serves as a reminder to Arizona employers of the importance of having restrictive covenants for employees with access to proprietary information.

## Arizona Court of Appeals Rules Against Company in Breach of Fiduciary Duty/Unfair Competition Case Against Former Vice President

By Kristin Culbertson and Kristy Peters

On May 13, 2010, the Arizona Court of Appeals reversed the lower court's decision granting summary judgment in favor of Taser International, Inc. against its former vice president of marketing, Steve Ward. The court of appeals directed entry of summary judgment on one claim in favor of Ward and remanded the remaining claims to the trial court for further proceedings.

Among other things, Taser produces personal video and recording products for use primarily in law enforcement. Taser brought a lawsuit against Ward alleging breach of fiduciary duty, misappropriation of trade secrets, and usurpation of corporate opportunity. Ward was a vice president at Taser and a member of Taser's Vital Factors team in which he participated with company executives and other vice presidents in considering new product ideas and concepts. He did not sign an employment contract, non-compete agreement, or non-disclosure agreement with Taser.

Ward voluntarily terminated his employment, and immediately formed a company selling a clip-on camera device, similar to a product Taser was in the process of developing. He began preparations for his competing entity while an employee of Taser. When Taser learned of his activities, it initiated this litigation.

With regard to Taser's breach of fiduciary duty claim, the court of appeals held that without an employment agreement or an appropriate restrictive covenant, the employee is precluded from actively competing while still employed, but not from merely preparing to compete. Determining what is actual competition versus preparation is a fact-intensive inquiry, and summary judgment in the case was not proper.

The court of appeals also reversed the judgment on Taser's claims regarding Ward's use of resources and confidential information. The court of appeals held that the employer must show sufficient information that the employee used the employer's time, facility, or resources in order to establish liability. This also is a fact-intensive inquiry that precludes summary judgment.

The company further alleged that Ward usurped a corporate opportunity by developing his product. Usurping corporate opportunity “prohibits fiduciary usurpation of a corporate opportunity,” or prohibits wrongfully depriving the party of a business opportunity. Taser alleged that, because it is the marketplace leader in personal video and audio equipment, any other on-officer recording devices are its corporate opportunities.

The court disagreed and directed judgment in favor of Ward explaining:

If the corporate opportunity doctrine is extended to all possible business ideas discussed, or learned about in the course of employment, even ideas present in the public domain, such extension would have the effect of unnecessarily restraining competition by precluding former employees from ever developing competing products based on ideas that once have been briefly discussed or abstractly contemplated by a former employer, or even products in the same line of business.

Therefore, the court of appeals held that in order to establish liability for usurpation of corporate opportunity, an employer must show an actual, concrete business opportunity in which the employee deprived the company, such as a partnership with another company.

## What This Means for Employers

This case underscores the value and importance for employers to use all contractual restrictions available to prevent employees from taking and using confidential and/or trade secret information in order to compete when they leave. Employers in Arizona and elsewhere are well advised to require key employees to sign valid and lawful restrictive covenants that are clear, narrowly tailored and enumerate the employer’s expectations regarding confidential information, competition, and disclosure.

Further, if an employer wants to bring a claim that an employee usurped a corporate opportunity, the employer increases its chance of success on such a claim if: (1) the company entered into a valid restrictive covenant with the employee, and (2) the company successfully demonstrates a concrete corporate opportunity or specific venture the employee did not share with the employer. A general business idea alone is insufficient as a matter of law in establishing that an employee usurped a corporate opportunity.

The court’s decision can be found at *Taser International, Inc. v. Ward*, 2010 Ariz. App. LEXIS 74, 582 Ariz. Adv. Rep. 23, or through the court of appeals’ website at: [www.cofad1.state.az.us/opinionfiles/CV/CV090468.pdf](http://www.cofad1.state.az.us/opinionfiles/CV/CV090468.pdf).

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