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SAND HASSLE

$50 million trade secrets verdict centered on grout coloring process

By THOMAS B. SCHEFFEY

A dispute over colored sand has led to a civil verdict that might be the biggest in state history – more than $50 million.

The case involves two Connecticut companies. Bethany-based Laticrete International Inc. is known for combining synthetic rubber (latex) and concrete to form a grout that allows tiles to stick to vertical surfaces.

In 2002, Laticrete turned to an East Hartford company as a supplier of sand used to add color to an epoxy-based grout called Spectra-Loc. The East Hartford company, Dur-A-Flex, which makes epoxy and acrylic floor coating, perfected a secret method of coloring the heated sand so the colors stayed uniform.

When Laticrete began purchasing sand from Dur-A-Flex, it entered into a trade secret confidentiality agreement, signed by Laticrete's head chemist, Rosi Rolshenas, who was named as a defendant in the case.

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Rogin Nassau partner Lawrence Rosenthal (center) and associates Fletcher Thomson (left) and Frank E. Hall Jr. represented East Hartford-based Dur-A-Flex and submitted bills for 6,400 hours of work at $350 per hour.

Dur-A-Flex claims that agreement was violated when Laticrete began making the sand on its own. Lawrence Rosenthal,of Hartford's Rogin Nassau, headed the three-lawyer team that represented Dur-A-Flex during an eight-week trial, said he couldn't offer any further details of the trade secret at the heart of the case.

"It's sort of like Kentucky Fried Chicken's 11 herbs and spices—it doesn't have to be amazingly technical to be a valuable trade secret. Nobody else makes this sand color coated the way these guys do," he explained.

In his last major case as a trial judge, Dennis G. Eveleigh added $6.8 million in attorney fees, litigation costs and royalties to the jury's $43.7 million verdict. That brought the total award to $50.5 million.

The judge, who was sworn in last week as a member of the state Supreme Court, also placed a restraining order on Laticrete.

"I'm sure this is the state's largest trade secrets verdict, and we're pretty sure it's the largest civil verdict in Connecticut,"

said Rosenthal.

Laticrete, which has eight plants in the U.S. and several foreign facilities, was defended by Hartford-based Murtha Cullina's Elizabeth Stewart and Jennifer Morgan DelMonico.

"We're of course very disappointed by the jury's verdict," DelMonico said. She said there would be a number of important issues to raise on appeal, but declined to be more specific.

In a prepared statement, Laticrete said: "[W]e think the finding that Laticrete is liable is absolutely baseless. Further, the award is grossly excessive and without foundation in either the facts or the law. We are particularly dismayed because, during its 53 years in operation, the company has always acted in accordance with the highest ethical standards."

Damage Breakdown

Dur-A-Flex sued under the Connecticut Uniform Trade Secrets Act (CUTSA) and the Connecticut Unfair Trade Practices Act (CUTPA). It also claimed breach of contract for alleged violations of the non-disclosure agreement.

The jury found a breach of the contract and that an unfair trade practice had occurred, but awarded zero damages on those claims. Instead, it awarded damages under the trade secrets act, on two separate theories. "The first is actual loss, which is like lost profits," said Rosenthal. In this case, the jury figured that Laticrete sold $3.7 million worth of sand that might have otherwise been sold by Dur-A-Flex.

But the lion's share of the May 18 jury award — $40 million — was based on a second theory, unjust enrichment. "That's the concept that if you steal something, you can't keep the profit from stealing it," said Rosenthal.

Still left to be decided at that point was whether Dur-A-Flex was entitled to attorney fees under CUTSA, and whether punitive damages were due. In an 18-page decision rendered May 27, he decided no punitive damages were due. The companies were not direct competitors, and the misappropriation of the trade secret was not "willful and malicious" behavior by Laticrete, Eveleigh found.

The Rogin Nassau firm submitted bills for 6,400 hours of work at $350 per hour. Rosenthal is a partner, and Fletcher C. Thomson and Frank E. Hall Jr. are associates. The 6,400 hours "involved extremely novel and difficult issues of law," the judge found. "Further, the hourly rate of $350.00 per hour for trial time is very reasonable for someone with the experience of Plaintiff's counsel," Eveleigh wrote.

Thomson handled the research of the case's complex legal issues, said Rosenthal, and Hall, a certified public accountant as well as a lawyer, handled depositions and exhibits involving company profit and loss records.

On top of the hourly rates, Dur-A-Flex's lawyers at Rogin and the company's president testified there was a 10 percent contingency "success fee," but they did not produce any written document memorializing that agreement.

Eveleigh noted the Rules of Professional Conduct state that a contingent fee agreement must be in writing and signed by the client. Laticrete's lawyers at Murtha Cullina argued that the 2003 state Supreme Court decision in *Statewide Grievance Committee v. Gifford* states that any fee agreement not conforming with the ethics rules is invalid.

Eveleigh decided otherwise, ruling that Laticrete did not have standing to challenge the agreement between Dur-A-Flex and its lawyers. He found the 10 percent success contingency bonus "not excessive in a matter of this nature [and] not unfair to Defendant Laticrete."

Even with the agreement, the total attorney fees came to less than $6 million; the judge noted that he has previously awarded "higher attorneys fees when the recovery has been much less than $43.7 million." The total attorney fees and costs amounted to $6,244,619.

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Eveleigh also awarded $10,000 a month in royalties to Dur-A-Flex for the next five years, or $600,000, and ordered the money accrue in an escrow account while the parties thrash out the appeals process.

The judge took some extraordinary measures to protect Dur-A-Flex's interests in the meantime. He issued a prejudgment remedy lien against Laticrete for $50.54 million and issued a restraining order against the family company, ordering it not to transfer any assets out of the country.

The judge also forbade transfer of assets to the company's top two shareholders, Henry Rothberg Jr. and David Rothberg, other than transactions made in the ordinary course of business. The Rothbergs are sons of company founder Henry Rothberg Sr.

Eveleigh's decision, rendered nine days after the jury verdict, denied Laticrete's motions to set aside the jury verdict, for a judgment notwithstanding the verdict, and for an arrest of judgment. ■