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Quirky laches doctrine can rescue even the unsympathetic

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Some legal defenses are rarely invoked. Others are rarely applied correctly. And a select few are so special that they get italicized. The equitable doctrine of *laches* is all three.

Richard Miller, who misappropriated his employer's material to unlawfully compete against it, ultimately beat a compelling case against him by successfully relying on a *laches* defense. He just saw his improbable victory upheld on appeal in *Osler Institute Inc. v. Miller*, 2015 IL App (1st) 133899.

Miller worked for Osler Institute, a medical education company based out of Terre Haute, Ind., that prepares physicians for their board exams. According to Osler, Miller incorporated and did business as Nighthawk Medical Educators Ltd. while employed at Osler and used Osler's own resources to compete against it.

Osler's first lawsuit, filed in Cook County in July 2005, charged Miller and others with a host of misconduct, including breach of contract, breach of fiduciary duty and duty of loyalty, trade secret misappropriation and tortious interference with Osler's business relations. The parties quickly entered a 36-month consent decree in September 2005, barring the defendants from competing with Osler or using its trade secrets.

When Miller's competition continued, Osler gave notice in May 2006 that it would present a rule-to-show-cause petition. Osler alleged that Miller worked for MD Exam Prep, a competitor in the same city as Osler, Louisville, Ky., offering the same radiation oncology course taught by the same instructor on almost the same days.

Granting the petition in August 2006, the court sanctioned Miller by ordering payment of more than \$13,000 in fees and costs incurred by Osler and retained jurisdiction to enforce the 2005 consent decree.

Rather than learn a lesson from the sanctions order, just two months later, Osler discovered that Miller and the other defendants violated the decree again by stealing Osler's property and continuing to compete against it. Inexplicably, Osler tucked this important discovery away.

Fast forward two years to September 2008.

Days after the consent decree expires, Osler takes action against Miller for misappropriating Osler's confidential files and competing against it while the decree was in force. A lawsuit is brought in Indiana, where most defendants resided and the conduct complained of occurred.

While the defendants do not challenge Osler's delay in taking action, the Vigo County Superior Court found other grounds to dismiss the complaint. Osler appealed.

The Indiana appeals court recognized the same parties were involved in the earlier Cook County action where the court had already rendered a final judgment on the merits, and so affirmed in September 2010 on res judicata grounds. The Indiana Appellate Court noted that Osler was "aware of the newly alleged conversion almost two years before the expiration of the Illinois court's jurisdiction to enforce the consent decree" and "could well have raised its Indiana claims in the Illinois action."

Osler waited another year, then refiled in Cook County. The new complaint alleged Miller, while employed by Osler in 2006, defied the consent decree by continuing to compete and wrongfully converted notes, PowerPoint presentations, lecture DVDs and other Osler material without its knowledge or permission.

Miller eventually raised the affirmative defense of *laches*, his motion noting that Osler delayed filing its Cook County complaint until 2011, five years after learning of Miller's alleged violation. The complaint did not claim Miller deceived Osler or otherwise caused the delay in filing.

Asserting the alleged violation was not brought to his attention until two years after Osler learned of it, Miller claimed the delay prejudiced him, a necessary element of a successful *laches* defense.

Laches can bar an action where a party was unfairly misled or prejudiced due to delay in bringing suit. A defendant asserting *laches* must show both a lack of diligence by the plaintiff in prosecuting its claim and prejudice resulting from the delay.

Miller's affidavit claimed he could not "secure or locate certain relevant witnesses, documents, website data, marketing materials, promotional materials and other critical exculpatory evidence" needed to properly defend himself against Osler's claims.

The circuit court granted Miller's motion to dismiss on the basis of *laches*, and Osler appealed.

Affirming, the 1st District was critical of Osler's decision to attempt an action in Indiana when the consent decree included explicit language retaining jurisdiction in Cook County to enforce it, and Osler had previously filed a rule to show cause and a fee petition for violating the consent decree in Cook County.

The two-year delay from the undisputed date that Osler learned of the second alleged violation in September 2006 before filing suit in Indiana also proved significant: "We conclude that Osler lacked the required diligence in pursuing the present action."

Curiously, the appellate court gave Miller, who was charged with pilfering Osler's proprietary educational materials and converting them for his own use, virtually a complete pass. "[S]uch actions by Miller still would not explain why Osler waited almost two years," the court ruled, "to file suit in the state of Indiana."

Quoting *O'Brien v. Meyer*, 281 Ill.App.3d 832, 839 (1st Dist. 1996), the court made the questionable determination that by Osler waiting until the consent decree expired to file suit, Miller was "lulled into doing that which he would not have done ... had the right been properly asserted."

Actual evidence of Miller being lulled by Osler's delay was hard to detect.

Further, in light of Osler's delay, the court accepted Miller's unlikely claim of prejudice arising from his not retaining copies of the materials he allegedly converted for use in his defense. The court deemed it "reasonable" for Miller to dispose of any documentation relating to the consent decree once it expired.

Osler implicitly argued that waiting two years to assert a claim was neither unreasonable nor a sufficient period to support a *laches* defense. Refusing to set any bright lines, the court simply ruled the availability of the *laches* defense "depends on the facts and circumstances of each case."

The decision shows that, unlike statutes of limitations or other hard and fast defenses, courts have considerable leeway in applying *laches* to reach results they deem equitable.

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