Cooley

From Negotiation to Litigation: Limiting Trade Secret Liability When M&A Deals Fail

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Medical device companies face heightened risks from trade secret litigation. Between January 1, 2020, and December 31, 2025, 802 lawsuits were filed in federal courts alleging trade secret misappropriation within the medical, pharmaceutical and biotech industries. While many cases were resolved through out-of-court settlements – keeping settlement amounts confidential – courts issued 87 permanent injunctions and awarded $651.5 million in damages across seven reported cases. This marks a 20-fold increase in aggregate reported damages awards, a 35% increase in permanent injunctions and an almost 20% increase in cases compared to the previous five-year period. This alert describes how medical device companies can proactively recognize areas of vulnerability and implement critical safeguards to reduce their exposure to claims of trade secret misappropriation.

As the medical device industry experiences an uptick in M&A activity,[1] companies are more vulnerable to trade secret litigation. M&A activity increases the risk of potential trade secret litigation because failed M&A deals provide both motive and factual grounds for an aggrieved seller to allege trade secret misappropriation. The fallout from a failed M&A deal is frequently an unhappy seller eager to blame their rejection on perceived malfeasance by an acquirer that walked away from a potential transaction. Specifically, the rejected party may suspect that the acquirer abandoned the deal after misappropriating valuable trade secrets, obviating any need for formal acquisition.

Indeed, this fact pattern recently played out in *Propel Fuels, Inc. v. Phillips 66 Company*, where a California jury found Phillips to have misappropriated Propel's trade secrets related to its renewable fuel business, leading to a damages award of approximately $800 million.[2] While the *Propel Fuels* case did not arise in the medical device context, the underlying fact pattern is a familiar one for veterans of the medical device industry, and the court's judgment is highly informative for medical device companies.

In September 2017, Phillips and Propel signed a nondisclosure agreement (NDA) after Phillips expressed interest in acquiring Propel. In August 2018, however, Phillips terminated negotiations. Propel sued Phillips under the California Uniform Trade Secrets Act. Following a trial in September and October 2024, a California jury awarded $604.9 million in damages to Propel, and further found that Phillips engaged in trade secret misappropriation that was willful and malicious. The jury's finding triggered exemplary damages, which the court awarded in the amount of $195 million based on misconduct that the court found reprehensible.[3] The court has since rejected Phillips' attempt to overturn these results via post-trial motions, upholding both the jury's verdict and its previous order concerning exemplary damages.[4]

Borrowing from lessons in the *Propel Fuels* case, below are specific measures that medical device companies can implement to mitigate potential liability amid the recent uptick in trade secret litigation.

Potential acquirers should employ a 'clean team' to conduct due diligence

A key element in effectively mitigating trade secret liability is isolating individuals with access to third-party confidential information from company teams that would gain a competitive advantage through access to that information. This means isolating individuals who access third-party confidential information, including as part of any due diligence efforts, from individuals at the company in strategic product engineering roles. For example, companies can employ "clean teams" (i.e., individuals removed from engineering decision-making) to perform technical due diligences, thereby providing some buffer between third-party confidential information and key decision-makers and product developers who are responsible for competitive offerings. Failure to do this can haunt a company in future litigation. Indeed, in *Propel Fuels*, Phillips' failure to employ a "clean team" exposed it to serious vulnerabilities, which came to light over the course of the litigation.

First, the court lambasted Phillips for taking "no efforts to shield the team implementing its … project from

Propel's trade secrets," noting that "Phillips 66 knew it could make use of a 'clean team' to avoid any potential misuse of Propel trade secrets … ."[5] The court observed that "evidence concerning the overlapping teams certainly helped support [the jury's] finding of willful and malicious conduct by clear and convincing evidence," and further "support[ed] the court's conclusions here" to award $195 million in exemplary damages.[6]

Second, the court criticized what it considered "Phillips' duplicitous handling of the wind-down of the parties' potential acquisition deal … ."[7] Had Phillips employed a clean team, there would have been a layer of separation between the Phillips executives directly interfacing with Propel and those who would ultimately decide whether to close on the deal. Yet, the very same Phillips executives who were assuring Propel of Phillips' continued interest in closing the deal harbored serious misgivings about doing so.[8] This double-dealing played out before the jury and judge, harming Phillips' credibility.

As the *Propel Fuels* court concluded, "Phillips 66's decision to use its Propel team to build Phillips' own business was, at best, a terrible error of judgement."[9]

Implement guardrails against disseminating third-party confidential information

Identify third-party confidential information

Companies often execute generic NDAs that guard against misappropriating proprietary know-how without identifying what the companies actually consider proprietary. These provisions can be problematic if litigation occurs because parties that share information frequently overdesignate the information that is produced (i.e., labeling everything "highly confidential" even if it is not), and NDAs rarely, if ever, require producing parties to differentiate confidential information from trade secret information. If hostilities ensue, plaintiffs can leverage the vagueness and breadth of inadequate NDA provisions to argue that whatever information they provided contained trade secrets. To guard against this, potential acquirers should demand a detailed listing of information that the disclosing party considers its trade secrets, demand that documents containing trade secrets be labeled accordingly, and that any verbal discussions be followed up with a written statement identifying any disclosed trade secrets.

Sequester third-party confidential materials

Companies should be careful to ensure that any confidential materials received from a third party, particularly if subject to an NDA, are properly sequestered and not disseminated internally. Merely "removing" or "redacting" certain portions deemed confidential is insufficient.

Returning to the *Propel Fuels* matter, a Phillips' employee was tasked with "preparing a financial model" by "stripping out and deleting Propel information in various financial models so that the models could (theoretically) then be reused."[10] Despite Phillips' attempts to strip out Propel information, "[h]ard-coded information from Propel remained in the models."[11] The court was not impressed, observing that Phillips "should have collected and sequestered, returned, or destroyed all Propel confidential information shared during due diligence, without exception and without trying to parse whether a particular piece of information was indeed a trade secret under the law."[12]

Accordingly, companies should ensure that employees receive clear guidelines regarding how to handle third-party trade secrets, including for example that such information should be stored according to any NDA obligations and be kept separate from any internal company materials (e.g., any emails or files containing third-party confidential information can be stored in separate folders to prevent dissemination and facilitate later deletion), and that third-party confidential information should be discussed only among individuals cleared to handle such information (e.g., other members of the "clean team" subject to the same NDA tasked with M&A diligence of a third party). Companies can include such guidelines as part of employee onboarding training, in employee handbooks and at the outset of an M&A diligence project.

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Implementing measures such as the ones described above are cost-effective ways of shielding against trade secret liability and creating a defensible factual record if litigation does ensue. Failure to implement such measures can prove disastrous – as the *Phillips* court concluded: "[I]f all that was really too hard or too expensive, then [Phillips] probably should have just acquired Propel [because t]he end result of all of these missteps brought Phillips 66 to the jury verdict and to this award of exemplary damages."[13]

Next steps

- Create buffers between engineering decision-makers and third-party confidential information – employ a "clean team" for technical due diligences.
- Establish clear protocols regarding identification of materials considered trade secret by third parties.
- Isolate third-party confidential materials, and prevent any internal dissemination thereof.
- Train employees regarding confidentiality obligations for third-party trade secret information.

Notes

1. According to J.P. Morgan, "[m]ergers and acquisitions have surged, reaching levels second only to the 2021 peak … ." (J.P. Morgan, 2024 Medtech Industry Insights: Investment Trends, M&A Activity and Market Dynamics, Q4 2024.)
2. *Propel Fuels, Inc. v. Phillips 66 Co.,* No. 22-CV-007197, Order at 1-3, 12 (Cal. Super. Ct. July 30, 2025) ("Order").
3. Order at 2-3.
4. *Propel Fuels, Inc. v. Phillips 66 Co.,* No. 22-CV-007197, Order at 1-2, 48-50 (Cal. Super. Ct. Oct. 20, 2025) ("Order re Post-Trial Motions").
5. Order at 3.
6. Id. at 10.
7. Id. at 7.
8. E.g., id. at 3, 8, 12.
9. Id. at 10.
10. Id. at 11.
11. Id.
12. Id. at 12.
13. Id.

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