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LEADER (U.S.)

EXECUTIVE PRIVILEGE

What Does a Noncompete Pact Truly Bar? Nasty Row Sorts It Out

Iron Mountain Fires an Official, Then Uses Sleuths to See If He's Becoming Its Rival

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BOSTON -- In late 2000, the big records-storage company Iron Mountain Inc. launched a secret internal investigation. The goal: to find out if one of its own board members was helping start a competing business.

The director, Peter Pierce, long had headed Iron Mountain's chief competitor. It merged with Iron Mountain in 2000, with Iron Mountain the survivor. Mr. Pierce got a board seat and became president of the main operating unit.

Just four months later, Iron Mountain fired him. He remained on the board, because his term had years to run. But the firing triggered an agreement Mr. Pierce had signed at the time of the merger, barring him from competing with Iron Mountain in any way for five years after leaving its employ.

Iron Mountain soon picked up indications the executive, upset over his dismissal, was doing just that. The ensuing dispute unfolded into one of the nastiest battles in the annals of "noncompete" agreements, those ubiquitous and contentious fixtures of upper-level corporate life. Records from a private arbitration of the fight, reviewed by The Wall Street Journal, suggest how far some will go to enforce such agreements, and what a tricky endeavor that can be.

Iron Mountain hired a private investigator. He staked out Mr. Pierce. It turned out a sister and son of Mr. Pierce were bankrolling a start-up aimed at taking business from Iron Mountain. A disgruntled business partner of Mr. Pierce came forward and claimed three employees of a company he owned with Mr. Pierce were secretly working at the start-up. With Iron Mountain's knowledge, the partner tape-recorded Mr. Pierce. Iron Mountain had its lawyers give the partner \$50,000 to help pay for a suit he had filed against Mr. Pierce.

Then there were the 16,000 pages of Mr. Pierce's business records, locked up in a truck trailer sitting in a New Jersey storage lot. One day the trailer vanished. An Iron Mountain lawyer photocopied the 16,000 pages. The trailer reappeared where it had been.

Soon, the boss of the man who had driven the trailer away got a consulting contract from Iron Mountain. Along the way, a central figure in the squabble found himself indicted, in a separate matter related to

alleged money laundering.

All this intrigue unfolded within a little-known industry that serves thousands of companies large and small, thanks to mandates to retain countless bulky records indefinitely. Iron Mountain -- named for an old mine in New York state where it first stashed files in cool, dry surroundings -- dominates this business with \$1.5 billion in 2003 sales. After rolling up 110 onetime rivals, Iron Mountain is a thriving publicly traded company boasting Warren Buffett's Berkshire Hathaway Inc. as a big investor.

Mr. Pierce acknowledged at arbitration that he gave the start-up some help, although not, he vigorously maintained, any that violated his noncompete agreement. In February, the arbitrator ruled that Mr. Pierce hadn't violated the agreement. The arbitrator ordered Iron Mountain to pay Mr. Pierce's legal fees -- some \$1.9 million -- and assailed the credibility of the company's case.

But Iron Mountain is still fighting. It has asked a New Jersey judge to vacate the ruling. In court, each side is seeking damages from the other. Iron Mountain is also in litigation with the remnants of the new competitor it accused its board member of helping.

Iron Mountain was founded in 1951 in Livingston, N.Y., site of an old mine that provided its first storage space. It was a sleepy regional outfit until 1981, when a former Harvard Business School instructor, Richard Reese, took over as chief executive and went on a buying spree. Now Iron Mountain holds at least a 25% share of the U.S. and European records-storage market. Some put the figure at closer to 50%.

It's a simple business. At 700 massive warehouses, most above ground, Iron Mountain stores millions of boxes on big racks. It charges an annual fee for every box and another fee to retrieve or move one. Demand keeps growing, fueled by new laws requiring retention of records and by some lawyers' preference for paper rather than computerized records.

Iron Mountain's chief competitor long was Pierce Leahy Corp., which Mr. Pierce's father started in 1969 by storing records in his basement in suburban Philadelphia. Peter Pierce, who had worked at the company most of his life, wasn't eager to give up control. Moreover, he says in an interview, when he first met Iron Mountain's Mr. Reese years ago, Mr. Reese greeted him by criticizing one of his deals. "I thought, 'Who is this jerk?'" Mr. Pierce says.

The two were nudged together by an investor in both companies, Thomas W. Smith, of Prescott Investors of Greenwich, Conn. Mr. Smith invited the men and their wives to his homes in Sun Valley, Idaho, and Watch Hill, R.I. The relaxed weekend getaways convinced the two chief executives, now both 58 years old, that they could co-exist.

They were wrong. In June 2000, four months after the \$1.1 billion merger, Mr. Reese walked into Mr. Pierce's office and fired him as president of Iron Mountain's main unit. Mr. Reese says in an interview that Mr. Pierce wasn't integrating the merged companies fast enough and his delays in making decisions were prompting managers to consider leaving. Mr. Pierce charges that Mr. Reese never intended to let him keep in the job -- letting him have the president's title only to get the merger done.

Mr. Pierce, however, remained on the Iron Mountain board.

A few months later, an Iron Mountain vice president attended an industry conference in Las Vegas, where he had gambled and visited a strip club with a former executive of Mr. Pierce's old company, Pierce Leahy. On his return, the vice president told Mr. Reese that the other man, after several drinks, had said Mr. Pierce was "planning something big." He quoted him as adding: "You guys are going to get hit so hard

across the side of your head you won't know what hit you."

Mr. Reese had already heard rumors the fired executive was backing a new competitor. He was suspicious, as well, because some former Pierce Leahy managers were leaving Iron Mountain without disclosing new plans. Mr. Reese worried about Mr. Pierce's continued presence on the board. Although the idea of "investigating a sitting board member is crazy," Mr. Reese says, he felt he had to know whether he had a spy on his hands.

For some answers, he turned to Iron Mountain's outside counsel, Sullivan & Worcester LLP. The law firm quickly learned that a former Iron Mountain vice president named Michael Gold, once a protege of Mr. Pierce, had incorporated a new company just three months after leaving Iron Mountain.

It was called Sequedex. Although Iron Mountain didn't know this at the time, 90% of Sequedex's initial capital came from Mr. Pierce's sister Molly and his son Peter Jr. Together, they invested \$4.5 million. The relatives and Mr. Gold, testifying at the arbitration, all said that Peter Pierce Sr. had nothing to do with the funding.

Iron Mountain's investigation gained traction when one of its computer consultants was contacted by the fledgling Sequedex. The consultant, David Woosley, later testified that he attended a meeting with Sequedex officials in October 2000. It took place at the offices of a venture-capital firm that Mr. Pierce owned near Philadelphia, not far from Sequedex's base in Norristown, Pa.

According to the consultant's testimony, Sequedex's Mr. Gold laid out the new company's business plan: Go after large customers of Iron Mountain.

At one point during the meeting, the consultant added, Mr. Pierce poked in his head and joked, "I don't see you if you don't see me." Mr. Pierce denies saying that, though he acknowledges greeting Mr. Woosley that day.

Mr. Woosley informed Iron Mountain about the meeting and Sequedex's strategy. Iron Mountain soon boosted the hourly rate on Mr. Woosley's consulting contract to \$135 from \$120, he testified. Iron Mountain and Mr. Woosley both say the increase wasn't related to his passing along information about Sequedex.

In 2001, Sequedex signed a lease for space in a Connecticut warehouse to store records. Mr. Pierce was one of a group of owners that had just bought the warehouse. Mr. Pierce said he did the deal only after his lawyer assured him it wouldn't violate his noncompete pact.

Then Iron Mountain got a call from a man who was a partner of Mr. Pierce in a New Jersey trucking and warehouse business. The partner, Thomas Carr, was unhappy with Mr. Pierce -- and offering to help.

Mr. Carr was soon visited by two Iron Mountain lawyers, General Counsel Garry Watzke and a lawyer from Sullivan & Worcester, Larry Varn. Mr. Carr says that at the meeting, held in East Brunswick, N.J., he told the lawyers that Mr. Pierce was bitter about his firing and was clandestinely supporting Sequedex, the start-up his sister and son had helped capitalize.

Specifically, Mr. Carr said, Mr. Pierce was supporting it through a business he and Mr. Pierce co-owned. In a deposition, Mr. Carr said three people on that business's payroll were actually spending their time working for the new records-storage company. They were all former Pierce Leahy employees who had gone over to Iron Mountain but had quit there. Like Mr. Pierce, they all had agreements not to compete with Iron Mountain.

Mr. Carr says he told the Iron Mountain lawyers he was coming to them because of his anger over what was happening. He said the business he shared with Mr. Pierce -- called Logisteq -- was in a financial bind and couldn't afford to pay salaries of people working elsewhere. But he said he couldn't stop this because he had just 49% of the business, to Mr. Pierce's 51%.

Mr. Carr's office manager later testified that after a brief period in which the employees did some work for Logisteq, she began mailing paychecks to their homes because they never showed up at Logisteq. One employee used "sequedex" as his password to the Logisteq computer system, according to court records. The employees denied in depositions that they were secretly working for Sequedex.

Mr. Carr approached Iron Mountain shortly after Mr. Pierce had taken away his CEO post at their joint business. Mr. Pierce says in an interview he had good reason for the demotion: Mr. Carr had been indicted on federal fraud charges of aiding a money-laundering scheme in which someone repatriated ill-gotten gains to the U.S. from abroad. Mr. Carr didn't tell Iron Mountain about his indictment, both he and the company say. The charges are pending.

Soon after he met with Iron Mountain lawyers, Mr. Carr began hiding a tape recorder in his coat for meetings with Mr. Pierce and others. He says the idea was his own, a way to get documentation of his claims. Iron Mountain knew of the tactic. Mr. Watzke, Iron Mountain's general counsel, testified that Mr. Carr checked in with him to report on his tapings and Mr. Pierce's activities. Mr. Carr said the same.

One recording covered a meeting in which Mr. Carr complained to Mr. Pierce about their business's losses and the strain it bore from paying salaries of people who actually worked at Sequedex. Mr. Carr said he was thinking of asking Sequedex's CEO, Mr. Gold, for reimbursement.

On the tape, Mr. Pierce refers to "the \$300,000 that we put into this ... from a Mike Gold perspective subsidizing that." To Mr. Carr, this was a clear acknowledgment that their joint business was subsidizing Sequedex, the start-up storage firm. Mr. Pierce says the remark meant no such thing, and he denies that such an arrangement existed.

Iron Mountain showered its informant with attention. Mr. Reese and another Iron Mountain director took Mr. Carr to dinner at the Harvard Club in Boston, where Mr. Carr says they discussed the case in a candlelit private room. When Mr. Carr said he was looking for investors to help him buy out his partner, Mr. Pierce, they put him in touch with an Iron Mountain director who ran a venture-capital firm.

Mr. Reese continued to work with Mr. Carr after learning of his indictment. At Mr. Carr's request, Mr. Reese directed Sullivan & Worcester to wire \$50,000 to Mr. Carr's lawyer to help foot the bill for a suit Mr. Carr had brought against Mr. Pierce for damaging their joint business. Mr. Reese said he paid because he believed that evidence gathered in the suit could help Iron Mountain. The suit, which Mr. Pierce is fighting, is pending in New Jersey state court.

Then, in March 2002, Iron Mountain filed suit against both Mr. Pierce and Sequedex. In New Jersey court, Iron Mountain alleged that Mr. Pierce -- still a member of its board -- had violated the noncompete agreement, breached his duty as a director and misappropriated trade secrets.

Evidence Iron Mountain introduced describes a board meeting where directors discussed a bid for Allstate Corp.'s records-storage business. After the meeting, according to Iron Mountain, Mr. Pierce spoke by phone with Sequedex's Mr. Gold, and within days, Sequedex made a pitch of its own to Allstate. Mr. Pierce says in an interview that he never shared information on Allstate with Mr. Gold.

Although Sequedex didn't land Allstate, it managed to sign contracts with some Iron Mountain clients, including Merrill Lynch & Co. and Travelers insurance, now part of St. Paul Travelers Cos. Iron Mountain fought back. It cut prices to some customers Sequedex solicited. When Travelers sought to move some boxes to Sequedex, Iron Mountain demanded a fee of \$3 per box. Travelers balked, and a long-running dispute ensued. One Iron Mountain executive wrote in an e-mail that though the spat hurt its relations with Travelers, the higher fee "cuts off oxygen to Sequedex in this market." Travelers never did move any boxes to Sequedex.

Nor did Merrill Lynch, which had agreed to give Sequedex about 10% of the business held by Iron Mountain. Iron Mountain got in touch with its investment-banking contact at Merrill, Robert Powers, who in turn told a Merrill official who oversaw storage to delay transferring any boxes to Sequedex, according to the second official's deposition. Mr. Powers says he doesn't remember that.

Sequedex got no revenue from the Merrill and Travelers contracts. And potential investors were put off by the litigation. In August 2002, Sequedex shut its doors.

About four months later, Mr. Pierce -- who had unloaded some two million shares of Iron Mountain for about \$56 million -- quit the board of the company and filed suit against it in a Pennsylvania court. He alleged invasion of privacy, among other things.

Close to the same time, the firm that Mr. Pierce owned with Mr. Carr, Logisteq, filed for bankruptcy protection. Its business records were boxed up and loaded onto a truck trailer, parked at a storage lot in Freehold, N.J. These were records that Iron Mountain wanted a look at. Six months later, it got its chance.

A lawyer for Mr. Carr found out where the trailer was. Days later, a trucking-company operator who was informally helping Mr. Carr and Iron Mountain gather information phoned Iron Mountain's outside lawyer, Mr. Varn, to say he had the trailer.

Mr. Pierce alleged at the arbitration that the trailer had been stolen and broken into. But the trucking-company owner who moved the trailer said it was all a mistake. He testified that he had bought some repossessed trailers and briefly thought this was one of them. He soon realized the error, he said, but notified the Iron Mountain lawyer because he knew the lawyer was keenly interested in the records inside it.

The lawyer, Mr. Varn, testified that he traveled to New Jersey to inspect the trailer's contents and arranged to have 16,000 pages photocopied. Then the trucking-company operator, James Neebling, sent the trailer back to its old lot.

Days after Mr. Neebling grabbed the trailer and told Iron Mountain he had it, Iron Mountain gave him a consulting contract. It included an upfront loan of \$105,000. Both the company and Mr. Neebling deny the contract was related to the trailer incident.

In February 2004, the arbitrator ruled on the noncompete agreement, which bound Mr. Pierce not to "own, manage, engage in, participate in, provide advice to, be employed by [or] have a financial interest in" any records-storage business for five years. Mr. Pierce's real-estate dealings with Sequedex "come close to a violation of the spirit" of the agreement, the arbitrator said, but didn't cross the line. The arbitrator didn't buy Iron Mountain's argument that the funds the Pierce family put up to start a new records-storage company implicated Mr. Pierce.

As for the claim that three employees of Messrs. Carr and Pierce's business were really working at

Sequedex, the arbitrator said even if this was true, it was a deal between Mr. Carr and Sequedex's chief -- even though Mr. Pierce controlled the business and Mr. Carr had protested the arrangement.

The arbitrator didn't listen to the tape on which Mr. Pierce referred to the arrangement. The arbitrator said the tape had been illegally made in Pennsylvania, where people can't be taped without their consent. Iron Mountain contended it was actually made in New Jersey, where such taping is legal.

The ruling slammed Iron Mountain's case. "Simply put, the fingerprints of Tom Carr, a con man ... are pervasive throughout these witnesses and their testimony," wrote the arbitrator, Thomas B. Rutter. He said Mr. Carr had "bamboozled Iron Mountain with corrupt 'evidence.'" The arbitrator didn't specify what the corrupt evidence was, and declined to be interviewed. Mr. Carr's money-laundering case hasn't yet gone to trial. As for Iron Mountain's effort to overturn the arbitration decision, a New Jersey court has yet to rule on the matter.

As various lawsuits among the parties work their way toward trial or settlement, Iron Mountain has continued to do well. Its stock is up 555% since its debut in 1996 and 41% since the start of 2003. To Mr. Reese, however, the merger that added Pierce Leahy to Iron Mountain's prosperous business "was not worth it," he said in a recent interview. "It's too painful. If I knew how it was going to play out, I would have said no thank you."

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