

## Focus | Business Litigation/Franchise & Distribution Law

# Defining Trade Secrets: What Passes the Test in Texas?

BY CHRISTOPHER W. PATTON

More wide-ranging than patent or trademark protection, trade secrets can be both highly valuable and highly vulnerable—particularly during tough economic times like these. Employee turnover often creates new opportunities for confidential information to be disclosed. And with the COVID crisis in full swing, employee turnover is higher now than at any time in recent history. This current environment also creates a special security risk for companies, many already fighting to stay afloat. In the now-familiar “virtual office,” businesses are often forced to entrust trade secrets to employees working remotely. This can create even more problems when those same companies lay off or furlough their newly homebound staff. And former employees may bring

insider knowledge with them, as they go in search of new jobs. In this context, it is increasingly essential for companies to redouble their efforts to ensure their trade secrets remain confidential.

Adopted by Texas in 2013, the Texas Uniform Trade Secrets Act (TUTSA) defines trade secrets as (a) business practices or information; which (b) derive commercial value from the fact that they are not generally known or not readily ascertainable by proper means; and (c) are subject to reasonable efforts under the circumstances to protect their secrecy. In 2016, the Defend Trade Secrets Act (DTSA) created a new federal cause of action which mostly tracks TUTSA’s trade secret definition (18 U.S.C. § 1836, *et seq.*)

To establish a protected trade secret, a plaintiff must ensure that it undertook

“reasonable efforts” to keep the information at issue confidential. Decisions over the last few years in Texas have addressed what qualifies as “reasonable,” holding, for example, that keeping confidential information in a password-protected database, requiring a keycard or security clearance to access information, checking material going in and out of a location where trade secrets are kept, or regularly training employees regarding their confidentiality obligations can pass the “reasonable” test under Texas law.

Beyond this, an actionable trade secret must “derive independent economic value” from the fact that it is either not “generally known” or not “readily ascertainable through proper means.” Information has “independent economic value” if its hypothetical use by a competitor would somehow disadvantage the trade secret owner. So, while passwords alone would not typically qualify, courts have found that compilations or databases—even complications of exclusively public information—could meet this standard.

A trade secret’s “independent economic value” can be established in several ways. Some plaintiffs offer expert testimony to demonstrate the trade secret’s value, but others have simply used employee testimony to detail how the information took substantial time and effort to develop. Indeed, one recent decision even found that the plaintiff had set forth sufficient evidence of the trade secret’s value by establishing that other companies partnered with the plaintiff to obtain access to the trade secret.

Of course, information that can be easily reverse engineered—*i.e.*, “readily ascertainable by proper means”—does

not qualify as a trade secret under either TUTSA or DTSA. But just because a competitor can potentially reverse engineer a trade secret does not, by itself, end the analysis. For example, if it would be theoretically possible, but costly, for a competitor to independently develop a specific trade secret, that information can still qualify.

Recent Texas cases have identified specific types of information—most of them fairly mundane—which may qualify as trade secrets. Some examples include distributor and network lists created by a multi-level marketing company; a consumer product’s national account information, including the volume of product in stores, revenue, and sales trends; records showing the type of contracts which the plaintiff typically underwrites with a client; a DNA test developed by a skincare company to inform customers about personalized products; and a database containing 1.7 million job applicant resumes. Most trade-secrets claims tend to spring from common commercial business relationships, such as an employee who leaves one company to join a competitor, or a vendor who obtains a company’s trade secret information as part of an ongoing relationship.

Although maintaining “reasonable” protections for trade secrets typically depends on each company’s unique situation, the current COVID crisis should, at the very least, spur a reassessment of best practices to ensure this valuable type of intellectual property does not fall by the wayside. **HN**

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