Texas has now joined 47 other states that have some version of the model Uniform Trade Secrets Act.1 The Texas Uniform Trade Secrets Act (“TUTSA”) takes effect on September 1, 2013, and will govern lawsuits for any misappropriation of a trade secret that occurs on or after that date.2 The act modernizes the law of trade secrets in Texas, and brings it into substantial harmony with the laws of most other states.

The Act Provides a Broader Definition of a Trade Secret

Before the act, Texas courts, relying upon the Restatement of Torts, defined a trade secret as “any formula, pattern, device or compilation of information which is used in one’s business and presents an opportunity to obtain an advantage over competitors who do not know or use it.”3 While some Texas courts have held otherwise,4 the Restatement’s additional “continuous use” requirement excluded potentially valuable confidential information that is: (1) still in development and thus not in use, e.g., research and development information; (2) used previously, e.g., a sales bid; or (3) “negative know-how,” e.g., expensive research determining paths not to pursue.5 In contrast, the act defines a trade secret as follows:

information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that: (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.6

By GREG PORTER
The act’s definition eliminates the Restatement’s “continuous use” language, and includes information that has “potential” economic value, which broadens the type of information that may be claimed as a trade secret. Moreover, even though the act was patterned after the UTSA, the act’s trade secret definition differs from it by providing that “financial data” or a “list of actual or potential customers or suppliers” may constitute protectable trade secrets. This broader definition, which was borrowed from the Illinois trade secret act, will provide additional certainty as to what may be protected as a trade secret.

The Act Should Streamline Trade Secret Litigation

The act should streamline trade secret litigation in several ways. Initially, the act includes the uniform act’s express statement that its general purpose is to make the law uniform among the states adopting it.

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The act modernizes Texas trade secret law and harmonizes it with that of most other states. Over time this will likely provide more certainty and predictability to the scope of trade secret protection and litigation. As stated in the legislative committee hearings on the TUTSA bill, it is believed that certainty and predictability in Texas trade secret law will attract more businesses that rely on trade secret protection to Texas.

Greg Porter is a partner in the Houston office of Andrews Kurth LLP. His practice emphasizes trade secret and patent litigation, as well as patent prosecution. He assisted with drafting the TUTSA bill and testified in hearings at the Texas Legislature in favor of its passage.

Endnotes

1. Only New York and Massachusetts lack some version of the Uniform Trade Secrets Act.
2. The act will be codified as Title 6, Chapter 134A of the Texas Civil Practice and Remedies Code.
4. Bertotti v. C.E. Shepherd Co., 752 SW.2d 648, 653 (Tex. App.—Houston [14th Dist.] 1988, no writ) (holding that the mere fact that a company is not presently using information does not prevent the information from being a trade secret);
5. The existing case law is less than clear on whether the mere fact that a company is not presently using information does not prevent the information from being a trade secret, and that should protect legitimate trade secret holders from malicious actions while discouraging unwarranted trade secret claims.
6. The act authorizes a court to issue an injunction to prevent “threatened misappropriation.” For example, an employer will be able to seek an injunction to prevent a former employee’s threatened disclosure of key trade secrets to a new employer without having to resort to a potentially difficult to enforce non-compete agreement.

Conclusion

The act modernizes Texas trade secret law and harmonizes it with that of most other states. Over time this will likely provide more certainty and predictability to the scope of trade secret protection and litigation. As stated in the legislative committee hearings on the TUTSA bill, it is believed that certainty and predictability in Texas trade secret law will attract more businesses that rely on trade secret protection to Texas.

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