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Recent Development

**RECENT DEVELOPMENTS RELATING TO TRADE SECRETS, UNFAIR COMPETITION AND COVENANTS
NOT TO COMPETE FOR THE TEXAS PRACTITIONER**

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There have been few reported Texas cases addressing trade secrets, unfair competition and covenants not to compete since 1992. One area of activity has related to implementation of Rule 76a, Tex.R.Civ.P., which concerns the requirements for sealing of court records. These cases have looked at the burden of proof under Rule 76a and at the effect of Rule 76a on the availability of conventional protective orders under Rule 166b(5), Tex.R.Civ.P. Other Texas cases have examined issues relating to the enforcement of covenants not to compete. Finally, several other cases, including non-Texas cases applying federal statutes, have examined the use of the Lanham Act,¹ the Racketeer Influenced and Corrupt Organization Act,² and the Texas Penal Code³ to obtain relief for theft of trade secrets.

***272 I. Trade Secrets and Rule 76a**

Rule 76a, Tex.R.Civ.P., was adopted to provide specific standards and procedures in sealing court records. While presuming that court records should be open, the rule provides an explicit exception for "discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights."⁴ However, the rule does not address the preservation of trade secrets in other litigation.

Protective orders to protect documents and other discovery containing trade secrets and confidential business information have routinely been entered under Rule 166b(5), Tex.R.Civ.P. These orders have been used to protect trade secrets and confidential information irrespective of the basis of the underlying cause of action. Adoption of Rule 76a which limited the sealing of “court records” and set forth specific procedures to be employed has caused some to question the continued availability of protective orders under Rule 166b(5).

Rule 166b(5) provides, in part:

c. [The court’s authority extends to] ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited or that its disclosure be restricted. Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule.⁵

While some courts have expressed reluctance to enter protective orders under Rule 166b(5) without compliance with Rule 76a, the rules clearly contemplate the necessity for compliance only where “court records” are concerned. Rule 76a specifically defines “court records.” Court records include:

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.⁶

Compliance with Rule 76a is explicitly excepted where the cause of action is initiated to preserve bona fide trade secrets or other intangible property rights. Accordingly, courts should not require compliance with Rule 76a in conventional trade secret litigation. However, the requirement for compliance in other kinds of litigation, e.g., unfair competition and products liability causes, was unclear.

The courts have now stated that Rule 76a applies and may be used to protect trade secrets and other confidential business information in all cases, not just cases initiated to protect trade secrets and other intangible property rights. However, trade secrets and other confidential information may still be protected with a conventional protective order under Rule 166b(5), if they are not embodied in “court records” as defined in Rule 76a. The crucial inquiry in these cases generally centers upon a determination of whether the documents and discovery at issue are “court records” as defined by Rule 76a. In this regard, the courts have placed the burden of proof to establish that discovery documents are “court records” on the party seeking to prevent entry of a protective order.

A. Dunshie v. General Motors Corp.⁷

Dunshie presented an interlocutory appeal challenging the trial court’s order to seal pretrial discovery under Rule 76a. *Dunshie* was a products liability and Deceptive Trade Practices Act suit wherein plaintiff sought discovery of documents relating to the development and testing of an automotive *273 restraint system. General Motors requested and received orders which would protect the trade secrets and confidential business information to be disclosed in discovery from further disclosure. The trial court entered both a protective order under Rule 166b(5)(c) and an order sealing discovery under Rule 76a.⁸

Plaintiff raised several points of error.⁹ Plaintiff asserted, *inter alia*, that the trial court erred by placing the burden of proof on the party opposing the sealing order under Rule 76a. The trial court required that the opposing party bear the burden of proving that the records sought to be sealed concerned matters having a probable adverse effect upon the public health and safety. Plaintiff also asserted that the evidence established that the documents did, in fact, have a probable adverse effect upon the general public health and safety and, accordingly, that the trial court erred in sealing the documents.¹⁰ The trade secret exception in Rule 76a(2)(c) does not appear to have been raised, probably because this was not a suit originally brought to preserve bona fide trade secrets.

The trial court’s decision was based, not on a finding that the documents contained trade secrets, but on its finding that the documents were not “court records” as defined by Rule 76a. After receiving expert testimony concerning the content of the documents, the trial court found that the documents did not concern matters having a probable adverse effect upon the general public health or safety.¹¹ The appellate court sustained the trial court’s finding that the documents were not “court records.” Because the documents were not “court records,” this matter was not governed by Rule 76a and the provisions for interlocutory appeal in Rule 76a(8) did not apply.¹² Because protective orders under Rule 166b are not reviewable on appeal prior to trial, the appellate court dismissed the appeal for lack of jurisdiction.¹³

The decision confirmed that continued protection of trade secrets not having a probable adverse effect upon the general public health and safety under Rule 166b would be available in all litigation, not just in cases originally initiated to preserve bona fide trade secrets.

B. Eli Lilly & Co. v. Marshall¹⁴

In *Eli Lilly* the defendants sought a writ of mandamus requiring the trial court to hear and render a decision on their request for an order under Rule 76a. *Eli Lilly* was a products liability suit in which plaintiffs requested discovery of documents relating to the anti-depressant drug Prozac. Defendants claimed that some of those documents included trade secrets and requested that the trial court issue an order limiting disclosure under Rule 76a. The trial court refused to consider the merits of the request.¹⁵

The Texas Supreme Court agreed with defendants and ordered the requested hearing. The Supreme Court explicitly recognized the applicability of Rule 76a to the preservation of trade secrets in all cases, not just cases initiated to preserve bona fide trade secrets.¹⁶

Although the rule's definition of "court records" excludes "discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights," Tex.R.Civ.P. 76a(2)(c), it does not mean that access to trade secrets cannot be limited in other types of litigation. *Regardless of the cause of action, a properly proven trade secret is an interest that should be considered in making the determination required by Rule 76a.* If the trial court determines the documents are "court records" within the meaning of the rule, it must decide whether any specific, *274 serious, and substantial interest, including a trade secret interest, has been established that justifies restricting access to the documents in question.¹⁷

It is now clear that trade secrets may be protected from disclosure by an appropriate order under Rule 76a without regard to the substance of the original cause of action.

C. Ford Motor Co. v. Benson¹⁸

Ford Motor was a products liability suit alleging a defective automotive design by Ford. Ford refused to produce documents until entry of a protective order under Rule 166b(5), which would limit disclosure of documents containing confidential information. The trial court refused to enter a protective order until the parties complied with Rule 76a. Ford presented motions requesting a protective order under Rule 166b(5) and, alternatively, temporary relief under Rule 76a.¹⁹

The court held a two day hearing on the requests.²⁰ Ford presented testimony establishing that several categories of documents contained trade secrets and confidential information which could be beneficial to Ford's competitors. Ford also presented testimony that none of the documents concerned matters having a probable adverse effect on the public health or safety.²¹ The court, after the hearing and *in camera* inspection of thousands of documents, issued an order finding several categories of documents to be "court records" subject to Rule 76a, and other categories of documents not to be "court records." Those documents which were not "court records," and thus not subject to Rule 76a, were deemed protectable under Rule 166b. Ford appealed.²²

Ford asserted on appeal that its request for a protective order under Rule 166b(5) did not require compliance with Rule 76a until the non-moving party had alleged and established that the documents sought to be protected were "court records."²³ The appellate court agreed and reversed.²⁴

When a trial court receives a motion for protective order under Rule 166b.5, the rule clearly provides that *Rule 76a is not implicated unless documents sought to be protected include "court records"* as defined in Rule 76a. Tex.R.Civ.P. 166b(5)(c). . . . When a party moves for a protective order under Rule 166b.5(c), the trial court should first determine whether there is good cause for protecting the documents from distribution or disclosure as the rule authorizes. Tex.R.Civ.P. 166b.5(c)²⁵

Where a protective order under Rule 166b(5) is requested, it is the burden of the non-moving party to show the court that there must first be compliance with Rule 76a by establishing that at least some of the documents are "court records."²⁶ Rule 76a will not apply where the non-moving party fails to establish that the documents sought to be protected by a protective order under Rule 166b(5) are "court records."²⁷

*275 The court in *Ford Motor* has confirmed that protective orders may still be entered under Rule 166b(5) without requiring compliance with Rule 76a except where the non-moving party establishes that "court records"²⁸ are concerned.

II. Covenants Not to Compete

Several Texas cases have addressed issues raised in the interpretation and enforcement of covenants not to compete.

A. Car Wash Systems of Texas, Inc. v. Brigance²⁹

Car Wash was an action brought by an employer for a temporary injunction to enforce an agreement not to compete. The trial court denied the employer's request for a temporary injunction. The appellate court reversed and remanded for entry of appropriate injunctive relief.³⁰

Brigance signed an employment agreement including non-compete and non-disclosure covenants.³¹ The agreement with an initial term of one year provided for annual extensions thereafter.³² The agreement provided that Brigance would not compete with Car Wash for a period of one year following the date his employment was terminated.³³

More than five and one half years after signing the agreement, Brigance resigned from Car Wash and began to work for a competitor.³⁴ Brigance contended that the agreement had not been "expressly" extended for successive one year terms and asserted that the non-compete term extended for one year from the expiration of the first year of employment under the agreement, not from the date his employment was terminated.³⁵

The court, in rejecting Brigance's argument, held that his continued employment comprised successive one year extensions of the agreement and that the non-compete period extended for the one year period after his employment had terminated.³⁶

B. Rugen v. Interactive Business Systems, Inc.³⁷

Rugen was an action by a former employer seeking a temporary injunction to prevent Rugen from using the employer's confidential business information in a competing business. While the trial court ruled that the parties' non-competition agreement was unenforceable, it granted an injunction to protect the employer's confidential information which Rugen had acquired.³⁸ The appellate court affirmed.³⁹

The appellate court held that, even in the absence of an enforceable contractual restriction: "a former employee is precluded from using for his own advantage, and to the detriment of his former *276 employer, confidential information or trade secrets acquired by or a party to him in the course of his employment."⁴⁰ However, in the absence of a covenant not to compete, a temporary injunction must be structured to prohibit only use of the confidential information or trade secrets; it may not be so broad as to prohibit competition in general.⁴¹

Rugen also sought to void the temporary injunction by asserting that it failed to comply with the specificity requirement of Rule 683, Tex.R.Civ.P. Rugen asserted that the order did not specifically list the trade secrets and confidential information he was prohibited from using;⁴² instead, the order referred to exhibits admitted into evidence under seal at the temporary injunction hearing. However, listing of the trade secrets and confidential information in the order itself would have constituted a disclosure for all. The appellate court dismissed Rugen's point of error and affirmed the order.⁴³

"When confidential information and trade secrets are sought to be protected, courts should word the injunction order to avoid disclosure of the information. An injunction referring to sealed exhibits is in compliance with Rule 683 provided the activity sought to be enjoined is described in reasonable detail."⁴⁴

C. Hilb, Rogal & Hamilton Co. v. Wurzman⁴⁵

Wurzman was a suit by an employer seeking a temporary injunction to enforce a non-competition agreement with a former employee. As an employee of HRH, Wurzman signed an employment agreement which included a non-competition clause. Wurzman terminated her employment and established a competing insurance agency. HRH sought a temporary injunction to prevent Wurzman from violating the non-competition agreement.⁴⁶ The trial court's denial of injunctive relief was affirmed on appeal.⁴⁷

Injunctive relief may only be granted when there is no adequate remedy at law.⁴⁸ If damages are incapable of calculation or if the defendant is incapable of responding in damages, no adequate remedy exists at law.⁴⁹

The only issue on appeal from a hearing for a temporary injunction is whether the trial court abused its discretion in granting or denying the requested relief.⁵⁰ The parties are not entitled to a ruling on the merits on such an appeal.⁵¹ Finding no abuse of discretion the trial court's denial of the temporary injunction was affirmed. In *dicta*, the court admonished the bar against taking appeals from temporary injunction hearings. The court opined that the fastest way to resolve unfavorable preliminary orders is through expeditious trial on the merits.⁵²

***277 III. Innovative Approaches to Protect Trade Secrets**

In several recently reported cases alternative causes of action have been used by innovative counsel to seek redress for the

theft of trade secrets. While we are all familiar with the standard civil suit for protection of trade secrets, the trade secret owners in these cases have sought redress under the Lanham Act,⁵³ the Racketeer Influenced and Corrupt Organization Act (“RICO”)⁵⁴ and the Texas Penal Code.⁵⁵

A. Repap Enterprises, Inc. v. Kamy, Inc.⁵⁶

Repap was an action alleging violation of the Lanham Act⁵⁷ unfair competition, misappropriation of trade secrets, breach of confidential relationship and unjust enrichment. *Repap* asserted that it had disclosed to *Kamy* various trade secrets and confidential information concerning a wood pulping process pursuant to a confidentiality agreement. *Repap* asserted that *Kamy* disclosed those trade secrets and confidential information in patent applications filed in the United States and abroad. *Repap* requested equitable relief, including the imposition of a constructive trust and the assignment of patent rights by *Kamy*.⁵⁸ *Kamy* contended that there were no trade secrets because the alleged *Repap* trade secrets had been disclosed in the prior art.⁵⁹ While acknowledging that some of the information may have been disclosed previously in the literature, the trial court found that the combined information of *Repap* was not in the public domain⁶⁰ and granted the requested relief.⁶¹

The court found that *Kamy* had violated Section 43(a) of the Lanham Act⁶² by unfairly competing with *Repap*. The acts of unfair competition included the making of false and misleading statements concerning the creation and ownership of intellectual property, the filing of patent applications disclosing *Repap*’s trade secrets and the claiming of ownership in *Repap*’s trade secrets and the patent applications.⁶³ The court found that the mere filing of the patent applications comprised activities in commerce. The court found that the foregoing acts caused actual or potential deception having a tendency to create confusion in a substantial portion of the intended audience. The court concluded that such deception would likely influence the public’s purchasing decisions and that such misrepresentations would affect commerce by causing injury to *Repap*. *Repap* had suffered injury by loss of apparent title to its intellectual property and by loss of goodwill.⁶⁴

The court concluded that *Kamy*’s assertion of ownership in its patent applications comprised unfair competition by misuse of *Repap*’s trade secrets.⁶⁵ *Repap* was found to be the equitable owner of the patents and patent applications filed by *Kamy* and disclosing *Repap*’s trade secrets and confidential information. *Kamy* was enjoined from using that information for seven years, the estimated time of *278 development,⁶⁶ after which time *Kamy* would enjoy a royalty free, non-exclusive, non-assignable license under any issued patents.⁶⁷ Finally, *Kamy* was ordered to assign the patent and patent applications to *Repap*.⁶⁸

B. General Electric Co. v. Iljin Corp.⁶⁹

This was an action by General Electric (“G.E.”) against several defendants alleging misappropriation of trade secrets, violation of the Lanham Act⁷⁰ and violation of the Racketeer Influenced and Corrupt Organization Act (“RICO”).⁷¹ G.E. alleged that a former employee had copied and taken documents, including drawings, computer programs and process instructions, containing G.E.’s trade secret information. G.E. also contended that its trade secret technology was then transferred by its former employee to several other defendants.⁷² The trial court granted the motion of those defendants to dismiss G.E.’s RICO and Lanham Act claims.⁷³ G.E.’s RICO claim alleged violation of 18 U.S.C. §1

962(c) which states: “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity”⁷⁴ To prevail on such a claim a plaintiff must establish “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.”⁷⁵ G.E. alleged that, in violation of several criminal statutes, the corporate and individual defendants had “knowingly received and knowingly transported valuable stolen property, i.e., trade secrets, in interstate and/or foreign commerce in violation of 18 U.S.C. §§ 2315 and 2314. . . . [and] knowingly engaged in mail and wire fraud in violation of 18 U.S.C. §§1341 and 1343.”⁷⁶ G.E. alleged that the *repeated* receipt and transportation of the trade secrets by defendants comprised the required pattern of racketeering activity. The court disagreed, stating that the repeated transport and receipt of trade secrets between the former employee and the other defendants did not establish a *pattern* of racketeering activity.⁷⁷ Accordingly, G.E.’s RICO claim was dismissed.⁷⁸

G.E. also alleged unfair competition under Section 43(a) of the Lanham Act.⁷⁹ G.E. asserted that the defendants’ use and disclosure of G.E.’s drawings and technology and their representation to others of ownership therein comprised unfair competition by falsely representing to the public and to potential customers the source of the technology. The court characterized the claim as “reverse palming off,” a cause of action not recognized by the First Circuit under Section 43(a) of the Lanham Act.⁸⁰ Because *279 G.E.’s claim did not assert an attempt by the defendants to trade on the goodwill of G.E., the court dismissed the Lanham Act claims.⁸¹

C. Schalk v. Texas⁸²

Schalk exemplifies the use of the criminal statutes to obtain a punitive remedy for theft of trade secrets.⁸³ Defendants *Schalk* and *Leonard* were each convicted of a third degree felony for criminal theft of trade secrets under V.T.C.A. Penal Code

§31.05.⁸⁴ The Court of Criminal Appeals upheld the convictions.⁸⁵

Schalk and Leonard were former employees of Texas Instruments, Inc. (“TI”). Prior to leaving TI and using TI computers, they had copied computer programs including TI’s trade secrets relating to speech recognition. Schalk and Leonard used these programs in a competing business. Upon learning that Schalk and Leonard may have taken and been using its trade secrets, TI requested the assistance of the Dallas District Attorney’s office. A search warrant directed to the programs was executed at Schalk and Leonard’s new business.⁸⁶ On appeal, Schalk and Leonard challenged the sufficiency of the description in the search warrant⁸⁷ and the sufficiency of proof establishing that the programs included trade secrets.⁸⁸ The challenges were dismissed.⁸⁹

It is a third degree felony for a person, without the owner’s effective consent, to knowingly (1) steal a trade secret, (2) make a copy of an article representing a trade secret, or (3) communicate or transmit a trade secret.⁹⁰ In defining a trade secret, the penal code requires that the owner must have taken measures to limit availability of the information to others.⁹¹ Appellants claimed that the measures taken by TI had been insufficient to establish a trade secret.⁹² The appeals court provided a laundry list of measures to be examined in determining whether steps had been taken to maintain a trade secret: nondisclosure agreements, exit interviews, identification badges, security guards, closed circuit television monitors, limitations on access, nondisplay of printouts and hard copies of data, computer passwords, access codes, a trade secret register and general admonitions to employees to protect the information.⁹³ Finding that TI had complied with substantially all of the foregoing,⁹⁴ the convictions were affirmed.⁹⁵

Footnotes

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¹ 15 U.S.C. §§ 1051 *et seq.* (1988).

² 18 U.S.C. §§ 1961-68 (1988).

³ V.T.C.A. Penal Code § 31.05.

⁴ TEX. R. CIV. P. Rule 76a(2)(c).

⁵ TEX. R. CIV. P. Rule 166b(5)(c).

⁶ TEX. R. CIV. P. Rule 76a(2)(c).

⁷ 822 S.W.2d 345 (Tex. Civ. App.--Beaumont 1992, no writ).

⁸ *Dunshie*, 822 S.W.2d at 346.

⁹ *Id.*

¹⁰ *Id.* at 347.

¹¹ *Id.*

¹² *Id.* at 348.

13 *Id.*

14 829 S.W.2d 157 (Tex. 1992).

15 *Eli Lilly*, 829 S.W.2d at 158.

16 *Id.*

17 *Id.* (emphasis added).

18 846 S.W.2d 487 (Tex. Civ. App.--Houston [14th Dist.] 1993, no writ).

19 *Ford Motor*, 846 S.W.2d at 488.

20 *Id.*

21 *Id.* at 488-89.

22 *Id.* at 490.

23 *Id.* at 491.

24 *Id.*

25 *Id.* at 491 (emphasis added).

26 *Id.*

27 *Id.*

28 As defined in TEX. R. CIV. P. Rule 76a(2).

29 856 S.W.2d 853 (Tex. Civ. App.--Fort Worth 1993, no writ).

30 *Brigance*, 856 S.W.2d at 854.

31 *Id.* at 854-55.

32 *Id.* at 856.

33 *Id.* at 857.

34 *Id.* at 856.

35 *Id.* at 858.

36 *Id.* at 858.

37 864 S.W.2d 548 (Tex. Civ. App.--Dallas 1993, reh'g denied).

38 *Rugen*, 864 S.W.2d at 550.

39 *Id.* at 553.

40 *Id.* at 551 (quoting *Johnston v. American Speed Reading Academy, Inc.*, 526 S.W.2d 163, 166 (Tex. Civ. App.--Dallas 1975, no writ)).

41 *Id.* at 551.

42 *Id.* at 552.

43 *Id.* at 553.

44 *Id.* at 553.

45 861 S.W.2d 30 (Tex. Civ. App.--Dallas 1993, reh'g overruled).

46 *Wurzman*, 861 S.W.2d at 32.

47 *Id.* at 35.

48 *Id.* at 32.

49 *Id.*

50 *Id.* at 35.

51 *Id.*

52 *Id.*

53 15 U.S.C. §§ 1051 *et seq.* (1988).

54 18 U.S.C. §§ 1961-68 (1988).

55 V.T.C.A. Penal Code § 31.05.

56 27 U.S.P.Q.2d (BNA) 1685 (E.D. Penn. 1993).

57 15 U.S.C. §§ 1051 *et seq.* (1988).

58 *Repap*, 27 U.S.P.Q.2d (BNA) at 1686.

59 *Id.* at 1689.

60 *Id.* at 1689.

61 *Id.* at 1691-92.

62 15 U.S.C. § 1125(a) (1988).

63 *Repap*, 27 U.S.P.Q.2d (BNA) at 1690.

64 *Id.*

65 *Id.*

66 *Id.* at 1391.

67 *Id.* at 1690.

68 *Id.* at 1692.

69 27 U.S.P.Q.2d (BNA) 1372 (D.Mass. 1993).

70 15 U.S.C. §§ 1051 *et seq.* (1988).

71 18 U.S.C. §§ 1961-68 (1988).

72 *Iijin*, 27 U.S.P.Q.2d (BNA) at 1373.

73 *Id.* at 1377.

74 18 U.S.C. § 1962(c) (1988).

75 *Iijin*, 27 U.S.P.Q.2d (BNA) at 1374 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)).

76 *Id.* at 1375.

77 *Id.* at 1376.

78 *Id.*

79 15 U.S.C. § 1125(a) (1988).

80 *Ijgin*, 27 U.S.P.Q.2d (BNA) at 1377.

81 *Id.*

82 823 S.W.2d 633, 21 U.S.P.Q.2d (BNA) 1838 (Tex. Crim. App. 1991).

83 *Schalk*, 823 S.W.2d at 634.

84 *Id.*

85 *Id.*

86 *Id.* at 635.

87 *Id.* at 635-36.

88 *Id.* at 636.

89 *Id.* at 644.

90 V.T.C.A. Penal Code § 31.05(b).

91 V.T.C.A. Penal Code § 31.05(a)(4).

92 *Schalk*, 823 S.W.2d at 637.

93 *Id.* at 637.

94 *See generally, id.* at 638-43.

95 *Id.* at 644.