Temporary Injunctions and Temporary Restraining Orders – A Focus on Trade Secrets

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I. Introduction.

District judges are often asked to decide whether to issue temporary restraining orders or temporary injunctions to protect trade secrets. This article focuses on the significance of injunctive relief in these cases, identifies trends seen in appellate law dealing with trade secret protection—focusing on the law post-Hyde Corp. v. Huffines[1]—and reports the results of an informal survey of a number of both state and federal district judges on what they have identified as best practices when addressing requests for injunctive relief. Further, this article covers the basic law dealing with those applications but is not intended to restate the law of either trade secrets or injunctions.

II. The Importance of Trade Secret Litigation to the Texas Economy and the Basic Law of Trade Secret Injunctions.

A. The importance of trade secrets.

Rapid technological innovation has become one of the primary drivers of Texas and national economic growth.[2] The federal government now tracks total productivity growth and its origins in order to determine the effect of innovation on national productivity.[3] When companies are valued, unique innovations or items of intellectual property often contribute greatly to corporate value. For instance, Google™ was valued at 118 times its actual annual earnings during its initial public offering because of the perception that its intellectual property carried with it the potential for long-term profit.[4] By the year 2000, United States businesses invested as much in intangible property such as trademarks, patents and trade secrets as they did in tangible capital, including machinery, equipment and fixtures.[5]

But the development of intellectual property—which by its nature is intangible and potentially ill defined—can be stunted by misappropriation that deprives the true owner of the fruits of his labor. The most well publicized and widespread thefts of intellectual property occur internationally. A study by the Organisation for Economic CoOperation and Development of the United Nations has concluded that counterfeiting of copyrighted or trademarked goods costs the owners of that intellectual property several hundred billion dollars of losses per year—more than the entire gross domestic products of 150 member nations of the United Nations.[6] Internationally, between 35 and 40% of packaged commercial software and musical recordings sold each year are counterfeited.[7]

Much, if not most, of this type of misappropriation occurs outside both Texas and the United States. When inventors or owners of trade secrets look to Texas courts for protection, courts must apply a unique balancing act between trade secret protection and overaggressive protection because that may itself injure competition and innovation. Thus, the Texas judicial system's ability to make consistent, accurate and predictable judgments about trade secret claims is an important part of creating a predictable environment in which innovation can grow.

B. The importance of trade secret injunctions to litigants.

Trade secret injunctive proceedings are critical to the litigants for a number of reasons. First, although the court's decision in a TRO or temporary injunction hearing is preliminary, litigants often derive great meaning from these proceedings because they influence whether a party should continue the action, quit it or resolve it. Injunction practice in trade secret cases frequently forms a sort of informal non-binding summary jury trial in which existence or validity of a trade secret, potential defenses and the cost of injunctive relief are all tested.[8]

Unlike a summary jury trial, the preliminary injunction or TRO is binding on the parties unless the plaintiff fails to post his bond.[9] The district court may set the TRO aside during temporary injunction hearing, afterward, or it may be reversed in the Court of Appeals. As a result, the decision to grant or to refuse temporary injunctive relief imposes substantial rights and burdens upon the parties, including—in some cases—the shuttering of entire fledgling businesses.

Moreover, litigation involving intellectual property tends to be very expensive, particularly where the trade secrets involved are of a highly technical nature. A strong parallel to state trade secret litigation is patent litigation, which tests the existence and ownership of inventions in the federal courts. A 2005 survey of the American Intellectual Property Law Association indicated that on a nationwide median in patent cases involving more than $25 million, each side will spend more than $4 million in fees and expenses.[10] While few Texas trade secret cases reach these lofty heights (or perhaps sink to these depths), trade secret litigation is nonetheless very expensive. Preliminary decisions by the court often dictate whether a party chooses to make the substantial continuing investments needed to pursue (or defend) a trade secret matter.

Trade secret injunctions are also important because parties frequently commit themselves to propositions of fact or law at the beginning of a case that either formally or informally bind them for the remainder of the litigation.[11] As a result, although the results are preliminary, temporary restraining orders and temporary injunctions in trade secret matters are an extremely important way for litigants to "test the waters" of their longer-term dispute.

C. The basics of trade secret injunction law.

Hyde Corp. v. Huffines[12] and its sister case K&G Tool & Serv. Co., Inc. v. G & G Fishing Tool Serv.[13] are the two seminal decisions in Texas law governing the existence and scope of trade secrets. Since 1958, Texas has 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 use it.[14] Customer lists, pricing data, client information, customer preferences, buyer contacts, blueprints, market strategies, drawings and software code have all been recognized as trade secrets when the legal requirements to establish a trade secret have been met.[15]

Texas courts use a six-factor test to determine whether information constitutes a trade secret: (1) the extent to which the information is known outside the claimant's business; (2) the extent to which the information is known by employees and others involved in the claimant's business; (3) the extent of measures taken by the claimant to guard the information's secrecy; (4) the value of the information to the claimant and to its competitors; (5) the amount of effort or money invested by the claimant to develop the information; and (6) the ease or difficulty in which the information could be properly acquired or duplicated by others.[16]

Trade secret litigation is most often spawned in one of three scenarios: (1) as part of employer/employee disputes where departing employees seek to compete with their former employers; (2) in joint venture or joint development agreements where property rights in the event of separation are ill-defined; and (3) in contractual "look see" scenarios in which one party is exposed to information of another to enable a bid for property or some other potential business arrangement with the disclosing party.[17] In each situation, the court's typical first inquiry is whether "property"—i.e., a trade secret—exists. If a trade secret is established, the same proof usually establishes ownership in the plaintiff, but not always.[18]

The duty to refrain from using trade secrets stems from different sources in each of the scenarios identified above. In the employer/employee scenario, all employees owe it to their employer to refrain from using the employer's property (including his trade secrets) for their benefit.[19] In contractual scenarios such as non-disclosure agreements and joint venture or joint development agreements, the obligation may be solely contractual or may be grounded in the common law as well.[20]

A number of particular rules have developed for the application of the rules of injunction law to trade secret cases. The general rule that the "status quo" for the purpose of trade secret analysis is the last actual and peaceable non-contested status which preceded the pending controversy is applied to misappropriation of trade secret cases.[21] When a temporary injunction relating to a trade secret is considered by an appellate court in Texas, the court is not entitled to substitute its discretion for that of the trial court.[22] Injunction decisions are reversed only for an abuse of discretion, and a trial court does not abuse its discretion if an applicant pleads an appropriate cause of action and presents some admissible evidence tending to sustain that cause.[23] Since the trial court is the finder of fact, it does not abuse its discretion when it bases its decision on conflicting evidence,[24] and all legitimate inferences in favor of the trial court's decision must be made by the appellate court.[25]

We thought it might be helpful to the bench to go well beyond these basic statements of law that are commonly applied in trade secret injunctions. We therefore did two analyses, one to see how trade secret injunction jurisprudence has developed in the past and the second to see how members of the bench are currently deciding such disputes.

III. Long-Term Trends in the Jurisprudence of Trade Secret Injunctions.

To test how courts of appeal handle appeals from injunction actions in trade secret cases in order to see if any useful trends could be discerned from those decisions, we identified, as best we could, all appellate cases involving the theft of trade secrets since 1958 and also mentioning or using the word "injunction" or "enjoin." We commenced our searches in 1958 because the issuance of the Texas Supreme Court's seminal opinions in Hyde Corp. and K&G Tool are widely acknowledged to have commenced the Court's most definitive statement of the status of trade secret protection. A total of 248 cases were located utilizing both the words "trade secret" and either "injunction" or "enjoin," and each was reviewed.[26]

Of the 248 cases reviewed, only 123 actually represented interlocutory appeals from the grant or denial of a preliminary injunction. In the remaining cases, injunctive applications were simply mentioned as part of claims pled or did not form any significant part in the appellate court's resolution of the appeal.

We reviewed the data for a number of trends: (1) whether grants of injunctions were more likely to be appealed than denials; (2) reversal rates of trade secret injunctions over time; (3) whether recent litigation involves different trade secrets than in the 1950s, 60s and 70s; (4) whether settled periods in the law of restrictive covenants affect the overall number of trade secret injunction appeals; and (5) whether the reversal rate has changed over the decades.

Before conducting the research in which we would see both standards and emerging trends, we hypothesized that: (1) grants of injunctions were more likely to be appealed than denials; (2) reversal rates would be higher on grants than in decisions appealing the denial of injunctions; and (3) as the Texas economy has become substantially more dependent upon intellectual property, the origin of trade secret disputes would have changed from the typical employer/employee dispute to disputes involving joint development agreements, non-disclosure agreements and other technological undertakings. Generally, the data confirmed our hypotheses with one significant exception.

We believed that the percentage would be even more lopsided in favor of appeals from injunctive grants because the abuse of discretion standard would be far more daunting to a party considering appeal from the denial of injunctive relief than the grant of injunctive relief. The data tended to confirm this conclusion. Decisions granting injunctions were, by far, more likely to be appealed than were denials. Of the 123 interlocutory trade secret appeals, 85 (or 69%) of interlocutory appeals were taken from injunction grants. Conversely, 38 (or 31%) of the cases involved appeals from denials of injunctive relief.

But what was the record of trial courts in these appeals? Of the 85 interlocutory appeals in which the trial court entered a preliminary injunction, 72% of the injunctions granted by the trial court were sustained and 28% reversed. Of course, several appellate decisions were not simple affirmations or reversals. Of the 61 cases in which injunctions were upheld, the injunction was modified in 21 of those cases. Usually, these modifications related to the scope of the injunction, its duration, or the identity of persons who could be charged as acting "in concert" with the defendant.[27] Trial courts actually appear to fare better in appeals from trade secret related injunctions than in the appeal of injunctions generally, where the reversal rate has been estimated at 59% to 61%.[28]

We also analyzed the decisions to determine whether trends could be seen in the nature of trade secret injunction litigation over time. Although we suspected that trade secret litigation would become more technologically sophisticated over time as the Texas economy changed and that the source of trade secret cases would change, neither hypothesis was confirmed in the data. Instead, both the source of trade secret appeals (employer/employee disputes) and the nature of the trade secret sought to be protected (customer lists or customer data) remained relatively constant throughout the decades.

From 1958 to 2010, 83% of appeals involving trade secret claims and injunctions arose in the employer/employee context—frequently with a covenant against competition involved in the litigation. This percentage of employer/employee generated appeals has diminished somewhat in the 2000-2010 time period, but the result is neither statistically significant nor significantly different from the overall historic trend.

Decade	Total number of trade secret injunction cases	Number of trade secret cases stemming from employer/ employee disputes	Percentage of trade secret injunctions arising from employer/employee disputes
1958–1969	23	14	60.8%
1970–1979	29	26	89.7%
1980–1989	47	43	91.5%
1990–1999	58	52	89.7%
2000–2010	91	71	78.0%
1958–2010	248	206	83.1%

We also tested the data on two other theories. First, we wanted to see if settled periods in the law of restrictive covenants affected the rates of appeal, injunction grants or reversal rates. As readers probably are aware, the permissibility of restrictive covenants, their scope, and the nature of consideration required to support them has been in flux since the Texas Supreme Court's decision in *Hill v. Mobile Auto Trim, Inc.*[29] Logically, one would assume that the settlement of standards by which non-competes can be judged to be legal or not would aid litigants in avoiding injunction disputes by permitting potential violators of the non-competes to modify their behavior based on the probability that their actions were permissible or not. We therefore focused on the frequency of trade secret injunctive activity in the five years following issuance of *Hill*—January 28, 1987—and in the five years following the issuance of the legislature's response, which occurred on August 28, 1989.[30] In the first five years following *Hill*, 23 interlocutory appeals following trade secret based injunctions occurred, but in the five years following legislative action, only 14 such appeals occurred. The data, therefore, has not undergone a rigorous test for statistical significance but tends to support the idea that settling the rules of the road for non-competes reduces injunction disputes by allowing parties to plan for their own affairs.

Finally, we reviewed the data to determine whether or not trial courts were being reversed more frequently on trade secret injunctions than they were in the past. We found that trial judges are being affirmed in trade secret injunction cases more than they have been in the past, but again, the result is probably not statistically significant. In the first ten years after Hyde and K&G Tool, injunction grants were sustained 70% of the time and denials 64% of the time. From 2000 through 2010, grants of injunctions were sustained 74% of the time and denials 87% of the time.

In addition to this historical survey of the appellate case law concerning trade secret injunctions, we conducted a survey of several sitting judges on both the state and federal bench in Harris County, Texas, to determine whether any symmetry existed in the way most judges approached trade secret litigation.

IV. Informal Survey of Judges on Trade Secret Injunctions.

A. What we asked the judges.

A copy of our survey form is posted on our firm website, but generally what we asked our judges was:

1. What were the most common types of intellectual property injunctions they have seen?

2. What percentage of trade secret injunctions came from routine enforcement of non-compete agreements as compared to other contractual or statutory sources?

3. In what percentage was the plaintiff successful? On TROs? On temporary injunctions?

4. What factors were most influential in causing you to grant injunctions when you granted them?

5. What factors were most influential in causing you to deny injunctions when you denied them?

6. How did you determine how broadly to scope the injunction?

7. What method(s) did you use to determine the amount of bond?

8. Did injunctive relief influence your choice of a trial setting?

9. Did you have to utilize your contempt powers?

10. How often were interlocutory appeals taken from your orders, and how did those appeals affect how you handled your cases?

11. What should we have asked you about this issue and missed?

Since many of our judges requested anonymity of particular responses and since the entire idea was to project general trends rather than individual practices, we kept the results anonymous as to all.[31]

The results were perhaps more enlightening to the bar than to the bench but were still interesting. Two caveats are in order. First, the survey is anything but scientific. It does not represent to be a statistically valid sample of district court judges and is clearly not geographically representative of the state. Second, the results from federal and state district judges were radically different. Most federal judges interviewed considered injunctive actions most often in cases where there were statutory constructs in place—trademark, copyright and patent litigation. In such cases, the substantive rules of law and procedures are significantly different from state practice.

B. What the respondents said.

1. The most common type of trade secret disputes is employer/employee contests.

Employer/employee disputes in which employees either left or were fired from an employer and then sought to open their own competing businesses were the most common trade secret injunction presented to our respondents.

The percentages were predictably different for our federal judge respondents, whose jurisdiction includes not only trade secret disputes in diversity actions but various statutorily based intellectual property actions such as patent, copyright or trade secret enforcement. Those judges still encountered ordinary employer/employee disputes more often than any other but in diminished percentages as compared to their state counterparts.

2. Employer/employee trade secret disputes were a high percentage of all trade secret disputes.

Our respondents estimated that between 50 and 80% of their trade secret injunctions were based upon employer/employee disputes, frequently involving covenants against competition.

3. Plaintiffs' success rates varied significantly from judge to judge.

The responses by our respondents to the success rates for trade secret injunctions and TROs could not be easily categorized. Several respondents indicated that as long as the plaintiff satisfied the rule requisites and narrowly tailored its relief requests, grants of TROs were commonplace. The reasoning for several respondents was that since the TROs lasted only 14 days, the probability of irreversible injury from the TROs was slight.

Several of our respondents were much more hesitant—granting fewer than 50% of trade secret TROs. Many of these respondents were highly skeptical of the quality of trade secrets in the typical employer/employee situation and reasoned that personal customer loyalty to the defendant employee was likely far more important than any customer data that employee might have accumulated on his or her exit.

Virtually all respondents indicated that, barring agreement of the parties, they were far less likely to issue temporary injunctions than temporary restraining orders. The full presence of opposing counsel, further development of factual defenses and chinks in the plaintiffs' armor all contributed to these differences. No symmetry existed in the percentage of responses we received on this question.

4. What factors were most important in granting trade secret injunctions?

In a word—skullduggery. Plaintiffs capable of demonstrating outright copying of sensitive files, computer assisted drawings or concealed planning to compete, combined with the use of the employer's property and strong similarity between a newly competing product and its predecessor, were more likely to prevail.

5. What factors were most important in denying trade secret injunctions?

Several factors were identified consistently: the "lightness" of the trade secrets—i.e., the absence of any true capital investment by the party seeking protection—was a critical factor. The second most commonly mentioned factor was the availability of money damages combined with obvious solvency of the defendant.

6. How broad were your injunctions?

The overwhelming preference of our respondents was to narrowly tailor the injunction to prohibit use of the trade secret rather than to prohibit the conduct of business that might utilize a trade secret. A number of factors supported this decision amongst those interviewed. First, a broad-based concern was expressed against granting a plaintiff more competitive advantage than required to reinstate the status quo. Second, most judges felt that narrow injunctions were helpful in compelling the plaintiff to precisely identify the trade secrets for which protection was sought—something that they viewed as beneficial for both the injunction and the case as a whole. Finally, most felt narrow injunctions promoted the use of reasonable bond requirements.

7. How did you determine the bond?

On first view, Texas Rule of Civil Procedure 684 seems clear enough. The trial court must set a bond that is sufficient to cause the party procuring the injunction to be able to "pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part." All of our respondents were keenly aware of this requirement, but no other issue caused such substantial disagreement than how to set a bond.

Several respondents fell into the "de minimus" camp, particularly with TRO issuance. They felt that if the rule requirements had been met, the likelihood of an improper injunction finding was low and the 14-day run of a TRO supported minimal bonding. Others calculated the amount of bond but used widely varying methods to calculate it, ranging from a low of 25% of the enjoined business' annual revenue to a high of the defendant business' entire annual projected revenue.

We were curious whether district judges used average rates of return on capital to set bonds. A large practical problem facing respondents was that many of the businesses being enjoined were just beginning and had little to no earnings or profit history. We know as a practical matter that many fledgling businesses will fail within a short time, whether they have access to another's trade secrets or not. It is, therefore, difficult if not impossible for trial court judges to assess the incremental cost that a trade secret injunction might impose on a defendant. We therefore thought that trial courts might use average rates of return on capital to set bonds. In other words, when "A" sues "B" for theft of trade secrets and "B" has invested $100,000 to commence its business in a high-tech field, one reasonable method of assessing the likely damage from a one-year injunction is the loss of likely return on the defendants' capital. If such ventures on average return 22% to their owners, then $22,000 might be a reasonable estimate of the cost of the opportunity lost to the defendant from a one-year injunction. But virtually none of our respondents utilized this or other statistical methods to set bonds.

A number of judges mentioned Judge Hecht's opinion in DeSantis v. Wackenhut Corp. as influencing their decisions about bonds.[33] In Wackenhut, it was reiterated that an action for wrongful injunction is limited by the amount of bond actually posted in support of the temporary injunction.[34] A number of respondents felt that since the defendants' cause of action was so limited, trial courts must set bonds large enough to ensure that the defendant is adequately protected in the event of error. This resulted in a strong tendency for the judges identifying the issue to increase bonding requirements.

Finally, all of our respondents were aware that many defendants viewed the setting of bonds as a second bite at the injunctive apple—that even where the defendant lost the temporary injunction hearing on the merits, the defendant might yet practically prevail by obtaining a bond setting that was higher than the plaintiff could afford. Other than stating a concern about such practices, the financial standing of the parties did not influence the amount of bonds set in trade secret cases.

One consistent response, however, was that the breadth of the injunction strongly influenced bonding. The broader the injunction, the larger the bond.[35]

8. Do injunctions influence trial settings?

For most respondents, yes. A strong majority of judges accelerated trial settings following trade secret injunctions, in some cases giving litigants only the minimum 45 days' notice required for an initial trial setting. Our respondents gave different reasons for these accelerated trial settings. Some felt that the burden imposed by the temporary injunction supported early final resolution of the case as a whole. Others believed that the initial discovery provided prior to or during the temporary injunctive phase mitigated against the need for a long discovery period. Still others assessed the resources of the parties and the need for immediate resolution of the disputes in the conduct of their respective business.

At least two of our respondents were inclined to bypass the temporary injunction stage altogether. Their reasoning was that it was highly unlikely that the parties could, within 14 days, conduct sufficient discovery to further advance the trial court's understanding of the issues. These judges worked to obtain agreement of the parties to extend the TRO into a temporary injunction and to conduct limited and well defined discovery as a precursor to a quick trial.

A significant number of dissenters, however, felt that all litigants were entitled to an equal position in the queue for trial settings and that the mere fact that one party claimed theft of trade secret materials did not justify placing it at the front of the queue.

9. Have you had to use your contempt powers?

Almost never. While two of our respondents had used their contempt powers, both were in conjunction with mixed injunction/discovery issues in which defendants refused to turn over pilfered materials, designs or computers.

10. How often are you appealed, and does it really matter?

Respondents indicated that interlocutory appeals from their trade secret injunctions were extremely rare. Many respondents with lengthy careers had never encountered them, while others estimated that they were taken in fewer than 5% of their cases.

11. What is in the "grab bag" of our respondents' other comments?

Fabulous war stories and good lessons learned. Virtually every judge we interviewed took the time at one point or another in the interview to reiterate that in trade secret injunctions, the trial court sits as a court of equity. As courts of equity, judges felt it appropriate to consider virtually any factor that might implicate the fairness of an injunction under the circumstances.

Our federal judges both commented that trade secret and copyright injunction process under the federal rules requires a declaration under Rule 65 why notice had not been given to the opposition or was not practical. Many simply omitted this critical proof and lost their injunctions as a result.

As an exemplar of the difference between "heavy" and "light" trade secrets, one of our respondents offered the day when, on back-to-back applications for temporary restraining orders, he heard the claims of a developer of proprietary "clean room" techniques designed to preserve pristine environments for pharmaceutical research and of a strip club that claimed its dancers could not work elsewhere because they had been trained in proprietary (but presumably legal) dancing techniques.

V. Conclusion and Thoughts.

Trade secret injunctions heavily influence the ultimate outcome of these expensive disputes and are amongst the most significant rulings trial courts can make. The very few appeals taken from trade secret based injunction, either on an interlocutory or final basis, and low reversals rates of those decisions indicate that the Texas trial bench is doing a solid job of calling balls and strikes in the trade secret injunction field.

Though one might suspect that in the emerging, more technical economy, "true" trade secret disputes would have become more prominent, the opposite is true. Our historic sampling of the case law and interviews both indicate that employer/employee disputes featuring covenants against competition are the most common source of trade secret disputes, making a solid knowledge of the law concerning such covenants a must for any trial judge.

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1 158 Tex. 566, 314 S.W.2d 763 (1958).

2 Carol Corrado, Charles Hulten & Daniel Sichel, *Measuring Capital and Technology: An Expanded Framework* (2002), *reprinted in* Measuring Capital in the New Economy 11–41, 11 (Carol Corrado, John Haltiwanger & Daniel Sichel eds., University of Chicago Press 2005), *available at* http://www.nber.org/chapters/c0202.pdf (hereafter "*Measuring Capital*").

3 *Measuring Capital* at 15.

4 Allan Slogan, *IPO Success Doesn't Justify Google's Price,* The Washington Post, Aug. 23, 2004, at E3.

5 *Measuring Capital* at 18.

6 Organisation for Economic Co-Operation and Development, *The Economic Impact of Counterfeiting and Piracy* 13 (June 2008), *available at* http://www.oepm.es/cs/OEPMSite/contenidos/ponen/InformeOCDE26feb09/2009_03_03_OECD_Study_on_Counterfeiting_and_Piracy.pdf.

7 *Id.* at 17-19.

8 *See* Tex. Civ. Prac. & Rem. Code Ann. § 154.026 (Vernon 1997).

9 *See* Tex. R. Civ. P. 684; *see also Ex parte Lesher*, 651 S.W.2d 734 (Tex. 1983) (reiterating issuance of injunction contingent on compliance by moving party with Rule 684).

10 *See* American Intellectual Property Law Association, Report of the Economic Survey (2005) (unpublished report, on file with American Intellectual Property Law Association).

11 This result usually occurs through the invocation of the doctrine of judicial estoppel, in which a party, having requested relief and receiving it based upon representations to a court, may not later change those representations. *See Ferguson v. Building Materials Corp. of America*, 295 S.W.3d 642, 643 (Tex. 2009).

12 158 Tex. 566, 314 S.W.2d 763 (1958).

13 158 Tex. 594, 314 S.W.2d 782 (1958).

14 *See Hyde Corp. v. Huffines*, 314 S.W.2d at 776.

15 *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, pet. dismissed) (hereafter "*T-N-T Motorsports*").

16 *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003) (*quoting* Restatement of Torts § 757 cmt. b (1939)). The original portion of section 757 has been omitted from the Restatement (Second) of Torts and incorporated into the Restatement (Third) on Unfair Competition. *See* Restatement (Third) of Unfair Competition § 39 reporter's n. cmt. d (1995).

17 *See, e.g., Sharma v. Vinmar Int'l, Ltd.*, 231 S.W.3d 405, 413-19 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (hereafter "*Sharma*") (former employee); *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1200 (5th Cir. 1986) (claimed violation of non-disclosure agreement); *CMNC Healthcare Props., LLC v. Medistar Corp.*, No. 01-06-00182-CV, 2006 WL 3628922, at *7 (Tex. App.—Houston [1st Dist.] Dec. 14, 2006) (mem. op., not designated for publication) (claimed theft of trade secrets through development agreement).

18 *See, e.g.*, *In re Kuntz*, 124 S.W.3d 179, 183 (Tex. 2003) (reserve data did not belong to Kuntz, employee, but to MOXY, his employer, and thus was not in Kuntz's "possession, custody or control.").

19 *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002).

20 *See Anglo-Dutch Petroleum Int'l, Inc. v. Smith*, 243 S.W.3d 776, 781-82 (Tex. App.—Houston [14th Dist.] 2007, pet. denied, reh'g denied). *Anglo-Dutch v. Smith* raises a series of interesting points that are not well resolved in Texas jurisprudence. In that matter, the Plaintiff contended in the trial court

that the execution of a confidentiality agreement that prohibited disclosure and misuse of confidential information automatically created a relationship of trust and confidence. *Id.* at 782. The court rejected this argument, relying upon authorities holding that all contracts imply some level of trust and confidence by the parties but do not create a fiduciary relationship. *Id.* Another interesting and as of yet unresolved question is how the economic loss rule might apply to a theft of trade secret occurring in a contractual context. If party "A" is privy to trade secret information solely because it signed a non-disclosure agreement under which it agreed not to disclose or misuse "B's" data, is it liable only in contract for a subsequent misappropriation, or does the independent tortious nature of a theft of property expose the misappropriating party to punitive damages as well? A number of authorities appear to hold fast to the notion that Texas courts will not expand the tort of conversion when purely intangible property is involved. *See Robin Singh Educ. Servs., Inc. v. Test Masters Educ. Servs., Inc.*, ☒S.W.3d☒, 2011 WL 1044210, *2 (Tex. App.—Houston [14th Dist.] Mar. 8, 2011) no pet.) (finding emails "intangible" property that may not be the subject of a conversion action). This question is compounded by the existence of the Texas Theft Liability Act, which may permit parties to sue for criminal misappropriations of intellectual property. *See, e.g., Texas Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 369 (Tex. App.—Dallas 2009, pet. denied) (failing to resolve the issue conclusively).

21 *Sharma* at *7.

22 *Landry's Seafood Inn & Oyster Bar☒Kemah, Inc. v. Wiggins*, 919 S.W.2d 924, 926 (Tex. App.—Houston [14th Dist.] 1996, no writ).

23 *Sharma* at *7.

24 *Id.*

25 *T-N-T Motorsports* at 21.

26 The results of the research are too voluminous to include in this article but may be accessed at http://www.tlotf.com/fulkerson_articles.htm.

27 Tex. R. Civ. P. 683.

28 Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. Tex. L. R. 431, 451 (2003) (finding a 59% reversal rate for temporary injunctions in the years 2001-02); Bob E. Shannon, Charles F. Herring, Jr. & J. Matthew Dow, *Temporary Restraining Orders and Temporary Injunctions in Texas—A Ten Year Survey, 1975-1985*, 17 St. Mary's ILL. 689, 750-55, 761-72 (1986) (finding a 61% reversal rate in the ten-year period studied).

29 725 S.W.2d 168 (Tex. 1987), *superseded by statute*, Tex. Bus. & Com. Code Ann. §§ 15.50–51 (Vernon Supp. 1990).

30 Tex. Bus. & Com. Code Ann. § 15.50 (Vernon Supp. 1990).

31 A copy of the form we used for the interview can be seen at http://www.tlotf.com/fulkerson_articles.htm.

32 Tex. R. Civ. P. 684.

33 793 S.W.2d 670, 685-86 (Tex. 1990).

34 *Id.*

35 Though not in the trade secret context, one of our respondents related the application by the losing competitor for a kiosk in the to-be-opened international wing of Houston's Intercontinental Airport as a case in point. The applicant sought to have the opening of the entire wing shut down because of alleged improprieties in the manner in which a yogurt kiosk was awarded. Our respondent offered that he was happy to grant the requested relief so long as the plaintiff was willing to post a $50,000,000 per-day cash bond.