

Feature Article

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Misappropriation of Customer List Trade Secrets as a Basis for an Injunction Containing a Non-Solicitation Clause

Where a person misappropriates another's customer list trade secrets, the misappropriation can be the basis for an injunction against the misappropriator under the Uniform Trade Secrets Act (UTSA). The injunction may contain both a provision prohibiting use of the customer list and a provision which prohibits soliciting the customers on the customer list.

The entry of the injunction and the prohibition against soliciting customers is based on the misappropriation alone. It is not based on any non-solicitation clause or restrictive covenant in an agreement between the misappropriator and the person entitled to trade secret protection.

We use the term "person entitled to trade secret protection" and not owner. The comment to the UTSA states that "Where more than one person is entitled to trade secret protection with respect to the same information, only that one from whom misappropriation occurred is entitled to a remedy." See UTSA with 1985 amendments, Comment to Section 2; See also *Metso Minerals Industries, Inc. v. FLSMIDTH-EXCELL LLC.*, 733 F. Supp 2d 969, 972-73 (ED Wisc. 2010)(the phrase "of another" in the misappropriation portion of the UTSA does not limit protection only to the "owner" of the trade secret) (emphasis in original).

To date forty-six states, the District of Columbia and the U.S. Virgin Islands have adopted the UTSA or a version of the UTSA. Only Massachusetts, New Jersey, New York and Texas have not. This article focuses on the Seventh Circuit and the laws of the states within the Seventh Circuit: Illinois, Indiana and Wisconsin.

A. Requirements for a Customer List to be a Trade Secret

1. Uniform Trade Secrets Act

Paragraph 2(d) of the Illinois Trade Secrets Act (ITSA) defines a trade secret:

"Trade Secret" means information, including but not limited to technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, that:

- (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosures or use; and
- (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality.

See 765 ILCS §1065/2(d) (West 2011).

The definition of trade secret in the Indiana and Wisconsin Uniform Trade Secrets Act is almost identical to the definition of trade secret in the ITSA. The difference is that neither the Indiana nor the Wisconsin Act contain the wording “or list of actual or potential customers or suppliers” in their definition of trade secret. For Indiana, see, Illinois Code (IC) 24-2-3-2, definition of “trade secret” (effective date 9-1-82), and for Wisconsin, see, Wis. Stats. 134.90 (1)(c) (effective date 4-24-86).

2. Case Law—Customer Lists as Trade Secrets

The standards to establish a customer list as a trade secret under the UTSA can parallel the standards at common law. *Elmer Miller, Inc. v. Landis*, 253 Ill. App. 3d 129, 133, 625 N.E.2d 338, 341 (1st Dist. 1993); *Stampede Tool Warehouse, Inc. v. Mark May, et al*, 272 Ill. App. 3d 580, 588, 651 N.E. 2d 209, 215-16 (1st Dist. 1995); *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 844, 853, 434 N.W. 2d 773, 774, 778 (1989)(prior case and Restatement provide helpful guidance in deciding what is a trade secret under the UTSA). But see, IC 24-2-3-1(c) (“This chapter displaces all conflicting law of this state pertaining to the misappropriation of trade secrets, except contract law...”).

To claim protection as a trade secret, a party must show that: (1) the information was sufficiently secret to give it a competitive advantage; and (2) affirmative measures were taken to prevent others from acquiring or using the information. *Multiut Corp v. Draiman*, 359 Ill. App. 3d 527, 536, 834 N.E.2d 43, 49-50 (1st Dist. 2005); *Stampede, supra*, 651 N.E.2d at 215; *U. S. Land Services, Inc. v U. S. Surveyor, Inc.*, 826 N.E.2d 49, 61, 63 (Ct. App. Ind. 2005); *ECT International, Inc., v. Zwerlein*, 228 Wis. 2d 343, 351-53, 597 N.W. 2d 479, 482-83 (Ct. App. Wis. 1999).

Customer lists and pricing information have been recognized as trade secrets where the person entitled to protection safeguards its customer data by limiting access to the data and by requiring individuals to sign confidentiality agreements. *Multiut Corp., supra*, 834 N.E.2d at 50; *Kozuch v. CRA-MAR Video Center*, 478 N.E.2d 110, 113 (Ct. App. Ind. 1985); *ECT International Inc., supra*, 597 N.W.2d at 484.

Where those criteria were present, courts have found, for example, that customer and prospect lists were trade secrets for a company which contracts with gas and electricity suppliers (*Multiut, supra*, 834 N.E. 2d at 50); a distributor of automotive tools and equipment to automotive jobbers (*Stampede Tool Warehouse, Inc., supra*, 651 N.E.2d at 211); an insurance agency (*Burt Dickens & Co. v. Bodi*, 144 Ill. App. 3d 875, 882, 494 N.E.2d 817, 821 (5th Dist. 1986)); a video center (*Kozuch, supra*, 478 N.E.2d at 112); a surveyor in the business of providing surveying services and survey coordination (*U.S. Land Services, Inc., supra*, 826 N.E.2d at 52); the owner of a lubrication business (*Hydraulic Exchange & Repair, Inc. v. KM Specialty Pumps, Inc.*, 690 N.E.2d 782, 784, 786 (Ct. App. Ind. 1998)); a securities underwriter’s list that identified securities investors (*B.C. Ziegler & Coe v. Ehren*, 141 Wis. 2d 19, 28-29, 414 N.W. 2d 48, 52 (Ct. App. Wis.1987)); a distributor of software used in the design and documentation of electrical systems (*ECT International, supra*, 597 N.W.2d at 484-85); and an insurance company’s database containing insureds’ information (*American Family v. Roth*, 485 F.3d 930, 933 (7th Cir. 2007)(applying Wisconsin law).

Where these criteria were not present, courts have found that customer lists were not trade secrets. See *Cincinnati Steel Company v. Breed*, 136 Ill. App. 3d 267, 270, 482 N.E.2d 170, 172 (2d Dist. 1985)(distributor of tool and die steel primarily to customers in Illinois, Wisconsin and Ohio); *Jackson v. Hammer*, 274 Ill. App. 3d 59, 60, 69, 653 N.E.2d 809, 816-17 (4th Dist. 1999)(hobby shop); *Steinhoven v. the College Life Insurance Company of America*, 460 N.E.2d 973, 974 (Ct App. Ind. 1984)(life insurance policy holder lists); *Gary Van Zealand Talent, Inc. v. Sandas*, 84 Wis. 2d 202, 204, 207, 267 N.W.2d 242, 245 (1978)(company placing musical groups in nightclubs and other places of entertainment); *Abbott Laboratories v. Norse Chemical Corporation*, 33 Wis. 2d 445, 463, 466, 147 N.W.2d 529, 538, 540 (1967)(seller of synthetic sweetener).

B. Misappropriation of a Customer List is Sufficient to Support Remedies Under the UTSA

1. Definition Of Misappropriation Under The UTSA

According to the ITSA, misappropriation means:

- (1) acquisition of a trade secret of a person by another person who knows or has reason to know that the trade secret was acquired by improper means; or
- (2) disclosure or use of a trade secret of a person without express or implied consent by another person who:
 - (A) used improper means to acquire knowledge of the trade secret; or
 - (B) at the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:
 - (I) derived from or through a person who utilized improper means to acquire it;
 - (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - (C) before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

See 765 ILCS §1065/2(b) and (c)(West 2011); IC 24-2-3-2; Wis. Stats. 134.90(2)(a) and (b).

To establish a violation of the UTSA, a plaintiff must prove that the information at issue was: (1) a trade secret, (2) that it was misappropriated, and (3) used in the defendant's business. *Multiut*, supra, 834 N.E. 2d at 49; *Hydraulic Exchange*, supra, 690 N.E.2d at 787 (must demonstrate disclosure or use of trade secrets without consent and at time of disclosure or use knew or had reason to know the information was a trade secret); *Minuteman*, supra, 434 N.W.2d at 853-54 (three questions arise, whether the material is a trade secret, whether a misappropriation occurred in violation of the UTSA and what type of relief is appropriate).

2. Injunction Remedy For Misappropriation Under The UTSA

Section 3(a) of the ITSA provides that “[a]ctual or threatened misappropriation may be enjoined.” *See* 765 ILCS §1065/3(a)(West 2011); IC 24-2-3-3(a); Wis. Stats. 134.90 Section 3(a) 1 (“A court may grant an injunction against a person who violates sub. 2”).

One court has held that “[A]n improper acquisition is enough to constitute a misappropriation of a trade secret, and therefore, all remedies in Section 134.90 [Wisconsin Uniform Trade Secrets Act] are available.” *Minuteman v. Alexander*, 147 Wis. 2d 842, 844, 434 N.W. 2d 773, 774 (1989). An injunction to protect a misappropriated customer list may contain both a provision prohibiting use of the customer list and a provision prohibiting solicitation of the customers on the customer list.

A plaintiff must satisfy a four-factor test before a court may grant an injunction. *See e-Bay v. Merc Exchange, LLC.*, 547 U.S. 388, 126 Sup. Ct. 1837, 1839 (2006); *Collins v. Hamilton*, 349 F. 3d 371, 374 (7th Cir. 2003); *Hicks v. Peters*, 10 F. Supp. 2d 1003, 1004 (N.D. Ill. 1998); *Amoco Production Company v. Village of Gambell, AK*, 480 U.S. 531, 546, n12, 107 Sup.Ct. 1396, 1404 (1987); *Stenstrom Petroleum Services Group, Inc. v. Mesh*, 375 Ill. App. 3d 1077, 1089, 874 N.E. 2d 959, 970-971 (2d Dist. 2007); *Kozuch, supra*, 478 N.E. 2d at 113-14; *Nettesheim v. S.G. New Age Products, Inc.*, 285 Wis. 2d 663, 676-77, 702 N.W.2d 449, 455 (Ct. App. Wis. 2005).

C. A Provision in an Injunction Prohibiting Solicitation of Customers is Valid to Protect Against Both Dissemination of Trade Secrets and Unfair Competition

Injunctions may include both a clause prohibiting disclosure and a clause prohibiting solicitation of the customers on the customer list. Injunctions may include the solicitation prohibition even though there is no restrictive covenant or non-solicitation clause in any agreement or condition of employment between the misappropriator and the person entitled to trade secret protection.

For examples under Illinois law, see *Stampede*, *supra*, 651 N.E.2d at 212, 214, 217-18 (salesman did not sign restrictive covenants and court affirmed entry of permanent injunction for four years prohibiting the solicitation of customers on the customer list assigned to the salesman); *Elmer Miller, Inc.*, *supra*, 625 N.E.2d at 339, 341 (the defendants signed neither a confidentiality agreement nor a restrictive covenant but the court entered a preliminary injunction against the employees restraining them from “soliciting any customer of [employer] ... until final disposition hereof or further order of this Court” and from “referring to, utilizing or publishing any customer list or customer information obtained from [employer].”); *Burt Dickens*, *supra*, 494 N.E.2d at 818-19, 821, 823 (no confidential or non-competition covenant but the court held that where a trade secret exists the proper remedy in cases of misappropriation is to enjoin the former employee from using the customer list and from competing for the customers whose names are contained on the customer list; *Revcor, Inc. v. Fame, Inc.*, 85 Ill. App. 2d 350, 357, 228 N.E.2d 742, 746 (2d Dist. 1967)(if salesman has fraudulently copied or removed lists of customers from a prior employer, then, under proper circumstances the salesman might be enjoined from soliciting business from the customers of his prior employer); *Armour & Company v. United American Food Processors, Inc.*, 37 Ill. App. 3d 132, 134, 139, 345 N.E.2d 795, 797, 801 (1st Dist. 1976)(even though employee signed only a contract not to reveal confidential lists of customers, court reversed the trial court and remanded with instructions to enter an injunction for the return of the list of customers taken by the former employee and preventing certain contact with those customers).

For examples involving Indiana law, see *U. S. Land Services, Inc.*, *supra*, 826 N.E.2d at 54, 56-57, 60, 65-66, 69 (no evidence that the former employees entered enforceable non-competition agreements, but the court affirmed a preliminary injunction enjoining the employees from contacting the former employer’s customers listed in the former employer’s database); *Kozuch*, *supra*, 478 N.E.2d at 115-16 (court affirmed injunction prohibiting the misappropriating company from using the customer lists of the company entitled to protection and prohibiting the misappropriating company from advertising to the names on the customer list).

For Wisconsin examples, see *Star Direct, Inc. v. Dal Pra*, 319 Wis. 2d 274, 312, 767 N.W. 2d 898, 901, 912-13, 917 (2009)(confidentiality clause prohibiting employee from exploiting or disclosing customer information would prevent employee from engaging the employer’s customers with whom the employee had dealt); *Radiator Exp. Warehouse, Inc. v. Shie*, 708 F. Supp. 2d 762, 767, N5, 769, N9 (E.D. Wisc. 2010) (a remedy for improperly disclosed trade secrets, there customer information, always exists under the Wisconsin Trade Secrets Act independently of any breach of contract claim); *Friemuth v. Fiskars Brands, Inc.*, 681 F. Supp. 2d 985, 991 (W.D. Wis. 2010) (an injured business can bring a claim for violation of the Wisconsin Trade Secrets Act independently of any breach of contract claim); *Wausau Medical Center v. Asplant*, 182 Wis. 2d 274, 283, 514 N.W. 2d 34, 39 (Ct. App. Wis.1994) and *Farm Credit Services of North Central Wisconsin, ACA v. Wysocki*, 237 Wis. 2d 522, 530-31, 614 N.W.2d 1, 5 (Ct. App. Wis. 2000)(restrictive covenants may serve to prevent the dissemination of confidential business information necessary to the employer and may prevent unfair competition).

D. Different Rules May Govern an Injunction Clause Restricting Solicitation Than Govern Restrictive Covenants in a Contract

In *Stampede Tool Warehouse, Inc.*, *supra*, 651 N.E.2d at 214, the court affirmed the entry of an injunction prohibiting customer contact and held that the use of pre-1988 cases that involve restrictive covenants were inapplicable to the case, which did not involve a restrictive covenant, to determine whether the customer list

was a protectable trade secret under the ITSA. In *Hexacomb Corp. v. GTW Enterprises, Inc.*, 875 F. Supp. 457, 464 (N.D. Ill. 1993), the court entered an injunction and held that under Illinois law the existence of a confidential agreement is not a prerequisite to recovery for misappropriation of trade secrets, which there included customer lists, citing to *Televation Telecommunications Systems, Inc. v. Saindon, et al*, 169 Ill. App. 3d 8, 12, 522 N.E.2d 1359, 1362 (2d Dist. 1988). The court in *Televation* held that an employer has a recognized business interest in protecting trade secrets disclosed in confidence to the employee during the course of the employment even where there is no enforceable restrictive covenant between the parties.

In *Dearborn v. Everett J. Prescott, Inc.*, 486 F. Supp. 2d 802, 820 (S.D. Ind. 2007), the court indicated that in cases involving trade secret statutes and non-disclosure agreements, former employers resort to an “inevitable” disclosure theory to try to stop former employees from competing where there is no enforceable non-competition covenant, citing to *Ackerman v. Kimball Int’l, Inc.*, 652 N.E.2d 507, 510-11 (Ind. 1995). *Ackerman* affirmed an injunction entered under the Indiana trade secrets statute which prohibited employment with a competitor where the former employee had been “harvesting” the employer’s customer list proprietary information before his departure. *Id.* The injunction prohibition was much broader than the covenant not to compete contained in the former employee’s employment agreement. In *Bridgestone/Firestone, Inc. v. Lockhart*, 5 F.Supp 2d 667, 681 (S.D. Ind. 1998), the court explained that where there is clear evidence the departing employee does not intend to honor the obligation to preserve the confidentiality of trade secrets, a court may enjoin employment with a competitor for a limited period of time, at least where no less restrictive remedy appears likely to be effective, but that the broad injunctive relief granted in *Ackerman* remains the exception rather than the rule.

In *Star Direct, supra*, 767 N. W. 2d at 901, 912-13, 917, the Wisconsin Supreme Court ruled that a confidentiality clause and a non-compete clause each deal with and protect legitimate and separate interests. *Star Direct* held that the confidentiality clause in that case listed specific information deemed confidential, including “trade secrets, customer lists,” and that prohibiting the defendant from exploiting or disclosing this information was necessary for the company’s protection. The *Star Direct* court recognized that prohibiting the use of the trade secret information would basically prevent the defendant from engaging the company’s customers with whom the defendant had dealt. *Id.* In *Techworks, LLC v. Wille*, 318 Wis. 2d 488, 509, 770 N.W.2d 727, 737 (Ct. App. Wis. 2009), the Wisconsin Court of Appeals held that the confidential-information clause in an employment agreement addressed interests other than the non-compete agreement. In *Nalco Chemical Company v. Hydro Technologies, Inc.*, 984 F.2d 801, 803 (7th Cir. 1993), the Seventh Circuit held that a paragraph in a Wisconsin employment agreement concerning trade secrets is analyzed under the Wisconsin UTSA separate from a covenant not to compete.

E. Length of Time an Injunction Restricting the Use of Customer List Trade Secrets and Solicitation Can Remain in Effect

1. Provisions Of The UTSA

Section three of the ITSA provides in part:

3(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction may be terminated when the trade secret has ceased to exist, provided that the injunction may be continued for an additional reasonable period of time in appropriate circumstances for reasons including, but not limited to an elimination of the commercial advantage that otherwise would be derived from the misappropriation. ...

See 735 ILCS §1065/3(a)(West 2011); IC 24-2-3-3(a); Wis. Stats. 134.90 (3)(a) 1, 2.

The ITSA also provides that an injunction may be continued for an additional reasonable period of time for deterrence of willful and malicious misappropriation or where the trade secret ceases to exist due to the

fault of the enjoined party or others by improper means. See 765 ILCS §1065/3(a). In addition, the ITSA provides that a contractual or other duty to maintain secrecy or limit use of a trade secret shall not be deemed to be void or unenforceable solely for lack of durational or geographical limitation on the duty. See 765 ILCS § 1065/8(b)(1).

2. Case Law - Time Limits For Injunction

a. Preliminary Injunction

In *Elmer Miller, supra*, 625 N.E. 2d at 341, the court restrained the defendant employee from soliciting any customer or using any customer lists until final disposition of the case. See also *Armour & Company, supra*, 345 N.E.2d at 797, 801 (court remanded with instructions to enter injunction for return of a list of customers and preventing certain contact with those customers pending disposition on the merits); *Prentice Medical Corp. v. Todd*, 145 Ill. App. 3d 692, 699, 701, 495 N.E.2d 1044, 1049, 1051 (1st Dist. 1986)(medical corporation entitled to an injunction prohibiting former employee from using confidential patient list and solicitation of names on the list pending further hearings); *Brunswick Corporation v. Outboard Marine Corporation*, 79 Ill. 2d 475, 479, 404 N.E. 2d 205, 207 (1980)(the exact nature and duration of injunctive relief generally for trade secret violations must be tailored to fit the facts of the particular case).

In *U.S. Land Services, Inc., supra*, 826 N.E. 2d at 62, 69, the Indiana Court of Appeals affirmed a preliminary injunction prohibiting defendants from contacting plaintiff's clients until further order of court. See also, *AGS Corp., Inc. v. Product Action Intern., LLC*, 884 N.E.2d 294, 300, 302, 314 (Ct. App. Ind. 2008)(purpose of a preliminary injunction preventing use of customer lists and solicitation of customers is to prevent harm to a plaintiff pending the indeterminate amount of time needed to adjudicate the merits of the case and is effective until there is a final adjudication on the merits); *Kozuch, supra*, 478 N.E. 2d at 114-15 (preliminary injunction entered pending adjudication of case on the merits).

b. Permanent Injunction

In *Stamperde* the court reduced a permanent injunction to a four-year injunction prohibiting the solicitation of or sale to the customers on the customer list assigned to the defendants. *Stamperde, supra*, 651 N.E.2d at 214, 218. See also, *Dorel Juvenile Group, Inc. v. DiMartinis*, 495 F. 3d 500, 504 (7th Cir. 2007), and cases cited therein, where the court held as a general proposition that a trade secret injunction may be extended past the time the information becomes public in order to prevent a wrongdoer from gaining the advantage of a head start.

In *Henderson v. U. S. Bank*, 615 F. Supp 804, 811-12, N4 (E.D. Wis. 2009), the court commented that where a non-disclosure provision is designed to protect trade secrets, to include customer privacy, the lack of a time limitation on the disclosure prohibition is not fatal. In *Techworks, supra*, 770 N.W.2d at 736, N2, the court recognized that the qualities of the information might qualify it for open-ended protection, if the information is a trade secret. See also, *Nalco, supra*, 984 F.2d at 803 (no time limit required on customer information trade secret restrictions); *3M v. Pribyl*, 259 F. 3d 587, 598, 607, 609 (7th Cir. 2001) (purpose of a permanent injunction prohibiting disclosure of trade secrets in general is to protect trade secret owners from the ongoing damages caused by the future use of trade secrets, but under Wisconsin law the court should continue an injunction only for a period of time reasonable to eliminate commercial advantage which the person who misappropriated a trade secret would otherwise derive from the violation).

For customer list trade secrets, the length of time for an injunction prohibiting disclosure and solicitation of a company's customers because of misappropriation of customer information could be the period of time that would be required for independent development of the protected information, i.e., how long a diligent salesperson in the industry would require to independently develop the protected customer information. *Surgidev Corp. v. Eye Technology, Inc.*, 828 F.2d 452, 456-57 (8th Cir. 1987); *Stamperde, supra*, 651 N.E.2d

at 217-18 (Illinois court reduced permanent injunction to four years, the period within which former employees could develop their own customer list from scratch); *U.S. Land Services, Inc.*, *supra*, 826 N.E.2d at 68, N4 (Indiana court held that client contact can be prevented for period of time it would take to create the database lawfully through independent development plus additional period to eliminate commercial advantage); *3M*, *supra*, 259 F.3d at 609.

Summary

Based on the analysis of these cases, defense counsel may claim trade secret protection under the UTSA for a client's customer list if it has information sufficiently secret to give it a competitive edge and the client has taken affirmative measures to prevent others from acquiring or using the information.

If a client is entitled to trade secret protection and someone misappropriates the customer list, defense counsel may obtain an injunction under the UTSA. The injunction may contain both a provision prohibiting use and disclosure of the customer list and a provision prohibiting solicitation of the customers on the list. Defense counsel may obtain both provisions based on the misappropriation alone. This is because different rules may allow a clause in an injunction restricting solicitation based on a misappropriation than govern restrictive covenants or non-solicitation clauses in contracts.

Counsel may obtain a preliminary injunction for the indeterminate amount of time needed pending the final disposition or adjudication of the case on the merits or until further order of court. Counsel may obtain a permanent injunction for the period of time required for a diligent salesman in the industry to independently develop the customer information. In appropriate cases, the injunction can extend beyond the time the customer information becomes public in order to prevent a wrongdoer from gaining the advantage of a head start. Where the injunction prohibits only the use or nondisclosure of the customer information and not solicitation, counsel might convince a court to enter an injunction without a time limitation.

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