

# Shh! It's a Trade Secret!

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## Why Be Concerned?

- Costs \$300 billion per year.
- Trade secret cases doubled in the seven years from 1988 to 1995, doubled from 1995 to 2004, will double again by 2017.

D. Almeling, D Snyder,  
*A Statistical Analysis of Trade  
Secret Litigation in Federal  
Courts*, Gonzaga  
Law Review (3/17/2010).



## How is TUTSA Different?

- TUTSA “displaces conflicting tort ... law of this state providing civil remedies for misappropriation of trade secret.” (emphasis added).
- The “trade secret” definition under TUTSA is generally broader than the definition under the Restatement (the old TX test / *In re Bass*).



## Trade Secret Definitions Before and After

- Before:
- “[A]ny 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.”

*In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003)(applying Restatement 6 factor test).



## Trade Secret Definitions Before and After

- After TUTSA:
- “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.”

Tex. Civ. Prac. & Rem. Code § 134A.002(6).

## How is TUTSA Different?

- TUTSA removed the “continuous use” requirement.
- It accepts negative know-how, “information that has commercial value from a negative viewpoint” (what doesn’t work), as a form of trade secret.
- The old element of “there must be a substantial element of secrecy” becomes “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”
- “Proper means” includes discovery through reverse engineering “unless prohibited”

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