UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2021 Oil, Gas and Mineral Law Institute
March 25-26, 2021

Trade Secrets in the Oil and Gas Context: Litigation and Discovery Issues

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I. INTRODUCTION

The oil and gas industry has long understood the importance of confidential and proprietary information – prospect identification and leasing, geophysical data and analysis, and drilling and completion techniques, just to name a few. Similarly, Texas courts and litigants have long recognized this sensitive oil and gas data as both highly valuable and legally protectable information. Thus, it is critical for lawyers to understand the legal rules governing not only the discovery of trade secret information, but also substantive rights that their clients have in that data and their remedies when it is improperly disclosed or used.

This paper will address, at a high level, both of these aspects of trade secrets, particularly in the context of oil and gas litigation. Discovery of trade secret and proprietary information is routine in oil and gas disputes, even when the data itself is not the subject of the dispute. For example, geophysical data and reserve analysis may be relevant to a damages claim, even when the underlying cause of action is unrelated to the data itself. In other cases, the dispute is the data – for example, when one party accuses the other of misappropriating confidential information regarding leasing prospects.

On the discovery side, trade secret issues, in particular, are generally dealt with on the following superficial level: (1) X requests that Y produce data; (2) Y objects that the information is a trade secret and confidential; (3) X&Y agree on a confidentiality order, or the Court imposes one, without any further analysis. Sometimes that is proper, but in other instances understanding Texas law on the discovery of trade secrets, particularly as applied to the oil and gas sector, can have profound and case-dispositive results. Likewise, a strong command of the statute governing claims for the misappropriation of trade secrets – the Texas Uniform Trade Secrets Act ("TUTSA") – is critical if your client ever falls victim to trade secret misappropriation.

These issues present real opportunities for good lawyering. Consider the following statements, all of which are black letter law:

- Trade secret information is not merely protected by custom and practice. It is the subject of a specific rule of evidence providing that such information is legally privileged from discovery – not just entitled to a protective order, but *privileged* – unless it can be shown to be necessary to a fair adjudication.

- Thus, even relevant and material information may be exempt from discovery unless it is necessary to the fair adjudication of a claim. A confidentiality order, no matter how strongly drafted, will not entitle the discovery of trade secret information unless it is necessary for such a fair adjudication.

- Before a trial court can compel the production of trade secret information, it must be shown that the party seeking production has a viable existing claim. Thus, in certain circumstances, piercing the trade secret privilege will require the requesting party to survive a summary judgment-like procedure for which mandamus review is available.

- The Texas Uniform Trade Secrets Act empowers a claimant to enjoin the actual or projected use of its misappropriated trade secrets and creates a statutory cause of action that may preempt traditional common law claims.

This paper addresses some of these unique challenges and opportunities involved in the discovery of oil and gas trade secrets, as well as the TUTSA cause of action a client may assert to protect these secrets. The first section of this paper addresses common discovery issues in this context and provides a general overview of issues in discovering oil and gas trade secrets. The second section of this paper provides an overview of the Texas Uniform Trade Secrets Act (TUTSA) and the substantive rights and remedies available to a party that believes that its confidential information has been improperly disclosed or used.

II. DISCOVERY OF OIL AND GAS TRADE SECRETS

Proprietary data is of central importance in an enormous variety of oil and gas lawsuits. Seismic and reserve data, for example, immediately comes to mind when one thinks of bad faith pooling and drainage claims. Information concerning the analysis of various completion techniques may be relevant in a suit over whether a lessee has fulfilled its development obligations. For some types of data, particularly geophysical data, electronic discovery is both necessary and particularly challenging. There are often complex technical considerations with regard to actually viewing the data, and seismic data is often not owned by the party from whom production is sought, but rather licensed from a third party vendor. Production of the information without taking the proper precautions can create potential liability to these third parties.

Imagine that you represent a small exploration company in a lawsuit brought by a group of your lessors claiming that you failed to drill an offset well to protect them from drainage from nearby wells just off the lease. You receive the following requests for production:

> Please produce all seismic data, whether raw or processed, covering the leased premises and a one mile halo surrounding the leased premises. Include in your production all raw data, including any field tapes and notes, as well as all processed versions of the data, log files, and interpretations. Produce the information in native format where available.

And:

> Please produce all reserve studies, estimates, or analysis relating to the value of the recoverable reserves from both the leased premises and the alleged draining wells.

Predictably, when you call your client to discuss this request, the client goes ballistic. This information is extremely proprietary and sensitive, and now, the client is being asked to provide it to an adversary in litigation and, in some cases, even potential competitors. Some of the seismic data is years old, and the client no longer even has the hardware necessary to retrieve, copy or work with the data. The newer seismic data has fewer technical problems, but its production presents greater issues. It is not even owned by the client; it is simply licensed from a geophysical company and is governed by a seismic license with an iron-clad confidentiality provision and harsh liquidated damages for its violation.

Title search: Trade Secrets in the Oil and Gas Context: Litigation and Discovery Issues

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2021 Ernest E. Smith Oil, Gas, and Mineral Law eConference

First appeared as part of the conference materials for the
47th Annual Ernest E. Smith Oil, Gas and Mineral Law Institute session
"Trade Secrets in the Oil and Gas Context: Litigation and Discovery Issues"