

# High Tech Counsel Corner

Our goal in writing this column is to discuss legal issues that have real-life implications for your company. Although we seldom engage in the analysis of specific judicial decisions, the implications of a 2006 decision by the New Hampshire Supreme Court (NHSC) warrants specific discussion.

The Mortgage Specialists, Inc. v. Davey case involves the efforts of an employer to prevent the disclosure or use of information that it considered to be confidential by independent contractors (IC's) working for the employer. Three years into the engagement, the employer asked the IC's to sign a non-disclosure agreement for the first time. Rather than sign the agreement, the IC's left to work for a competitor and brought with them the employer's confidential information.

The employer sued the IC's asserting a variety of statutory and common law claims. Upon the IC's motion, the trial court dismissed all but the claim based on misappropriation of trade secrets under New Hampshire Uniform Trade Secret Act (NHUSTA). For information to be considered a "trade secret" under NH law, it must 1) be information that is economically valuable because it is not generally known, or ascertainable by others; and 2) it must be subject to reasonable efforts to maintain its secrecy.

The employer lost its NHUSTA claim because it did not take reasonable steps to protect the confidentiality of the information. The NHSC upheld the jury's verdict for the IC's and the dismissal of the other claims, concluding that the NHUSTA provides the only non-contractual remedy for these types of claims.

So what does this all mean? If information which you consider confidential and proprietary does not constitute a trade secret under the NHUSTA, or if you do not have an agreement specifically protecting that information, then you may have no legal protection for such information under New Hampshire law.

So what should you do? It is now more important than ever to protect any information which you believe provides your company with a competitive advantage by adopting a comprehensive program of protection that is consistently followed. Such a program may include marking such information as confidential, limiting access to such information on a "need to know" basis, and requiring the return of all such information upon an employee's separation from employment.

Another method of protection is to require all persons with access to the information to sign confidentiality and non-disclosure agreements. The Mortgage Specialists case confirmed that properly drafted agreements are enforceable in NH, regardless of whether the information subject to the agreement is considered a "trade secret" under the NHUSTA.

The level of protection that is appropriate will differ for each employer. We encourage you to seek advice from a knowledgeable attorney as to how you can best protect your trade secrets and confidential information.



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