Here's What You Need To Know About *Protecting* Trade Secrets

Steve Thomas

By Steve Thomas *steve.thomas@lowndes-law.com*

What do you do when a key employee leaves and you believe he/she has taken your company's trade secrets to a competitor? Or when a strategic business partner uses your trade secret information to compete against you?

The likelihood of recovering damages, or securing injunctive relief, in these scenarios will depend on the steps that were taken to identify and protect trade secret information prior to the breach. As many businesses have learned, deficiencies in your trade secret protection approach can become glaringly obvious in hindsight, and may even prevent recovery of damages or injunctive relief. This is truly a situation in which an ounce of prevention is worth a pound of cure. Failure to adequately protect trade secret information may also amount to an actionable breach of an officer's duty to the corporation.

There are two common scenarios in which trade secret information is

typically lost. The first scenario occurs when courting potential strategic partners or customers. In the rush to impress such parties, too much information may be shared too soon, sometimes even before confidentiality agreements are executed. The second scenario occurs when employees are exposed to company trade secrets unnecessarily, or without confidentiality obligations. The key in both scenarios is diligence.

The general rules are simple:

1. Never share trade secret information without enforceable confidentiality obligations.
2. Never share trade secret information unless it is absolutely necessary to do so.

Here are some key points from litigated lessons learned:

• **Not all confidentiality agreements will protect your trade secrets.** Beware of any confidentiality agreement that does not specifically address trade secrets. Trade secret information that is shared under a confidentiality agreement that expires without any following requirement for confidentiality may lose its trade secret status, making it fair game for use by anyone. All confidentiality agreements and Non-Disclosure Agreements should be reviewed by qualified counsel. Unfortunately many of these agreements are executed as a matter of course, without legal review, usually due to time pressure.

• **Identify, Protect, Monitor.** If you have never categorized your company's intellectual assets into trade secret and non-trade secret buckets, you would

...continued on page 6

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...continued from page 5

be wise to do so soon. Be deliberate about the process of identifying this information. Design steps now to keep such information secret. Key steps often include having employees execute fresh, enforceable confidentiality agreements (even as often as at each annual employee review), compartmentalizing information on password protected, encrypted servers (possibly even using non-networked computers for this purpose), and establishing access-controlled work areas in which trade secret processes are used. And what about backup files? Are they maintained in a secure manner? You may want to review those cloud backup services agreements. In some instances, trade secret processes may be divided into multiple sub-processes, with no employee having knowledge of the overall trade secret processes. In other cases the process may be easier to manage — for example, in the case in which the process is implemented in software. In such cases, the focus is on protecting the code and preventing code decompilation, even to the point of implementing critical portions of code in a separate firmware device or hard logic. Each situation is specific, requiring a specific technical approach to protection. This is where technically competent legal counsel can make a tremendous difference in creating an effective, streamlined approach to protecting valuable trade secret information.

Once the plan is in place a monitoring system should be implemented. The results of the monitoring should be reported at the executive level, along with a risk assessment that identifies any individual or entity that represents a risk. Appropriate mitigation should be implemented. These steps are not particularly expensive or time consuming, and they could make all the difference in recovering damages. There are effective statutory tools such as the federal Defense of Trade Secrets Act (DTSA) and state statutes, but these tools generally require that steps be taken to maintain the confidentiality of trade secret information in the first place.

Still, you may be asking if all this is really necessary, as you don't see your competitors talking about their trade secrets, or the steps they are taking to protect such assets. And that is precisely the point. ■

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www.lowndes-law.com

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The Fine Print

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Will Your Business Be Affected By the New California Privacy Law?

Drew Sorrell

By Drew Sorrell *drew.sorrell@lowndes-law.com*

The first communication between two computers occurred on October 29, 1969. One computer was located at UCLA and the other at Stanford. One communicated to the other "LOGIN" and it promptly crashed after receiving "LO". From this humble beginning, the Internet was born. It wasn't until the early 1980's that networks were assembled and thereby the first modern-ish version of the Internet. And, of course, the World Wide Web — websites and hyperlinks — was not invented until 1989. The law has been trying to catch up ever since.

The Internet has been revolutionary in so many ways, not the least of which is giving companies access to customers' information and chronicling everything about their digital footprint. That is why the California Consumer Privacy Act (CCPA) was created, and why all of us need to understand its implications.

What makes the CCPA, which goes into effect on January 1, 2020, so extraordinary? First, it may be the first privacy law potentially shifting ownership of a consumer's information back to the consumer. Second, it requires transparency on the part of the companies gathering the consumer information. Third, it holds companies accountable for protecting your personal information. Fourth, and perhaps most important for our readers, the CCPA may have a bigger impact than you think on Florida (or other non-California) companies.

If you operate a business that "does business" in California, either physically or on the Internet, only one of the answers to these questions needs to be "yes" for the CCPA to apply:

1. Do your annual gross revenues exceed $25,000,000?
2. Do you buy, receive, sell, or share personal information of over 50,000 California consumers or households?
3. Do you derive at least 50% of annual revenue from selling California consumers' personal information?

Notably, the California Attorney General may not bring any enforcement actions until the earlier of six months after promulgating regulations defining the law or July 1, 2020.

This law is astonishing because the current and general model in the US is that corporations own our information — with some caveats — and generally may do anything they want with it — with some caveats. The CCPA in contrast effectively places ownership and control of consumer data in the hands of the consumer. It does so by affording consumers the right to:

- Clear and understandable notice of what information is being collected and what will be done with it;
- The right to know how and to whom data is sold;
- The right to correct and indeed the right to require the corporation to delete or "forget" that information;
- Finally, consumers may not be discriminated against if they opt out of their information being sold (corporations may charge a different fee or offer a different service if the corporation can show it is reasonably related to the loss in value of the conumer's information).

But why do we care in Florida? The meaning of "operating" in California on the Internet via the World Wide Web is quite broad. Thus, if your company is reaching into California via its website to sell goods or services, you should be concerned. Moreover, from an operations perspective, can a corporation effectively provide rights to one class of consumer while not providing those same rights to another class? (Legal readers: Is it an unfair and deceptive trade practice to provide a right to one consumer and not to another?) All of the forgoing of course necessitates careful consideration of your online platform and whether it must or reasonably should comply with the CCPA.

If you have any questions or consideration, contact Drew Sorrell or any member of the Lowndes Privacy and eDiscovery Group. ■

In This Issue

If you have an address change, prefer to receive this publication electronically, or no longer wish to receive it, please email MarketingMailingList@lowndes-law.com

In the Community


Bill Dymond

Bill Dymond, CEO and President, has assumed the role of Chair of the Orlando Economic Partnership Board for the 2019-2020 term, after serving the previous term as Chair-Elect.


Jennifer Dixon

Jennifer Dixon was appointed to the Emeritus Council of the Orlando Repertory Theatre.


Alex Dobrev

Alex Dobrev was reappointed as the Vice Chair of the Florida Bar Condominium & Planned Development Committee.


Eddie Francis

Eddie Francis was appointed Secretary of the Heart of Florida United Way Board of Directors.


Julie Frey

Julie Frey was re-elected Chair of the Greater Orlando Board of the American Red Cross. Additionally, Julie was sworn in for another two-year term to The Florida Bar Board of Governors.


Jonathan Huels

Jonathan Huels was reappointed by Mayor Buddy Dyer to the Orlando Municipal Planning Board.


Gary Kaleita

Gary Kaleita was appointed to the Board of Directors of Be an Angel Therapy Dogs Ministry, Inc., a non-profit organization that participates in animal-assisted activities for many people.


Quino Martinez

Quino Martinez was appointed to the Lake Highland Preparatory School Board of Trustees.


James O'Brien

James O'Brien was re-appointed to the Candlelighters of Brevard, Inc. Board of Directors.


Tara Tedrow

Tara Tedrow was appointed Chair of the Inaugural Hemp Advisory Committee. Additionally, Tara was appointed chair of The Florida Bar Ninth Circuit Judicial Nominating Commission.


Steve Thomas

Steve Thomas was appointed as the chair of the Florida Tech College of Business Advisory Board.

Congratulations to **John Ruffier**, past chair of the Human Rights Campaign (HRC), who spoke at the 23rd annual HRC National Dinner in DC about the many advancements in the fight for LGBTQ equality.

Kudos

Bill Dymond

- Lowndes was named "Hospitality & Leisure Industry Law Firm of the Year" by *Corporate Intl Magazine*.
- The firm was named to the "2020 Best Law Firms" list by *U.S. News & World Report & Best Lawyers*.
- Lowndes was recognized as one of the "Biggest Law Firms in Florida" by *Florida Trend*.
- Lowndes was highlighted in the *Orlando Business Journal*'s Top Intellectual Property & Litigation Law Firms.
- Lowndes was recognized as a Corporate Philanthropy Award Winner by the *Orlando Business Journal*.
- Lowndes was named to the "2019 Leading Real Estate Law Firms" list by *Commercial Property Executive and Multi-Housing News*.
- **Bill Dymond**, CEO and President, was named one of Florida's Most Influential Business Leaders by *Florida Trend*.
- Congratulations to **Ronny Edwards** who graduated from Leadership Orlando.
- **Brian Lawrence** received the OCBA YLS Outstanding Committee Chair Award.
- **Melody Lynch** was awarded the E. Susan Khoury Guardian ad Litem Award of Excellence from Legal Aid Society of the Orange County Bar Association.


Ronny Edwards


Brian Lawrence


Melody Lynch

Welcome to the Firm


Keith Marlow


Isidore Okoro


Brian Smith

Keith Marlow joined the firm as Chief Operating Officer.

Isidore Okoro joined the firm as Chief Information Officer.

Brian Smith joined the firm as of counsel, focusing on eminent domain and the condemnation process, from preliminary negotiations to valuation determination to trial.


McGregor Love


Ferran Arimon


Emmett Egger


Nicole Cuccaro

We also welcomed four new associates—**McGregor Love**, **Ferran Arimon**, **Emmett Egger**, and **Nicole Cuccaro**. McGregor works in the firm's Land Use, Zoning & Environmental Group; Ferran works in the firm's Tax Group; Emmett works in the firm's Real Estate Group; and Nicole works in the firm's Real Estate Group.

Industry News Briefs

Happy New Year! Did I Miss My Chance At Opportunity Zones?


Amanda Wilson

By Amanda Wilson *amanda.wilson@lowndes-law.com*

Opportunity zones were introduced in 2017 as part of President Trump's tax reform bill. Taxpayers with capital gains can receive several tax benefits if the taxpayers take those capital gains and invest them in a qualified opportunity fund. These tax benefits include deferring recognition of the capital gains and potentially avoiding recognizing any gain on exiting the opportunity fund investment. Another benefit is that 15% of the deferred gains is excluded from recognition when the deferred gains are triggered on December 31, 2026 if the qualified opportunity fund investment has been held for at least 7 years. More simply, to receive the maximum tax benefit of an opportunity fund investment, taxpayers needed to have made the investment by December 31, 2019. This has resulted in a common misconception that an opportunity zone investment has to be made by December 31, 2019 to receive *any* tax benefit. I am happy to say that this is not the case. Investments made after 2019 will receive the tax benefits of qualified opportunity zones except that when the deferred capital gains are triggered on December 31, 2026, a taxpayer will exclude 10% (as compared to 15%) of the deferred gains if the investment has been held for at least 5 years (if less than 5 years, the capital gains will be deferred but no portion of the gains will be excluded from recognition). In other words, if you have capital gains in 2020 that you are looking to reinvest, it is not too late and qualified opportunity zones continue to be a powerful tax investment vehicle. ■

New Year, New Insurance


Mike Gibbons

By Mike Gibbons *mike.gibbons@lowndes-law.com*

Transfer of risk through insurance has become an increasingly important and complex part of construction and development in Florida. The US. Courts have shown an increased willingness to find that contractors' General Liability (GL) policies cover latent defects and warranty type claims that manifest as a construction defect causing resulting or ensuing property damage. As a result of a number of unfavorable court decisions expanding coverage on General Liability policies, insurers have become more aggressive about modifying and limiting coverage through Endorsements issued to General Liability policies. These Endorsements frequently refer to contract terms in the underlying construction contract. Essentially, under such Endorsements, if the underlying construction contract doesn't have the "magic language" required in the Endorsement, then coverage will be lost or reduced from the optimum level expected by the Owner additional insured.

By way of example, many GL Endorsements now provide that if the underlying contract does not contain a term stating that the additional insurance is primary and non-contributory, then the contractors' GL insurance is considered excess and will not apply to provide a defense and indemnity for the additional insured until the additional insured's own coverage is exhausted. This frequently operates to frustrate the coverage expectations of both Owners and General Contractors who require others to name them as an additional insured. There are other similar insurer mandated contract terms that pose significant traps for the unwary additional insured in the construction world. If you have not had your construction related insurance provisions reviewed recently, the New Year is a good time to have us make sure your contract language is properly aligned with your expectations for insurance. ■

Medicare Will Affect Senior Housing Communities


John Ruffier

By John Ruffier *john.ruffier@lowndes-law.com*

Since the 1970s, Medicare beneficiaries have had the ability to receive Medicare benefits through private health plans (mainly Health Maintenance Organizations) as an alternative to the traditional Medicare program administered by the federal government. The Medicare Modernization Act of 2003 updated the program's name to its current moniker: "Medicare Advantage."

While the majority of people on Medicare remain in the traditional, government-run program, as of 2017 roughly 1/3 of those receiving Medicare (totaling 19 million people) were enrolled in Medicare Advantage plans. Further, Medicare Advantage plan enrollment is growing rapidly, with a tripling of Medicare Advantage participants in the 12 years between 2004 and 2017.

In April 2018, the Centers for Medicare & Medicaid Services finalized a policy allowing Medicare Advantage plans to cover certain non-skilled in-home care as supplemental benefits, paving the way for Medicare Advantage to become a payer for senior living services. In the wake of this policy change, several insurers that offer Medicare Advantage plans expressed a willingness to work more closely with senior living providers — including Anthem and Humana.

Ultimately, the benefit to senior housing owners and operators is still unclear as this new benefit rolls out, but a recent article in Senior Housing News suggests a surprising possible consequence: the entry of insurance companies into the senior housing sector in order to offer Medicare Advantage directly to customers. While only time will tell if such a tectonic change will occur, there is no doubt that the change to rules governing Medicare Advantage will affect senior housing communities. ■

Industry News Briefs

The Multi-family Sector Ends With a Bang In 2019


Alex Dobrev

By Alex Dobrev *alex.dobrev@lowndes-law.com*

The multifamily sector had another very strong year in 2019, with approximately 300,000 new apartment units delivered nationwide, which puts the year at or near the top of the current cycle. While 2020 is expected to be comparable in terms of deliveries, the overall demand and some leading indicators (such as permits for new construction) are expected to taper off. There is some concern that multifamily valuations and rent growth are unsustainable at their current levels, as they have far outpaced income growth in the populations they serve.

The "new construction" condominium market in Florida has remained largely tepid during this cycle, with the exception of certain pockets popular with foreign cash buyers, as well as the super-luxury (millions of dollars per unit) type product. While in prior cycles condominium conversions have served as exit strategies for peak-valuation multifamily properties, it is unclear (and unlikely) that we will see much of that this cycle.

As we look towards 2020, all stakeholders should keep an eye on the Florida Legislature, which meets early (staring in January) due to the election, and is expected to take up a number of initiatives which may affect the multifamily and condo/HOA sectors. Stay tuned for more on this front from us as the legislative session gets into full gear. ■

I Need Licenses?


Jon Gibbs

By Jon Gibbs *jon.gibbs@lowndes-law.com*

Businesses of all types make great efforts to enhance the consumer experience by providing entertainment in the nature of radio or television. What is generally intended to be a value-add for customers can actually be copyright infringement.

Music is generally protected by copyright. Composers of music also hold the right to the public performance of their works. Because it is difficult to individually monitor use of compositions, performing rights organizations (PROs) such as ASCAP, BMI, GMR, and SESAC, represent composers to police and license public use. While a composer may generally only be affiliated with one PRO, not all composers are signed to the same PRO, and some compositions require the license of more than one PRO.

If a business is displaying a television or playing music (via radio, internet, or even TV) in its establishment — even if it is paying for the signal, stream, or other content — the general rule is that a license is required as it is often considered a public performance. Note that a PRO can only license the works contained in the music catalog that it manages and no PRO has rights to license ALL music. Accordingly, a license may be needed from each of the relevant PROs.

There is some good news in that there are certain exceptions to the general rule requiring licensure, but the exceptions are very limited in application and require an analysis of the type of business, the square footage, the number of speakers and/or TVs being used. Sometimes a quick call to an attorney with knowledge in music licensing is all that is needed to determine whether there may be an exception.

If approached by a PRO seeking a license, the PRO should not be ignored. Avoiding a PRO could lead to legal action and adverse consequences could result. Statutory damages as well as attorney's fees and costs for the PRO are all a real danger. ■