

DETERMINING WHAT CONSTITUTES A TRADE SECRET UNDER THE NEW TEXAS UNIFORM TRADE SECRETS ACT (TUTSA)

*Michelle Evans**

I. INTRODUCTION.....	469
II. BACKGROUND OF THE RESTATEMENT OF TORTS FACTORS.....	470
III. THE TUTSA DEFINITION OF A TRADE SECRET.....	472
IV. IT IS PERMISSIBLE TO USE THE RESTATEMENT OF TORTS FACTORS AS PERSUASIVE AUTHORITY.....	475
V. A COMPARISON OF THE TUTSA DEFINITION AND THE RESTATEMENT OF TORTS FACTORS.....	477
A. <i>The Information Must Have Independent Economic Value, Actual or Potential</i>	479
B. <i>The Information Must Not Be Generally Known to Other Persons</i>	480
C. <i>The Information Must Not Be Readily Ascertainable by Proper Means</i>	483
D. <i>The Information Must Be the Subject of Reasonable Efforts to Maintain Its Secrecy</i>	485
VI. CONCLUSION.....	486

I. INTRODUCTION

On September 1, 2013, Texas’s modified version of the Uniform Trade Secrets Act (TUTSA) became effective.¹ Unfortunately, however, Texas attorneys and their business clients may be wondering what exactly constitutes a trade secret under the new TUTSA because its definition of a trade secret is different from the prior law.² While one may assume that trade secret protection will continue to exist for those items properly protected under the prior law, there is no express grandfather clause to that effect.³ In addition, the new definition is complex, making it difficult to determine at first glance what type of information falls within the subparts of the definition.⁴ Furthermore, there is no guidance from the new statute, and limited guidance from the uniform statute on which it is based, that can aid full interpretation of the multi-

* J.D., Assistant Professor of Legal Studies, Texas State University.

1. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 134A.001–.008 (West Supp. 2013).

2. See *infra* Part II.

3. See CIV. PRAC. & REM. §§ 134A.001–.008.

4. See CIV. PRAC. & REM. § 134A.002.

component definition.⁵ Moreover, it is unclear which state's law Texas courts will rely upon for persuasive authority when called to interpret the definition.⁶ These issues are compounded by the fact that court interpretation of the new law will be delayed to some extent because the old law will still be applied to all acts of misappropriation that occurred before the new statute and for all continuing acts.⁷ This delay could be extensive.⁸

It is therefore proposed that Texas attorneys continue to use the comment b factors of the Restatement of Torts, sometimes referred to as the *In re Bass* factors, as a guide to determine what constitutes a trade secret under the TUTSA.⁹ This proposal is consistent with Texas statutory law as well as with case law from other states that continue to use the Restatement of Torts factors to interpret their versions of the Uniform Trade Secrets Act (UTSA).¹⁰ Such an approach will be a helpful starting point for Texas attorneys to use when advising business clients as well as when arguing before Texas courts. The approach will provide consistency to both business clients and courts as the new law is applied.

In support of this proposal, Part II of this Article will provide background information on the Restatement of Torts factors.¹¹ Next, Part III will look at the TUTSA definition for a trade secret in more detail.¹² Then, Part IV will provide preliminary support for the continued use of the Restatement of Torts factors as a guide to determine what constitutes a trade secret under the TUTSA.¹³ And last, Part V will present a comparison of the TUTSA definition with the Restatement of Torts factors, along with representative case law as further support for the continued use of the factors under TUTSA.¹⁴

II. BACKGROUND OF THE RESTATEMENT OF TORTS FACTORS

Texas was one of the last states to adopt a version of the UTSA.¹⁵ Prior to that time, Texas followed a common law approach based upon the Restatement of Torts for determining trade secret status.¹⁶ Texas courts first recognized the

5. See CIV. PRAC. & REM. §§ 134A.001–.008; UNIF. TRADE SECRETS ACT §§ 1–12 (amended 1985), 14 U.L.A. 535–59 (2005).

6. See CIV. PRAC. & REM. § 134A.008.

7. See Texas Uniform Trade Secrets Act, 83d Leg., R.S., ch. 10, § 1, 2013 Tex. Sess. Law Serv. 12 (West) (to be codified at CIV. PRAC. & REM. § 134A).

8. See CIV. PRAC. & REM. § 16.010(a) (West 2002) (requiring a plaintiff to bring suit under the old law “not later than three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered”).

9. See *infra* Part II.

10. See *infra* Parts IV–V.

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part V.

15. See UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 538–44 (2005 & Supp. 2013) (listing statutory citations for states that have adopted the Uniform Trade Secrets Act).

16. See, e.g., *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 769–70 (Tex. 1958).

Restatement of Torts definition of trade secrets in 1958 with the Texas Supreme Court's decision in *Hyde Corp. v. Huffines*.¹⁷ According to this definition:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article.¹⁸

Unfortunately, however, the *Hyde Corp.* case did not provide much guidance on what specifically constituted a trade secret under this definition; therefore, interpretation for future cases had to be made on a case-by-case basis.¹⁹ Needless to say, determining trade secret status using this scheme was unpredictable, but it continued for forty-five years.²⁰ In 2003, however, case law in the trade secret area started to become more predictable with the Texas Supreme Court's decision in *In re Bass*.²¹

In *Bass*, the Texas Supreme Court introduced six factors from comment b of the Restatement of Torts that could be used to determine if a trade secret existed.²² These factors are:

(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of the measures taken . . . to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended . . . in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.²³

Texas courts, unlike those of many other states, used these factors as a guide, but did not require a showing of all six factors to have trade secret status.²⁴

17. *Id.*

18. *Id.* at 776 (quoting *Extrin Foods, Inc. v. Leighton*, 115 N.Y.S.2d 429, 433 (N.Y. App. Div. 1952)) (internal quotation marks omitted).

19. See generally Michelle Evans, *What Constitutes a Trade Secret in Texas?*, 23 S. L.J. 99 (2013) (providing further discussion of cases decided during this time period).

20. See *id.* at 102–10.

21. See *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003).

22. See *id.*

23. *Id.* (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939)).

24. See, e.g., *id.* at 740; *Sharma v. Vinmar Int'l, Ltd.*, 231 S.W.3d 405, 425 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 635 (Tex. App.—Fort Worth

After the *Bass* decision, the factors were regularly used by courts in their trade secret discussions.²⁵ With the use of these factors, the courts' analyses became more predictable. The majority of Texas courts that discussed the factors held in favor of the business owner and granted protection of the information in question as a trade secret.²⁶ Only a small number of federal cases applying Texas law have discussed the factors, but the majority have found in favor of the business owner.²⁷ This level of predictability is necessary for business owners attempting to protect information as a trade secret, as well as for the attorneys advising them. It is therefore proposed that the comment b factors from the Restatement of Torts continue to be used as a guide to determining trade secret status under the TUTSA.²⁸

III. THE TUTSA DEFINITION OF A TRADE SECRET

Before turning to the support for this proposal, it is important to first look at the definition of a trade secret under the new statute. The new TUTSA defines a trade secret as:

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.²⁹

One thing missing from this statute is a grandfather clause that allows trade secrets under the Restatement of Torts to be considered trade secrets

2007, pet. denied). *But see* Wal-Mart Stores, Inc. v. P.O. Mkt., Inc., 66 S.W.3d 620, 630 (Ark. 2002) (requiring satisfaction of all six factors even when applied to the new uniform statute).

25. *See Bass*, 113 S.W.3d at 739; *see, e.g., Sharma*, 231 S.W.3d at 425; *Astoria Indus. of Iowa, Inc.*, 223 S.W.3d at 635.

26. *See, e.g., In re Union Pac. R.R.*, 294 S.W.3d 589, 592 (Tex. 2009); *Bass*, 113 S.W.3d at 739; *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 915 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *INEOS Grp. Ltd. v. Chevron Phillips Chem. Co.*, 312 S.W.3d 843, 848–49 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 370 (Tex. App.—Dallas 2009, pet. denied); *In re XTO Res. I, LP*, 248 S.W.3d 898, 901 (Tex. App.—Fort Worth 2008, no pet.); *Global Water Grp., Inc. v. Atchley*, 244 S.W.3d 924, 928 (Tex. App.—Dallas 2008, pet. denied); *Sharma*, 231 S.W.3d at 424; *Astoria Indus. of Iowa, Inc.*, 223 S.W.3d at 634–35; *Sands v. Estate of Buys*, 160 S.W.3d 684, 687–88 (Tex. App.—Fort Worth 2005, no pet.); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 197–98 (Tex. App.—Fort Worth 2005, no pet.); *Mabrey v. Sandstream, Inc.*, 124 S.W.3d 302, 310 (Tex. App.—Fort Worth 2003, no pet.); *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 858 (Tex. App.—Fort Worth 2003, no pet.).

27. *See, e.g., Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 150 (5th Cir. 2004); *Alliantgroup, L.P. v. Feingold*, 803 F. Supp. 2d 610, 626 (S.D. Tex. 2011); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 661 (S.D. Tex. 2010).

28. *See supra* notes 21–27 and accompanying text.

29. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6) (West Supp. 2013).

under the TUTSA.³⁰ It has, however, been suggested by other courts that where the Restatement of Torts presents a narrower view, the UTSA preempts the definition.³¹ Because the UTSA is considered broader, it should not be as difficult for a business owner to establish trade secret status under the new TUTSA.³² Therefore, if a business owner is able to satisfy the Restatement of Torts' definition for a trade secret, then protection should still exist under the new TUTSA.

Another noticeable difference in the TUTSA definition, as well as that of the UTSA, is the removal of the "continuous use" requirement that was seen in the Restatement of Torts' definition.³³ This removal broadens the trade secret definition, allowing for protection of information that has never been used.³⁴ The comments to § 1 of the UTSA confirm that the definition permits protection for "information that has commercial value from a negative viewpoint," e.g., information that something does not work.³⁵ In short, the statute recognizes that "[k]nowing what not to do often leads automatically to knowing what to do."³⁶ This is an important extension to Texas trade secret law.

In addition, the TUTSA definition is slightly different from the UTSA.³⁷ Specifically, the TUTSA adds "financial data" and a "list of actual or potential customers or suppliers" to the list of potentially protectable items.³⁸ The inclusion of "financial data" to the list is not exclusive to Texas, but has been incorporated into the respective UTSA statutes for Colorado, Georgia, Illinois, Ohio, and Tennessee.³⁹ Protection for customer lists has been incorporated into

30. *See id.* The TUTSA definition differs from the definition in *Hyde Corp. v. Huffines*, a case in which the trade secret gave the owner an opportunity to gain a competitive advantage over another business. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). Because the TUTSA definition requires different factors, information previously classified as a trade secret may or may not be classified in the same way under the new statute. *See* CIV. PRAC. & REM. § 134A.002(6); *Hyde Corp.*, 314 S.W.2d at 776.

31. *See, e.g.*, *Bond v. Polycycle, Inc.*, 732 A.2d 970, 974 (Md. Ct. Spec. App. 1999); *Optic Graphics, Inc. v. Agee*, 591 A.2d 578, 585 (Md. Ct. Spec. App. 1991).

32. *See* BYRON F. EGAN, LEGISLATIVE UPDATE: BUSINESS LAW 23 (2013), available at www.jdsupra.com/legalnews/legislative-update-business-law-45558/ (stating that TUTSA results in a larger class of protected trade secrets).

33. *See id.*

34. *See id.* at 23 n.142.

35. UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 538 (2005).

36. *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1203 (5th Cir. 1986).

37. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6) (West Supp. 2013); UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 538 (2005). Under the Uniform Trade Secrets Act, a trade secret is defined as

information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) 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 (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

See UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 538 (2005).

38. *See* CIV. PRAC. & REM. § 134A.002(6).

39. *See* COLO. REV. STAT. ANN. § 7-74-102(4) (West 2013) (stating "financial information" instead of "financial data"); GA. CODE ANN. § 10-1-761(4) (West 2013); 765 ILL. COMP. STAT. ANN. 1065/2(d) (West

other states' definitions as well; Colorado, Connecticut, Georgia, Illinois, Ohio, Oregon, and Pennsylvania all have provisions that can be used to protect customer lists.⁴⁰ There is also support for this addition from the old Restatement of Torts' definition, as well as from the *Bass* line of cases.⁴¹ Protection for supplier lists, on the other hand, is uncommon. Only Colorado, Georgia, Illinois, and Ohio have definitions that can be used to protect supplier lists.⁴² However, support for protection of supplier lists is found in Texas case law.⁴³ It is interesting to note that the full list of potentially protectable items indicated in the Texas statute is unlike any other state's definition.⁴⁴ Aside from these modifications, the requirements under parts (A) and (B) of the TUTSA definition follow the language used in the UTSA.⁴⁵

While adherence to the crucial components of the uniform statute gives Texas courts a starting place for interpreting the statute on a case-by-case basis, there is no clear guideline that business owners can immediately use to ensure their information constitutes a trade secret under the new TUTSA.⁴⁶ The complexity of the definition itself means that there will likely need to be court interpretation in every trade secret misappropriation case.⁴⁷ Until Texas courts interpret the new statute, it will be difficult for Texas business owners to know what is necessary to protect their information as a trade secret. The comments to the UTSA offer some guidance, but, unfortunately, the comments are limited.⁴⁸ In addition, Texas courts, when called upon to interpret the TUTSA, can use persuasive authority from those states that kept the two requirements under (A) and (B) of the trade secret definition unchanged.⁴⁹ But until Texas courts start using this persuasive authority, there is no way to determine which

2009); OHIO REV. CODE ANN. § 1333.61(D) (West 2004) (stating "financial information" instead of "financial data"); TENN. CODE ANN. § 47-25-1702(4) (West 2013).

40. See COLO. REV. STAT. ANN. § 7-74-102(4); CONN. GEN. STAT. ANN. § 35-51(d) (West Supp. 2005); GA. CODE ANN. § 10-1-761(4); 765 ILL. COMP. STAT. ANN. 1065/2(d); OHIO REV. CODE ANN. § 1333.61(D); OR. REV. STAT. ANN. § 646.461(4) (West 2013); 12 PA. CONS. STAT. ANN. § 5302 (West 2013).

41. See, e.g., *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 372 (Tex. App.—Dallas 2009, pet. denied).

42. See COLO. REV. STAT. ANN. § 7-74-102(4); GA. CODE ANN. § 10-1-761(4); 765 ILL. COMP. STAT. ANN. 1065/2(d); OHIO REV. CODE ANN. § 1333.61(D).

43. See, e.g., *John Paul Mitchell Sys. v. Randalls Food Mkts., Inc.*, 17 S.W.3d 721, 738 (Tex. App.—Austin 2000, pet. denied) (using the Restatement of Torts' factors to establish trade secret status for the plaintiff's list of suppliers). Even though the Restatement of Torts' factors were formally adopted into Texas law in 2003, the factors were suggested in a concurring opinion by Justice Doggett in 1992. See *Chapa v. Garcia*, 848 S.W.2d 667, 670 (Tex. 1992) (Doggett, J., concurring).

44. See sources cited *supra* notes 37–43. The list of protectable items found in the TUTSA does appear similar to the Illinois UTSA. See 765 ILL. COMP. STAT. ANN. 1065/2(d).

45. See TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6) (West Supp. 2013); UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 (2005).

46. See CIV. PRAC. & REM. § 134A.002(6); UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 (2005).

47. See CIV. PRAC. & REM. § 134A.002(6).

48. UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 cmt. (2005).

49. See sources cited *supra* note 39.

state's law Texas courts will rely upon, as the majority of the states left these portions intact.⁵⁰ Furthermore, time is a factor.⁵¹ It is expected that court interpretation of the new TUTSA definition will be delayed to some extent because the old law will still be applied to all acts of misappropriation that occurred before the new statute and for all continuing acts.⁵² This could be a minimum of three years, but could be longer because, under the discovery rule, misappropriation claims must be brought no later than three years from the time the misappropriations are discovered.⁵³ With this degree of uncertainty, business owners need some type of guideline that can be used to determine whether their information still constitutes a trade secret.

IV. IT IS PERMISSIBLE TO USE THE RESTATEMENT OF TORTS FACTORS AS PERSUASIVE AUTHORITY

Because of this lack of clarity in the new statute, Texas attorneys and their business clients may tend to fall back on the comment b factors from the Restatement of Torts because they offer a useful checklist for planning purposes.⁵⁴ Therefore, it would be helpful if Texas courts included the comment b factors in their analyses under the TUTSA to support this approach.⁵⁵ Unfortunately, the TUTSA makes it clear that the comment b factors, used to simplify the analysis under the Restatement of Torts, are no longer primary, binding authority.⁵⁶ Specifically, the law provides that it “displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.”⁵⁷

What may not be immediately clear from the statute, and what will be imperative to argue before the courts, is that this provision does not prevent Texas courts from using the comment b factors from the Restatement of Torts as a guide to interpretation as persuasive authority.⁵⁸ While some might argue that the statute must be ambiguous before the court can apply the factors,⁵⁹ the

50. See sources cited *supra* note 39.

51. See CIV. PRAC. & REM. § 16.010(a) (West 2002).

52. Texas Uniform Trade Secrets Act, 83d Leg., R.S., ch. 10, § 1, 2013 Tex. Sess. Law Serv. 12 (West) (to be codified at CIV. PRAC. & REM. § 134A).

53. See CIV. PRAC. & REM. § 16.010(a).

54. See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

55. See CIV. PRAC. & REM. § 134A.002(6); RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

56. See *Minuteman, Inc. v. Alexander*, 434 N.W.2d 773, 777 (Wis. 1989) (pointing out that the court's common law decision that applied the Restatement of Torts' factors was no longer the legal standard).

57. CIV. PRAC. & REM. § 134A.007(a); see also John T. Cross, *UTSA Displacement of Other State Law Claims*, 33 HAMLIN L. REV. 445, 469 (2010) (discussing two competing views of the meaning of this UTSA provision).

58. See, e.g., *Minuteman, Inc.*, 434 N.W.2d at 778 (concluding that the Restatement of Torts' factors provide “helpful guidance” to determine what constitutes a trade secret under the UTSA definition).

59. See, e.g., *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 915, 919 (Ind. 1993) (finding that the phrase “not being readily ascertainable” was too ambiguous to justify judicial construction and concluding that the sixth factor of the Restatement of Torts could aid interpretation); Charles R. Reeves, *Survey of Indiana Trade*

Texas Code Construction Act in fact permits a Texas court to consider the common law during statutory construction, regardless of whether the statute is considered ambiguous.⁶⁰ This common law could include not only the comment b factors from the Restatement of Torts, but also the *Bass* line of cases.⁶¹

The consequences of this approach are consistent with the state's intention in enacting new statutes to ensure a "just and reasonable result," as well as to favor the public interest of judicial efficiency.⁶² Specifically, construing the TUTSA definition in light of the Restatement of Torts factors should keep the number of lawsuits determining trade secret status to a minimum because business owners would be able to continue using these factors as a checklist to adequately protect their trade secrets.⁶³ This approach would also provide the court with a systematic method of analysis for those cases that proceed to trial, which was commonly seen in the *Bass* line of cases.⁶⁴ It will be up to the individual courts to determine how many factors to review for trade secret status, but having a starting point should improve judicial efficiency.

This proposal is also not inconsistent with the plain language of the TUTSA, which provides that the law be "construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it."⁶⁵ In fact, a review of other UTSA jurisdictions revealed at least twelve other states—Arizona, Arkansas, Colorado, Idaho, Illinois, Indiana, Maryland, Missouri, Ohio, Oklahoma, Utah, and Wisconsin—that continue to use the comment b factors from the Restatement of Torts as a guide even after adoption of their respective UTSA versions.⁶⁶ These cases

Secret Law: UTSA Survives an Eleventh-Year Scare, 27 IND. L. REV. 1193, 1195 (1994) (reviewing *Amoco Production Co. v. Laird*).

60. See TEX. GOV'T CODE ANN. § 311.023(4) (West 2013); see generally Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 351–52 (2012) (discussing statutory construction in Texas).

61. See Beal, *supra* note 60, at 346–48.

62. GOV'T §§ 311.021(3), (5) (2013), 311.023(5).

63. See *Minuteman, Inc.*, 434 N.W.2d at 777.

64. See, e.g., *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003) (showing how the Restatement's six factors provide a system for analysis).

65. TEX. CIV. PRAC. & REM. CODE ANN. § 134A.008 (West Supp. 2013).

66. See *Enter. Leasing Co. of Phx. v. Ehmke*, 3 P.3d 1064, 1068–69 (Ariz. Ct. App. 1999); *Tyson Foods, Inc. v. ConAgra, Inc.* 79 S.W.3d 326, 331–32 (Ark. 2002); *Network Telecomms., Inc. v. Boor-Crepeau*, 790 P.2d 901, 903 (Colo. App. 1990); *Wesco Autobody Supply, Inc. v. Ernest*, 243 P.3d 1069, 1085–86 (Idaho 2010); *Bond v. Polycycle, Inc.*, 732 A.2d 970, 974–75 (Md. Ct. Spec. App. 1999); *Al Minor & Assoc., Inc. v. Martin*, 881 N.E.2d 850, 852 (Ohio 2008); *USA Power, L.L.C. v. Pacificorp*, 235 P.3d 749, 760 (Utah 2010); *Minuteman, Inc.*, 434 N.W.2d at 778–79; Richard J. Cipolla, Jr., *A Practitioner's Guide to Oklahoma Trade Secrets Law, Past, Present, and Future: The Uniform Trade Secrets Act*, 27 TULSA L.J. 137, 143 (1991); see generally Milton E. Babirak, Jr., *The Maryland Uniform Trade Secrets Act: A Critical Summary of the Act and Case Law*, 31 U. BALT. L. REV. 181 (2002); Cipolla, *supra*, at 778–79; Robert W. Kiesnowski, Jr., *Trade Secrets, Duties of Confidentiality, and Misappropriation Claims Under the Colorado Uniform Trade Secrets Act*, 37 COLO. LAW. 81 (2008) (discussing the UTSA statutes for Maryland, Arkansas, Oklahoma, and Colorado); Brandon B. Cate, Case Note, *Saforo & Associates, Inc. v. Porocel Corp.: The Failure of the Uniform Trade Secrets Act to Clarify the Doubtful and Confused Status of Common Law Trade Secret Principles*, 53 ARK. L. REV. 687 (2000).

generally mention the usefulness of the factors.⁶⁷ But several of them also include a detailed analysis of each of the factors within the decision.⁶⁸ If the general purpose under the TUTSA is to strive toward uniformity, this persuasive authority may be helpful to Texas courts when interpreting the new statute.

V. A COMPARISON OF THE TUTSA DEFINITION AND THE RESTATEMENT OF TORTS FACTORS

In addition to the primary authority granted by Texas law and persuasive authority from other UTSA jurisdictions, there is a correlation between the TUTSA definition and the Restatement of Torts factors that supports the continued use of the factors as a guide for determining trade secret status in Texas.⁶⁹ For ease of analysis, the two major requirements for trade secret status under the TUTSA have been broken down into four parts.⁷⁰ These four parts provide that the information (1) must have independent economic value, actual or potential; (2) must not be generally known to other persons who would benefit from it; (3) must not be readily ascertainable by proper means; and (4) must be the subject of reasonable efforts to maintain its secrecy.⁷¹ Each of the six factors of the Restatement of Torts can be applied to this definition according to Table 1.⁷²

67. See, e.g., *Ehmke*, 3 P.3d at 1069; *Boor-Crepeau*, 790 P.2d at 903; *Al Minor & Assoc., Inc.*, 881 N.E.2d at 853; *U.S.A. Power, L.L.C.*, 235 P.3d at 760; *CDC Restoration & Constr., LC v. Tradesmen Contractors, LLC*, 274 P.3d 317, 324 (Utah Ct. App. 2012).

68. See, e.g., *Tyson Foods, Inc.*, 79 S.W.3d at 337; *Bond*, 732 A.2d at 974.

69. See *infra* TABLE 1.

70. Ramon A. Klitzke, *The Uniform Trade Secrets Act*, 64 MARQ. L. REV. 277, 285 (1980) (discussing three factors to the UTSA definition, including that the trade secret “(1) be information, (2) have actual or potential ‘independent economic value’ stemming from its secrecy and (3) have been the object of reasonable efforts designed to maintain its secrecy”).

71. See TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002 (West Supp. 2013). At least one court has suggested that each of the Restatement of Torts factors is used to determine whether information is generally known or readily ascertainable under the UTSA. See *Wesco Autobody Supply, Inc.*, 243 P.3d at 1086.

72. *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003); see CIV. PRAC. & REM. § 134A.002; RESTATEMENT (FIRST) OF TORTS § 757 (1939).

TABLE 1:⁷³

TUTSA	Restatement of Torts Factors
(1) Must have “independent economic value, actual or potential”	Factor 4: the “value of the information [to the business] and to [its] competitors”
(2) Must not be “generally known to . . . other persons”	Factor 1: “the extent to which the information is known outside of [the] business” Factor 2: “the extent to which it is known by employees and others involved in [the] business”
(3) Must not be “readily ascertainable by proper means”	Factor 5: “the amount of effort or money expended . . . in developing the information” Factor 6: “the ease or difficulty with which the information could be properly acquired or duplicated by others”
(4) Must be the subject of reasonable efforts “to maintain its secrecy”	Factor 3: “the extent of the measures taken . . . to guard the secrecy of the information”

This correlation between the Restatement of Torts factors and the TUTSA definition’s components also supports the argument that Texas courts could continue to use the existing *Bass* line of cases as persuasive authority to interpret the new definition.⁷⁴ There may be instances in which it is useful to utilize Texas case law prior to *Bass*, but this Article will only focus on the *Bass* line of cases.⁷⁵ The *Bass* line of cases appears to be consistent with the new TUTSA definition, as well as with those jurisdictions that continue to use the Restatement of Torts factors to construe their respective UTSA definitions.⁷⁶ This Article will review each of the TUTSA definition’s requirements below, along with their respective cases.⁷⁷

73. The text in Table 1 organizes the text of the TUTSA factors and the Restatement of Torts factors, which are quoted in full *supra* notes 29 and 23, respectively.

74. TEX. GOV’T CODE ANN. § 311.023(4) (West 2013); *Bass*, 113 S.W.3d at 735; *see supra* Part II.

75. *See* Ctr. for Econ. Justice v. Am. Ins. Ass’n, 39 S.W.3d 337, 344–45 (Tex. App.—Austin 2001, no pet.) (the court cited *Randalls Food’s* analysis, which relied on Justice Doggett’s concurring opinion in *Chapa*; the court concluded that the parties stipulated to four factors, the remaining factors favoring the trade secret owner (citing *John Paul Mitchell Sys. v. Randalls Food Mkts., Inc.*, 17 S.W.3d 721, 738 (Tex. App.—Austin 2000, pet. denied))); *see generally* *Randalls Food Mkts., Inc.*, 17 S.W.3d at 738 (relying on Justice Doggett’s concurring opinion from *Chapa v. Garcia*, the court found the plaintiff’s list of suppliers met all six factors to establish trade secret status in that there were a restricted number of individuals with access to the list; the list took time and money to develop; the list had value because it enabled the company to obtain products to sell to retail outlets; many of the plaintiff’s competitors would be eager to compete; and the information could not be readily obtained or duplicated).

76. *See supra* Part II.

77. *See infra* Part V.

A. The Information Must Have Independent Economic Value, Actual or Potential

The TUTSA definition's first requirement is that the information alleged to be a trade secret must have "independent economic value, actual or potential."⁷⁸ The TUTSA's actual economic value requirement is similar to that of the Restatement of Torts' fourth factor.⁷⁹ Under either application, the trade secret owner must have some idea of the information's value to establish trade secret status.⁸⁰ Prior to the TUTSA's enactment, Texas courts, interpreting the Restatement of Torts definition for trade secrets, indicated several ways for companies to value their trade secrets.⁸¹ First, a company could show the information was valuable to itself, its competitors, or both.⁸² Furthermore, the trade secret owner could show a direct⁸³ or an indirect monetary amount to establish the information's value.⁸⁴ Successful indirect monetary amounts might be in the form of company profit derived from the information,⁸⁵ salary and contract dollars paid for the information's development,⁸⁶ or value of the company's market.⁸⁷ Courts would, however, deny trade secret status on this factor where the business owner was unable to produce any evidence of value.⁸⁸

The *Bass* line of cases does not appear to be inconsistent with the new TUTSA's general purpose regarding actual economic value, and could provide

78. TEX. CIV. PRAC. & REM. ANN. § 134A.002(6)(A) (West Supp. 2013).

79. *Id.*

80. See generally R. Mark Halligan & Richard F. Weyand, *The Economic Valuation of Trade Secret Assets*, J. INTERNET L., Feb. 2006, at 19 (discussing property valuation methods).

81. See *infra* notes 81–86 and accompanying text.

82. See *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 917 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (finding documents the company sought to produce were valuable to both the company and its competitors); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 370–72 (Tex. App.—Dallas 2009, pet. denied) (concluding that if competitors obtained the customer list, the plaintiff would be severely harmed); *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 635–38 (Tex. App.—Fort Worth 2007, pet. denied) (finding the drawings were valuable to both the plaintiff and the defendant); *Ctr. for Econ. Justice v. Am. Ins. Ass'n*, 39 S.W.3d 337, 345–46 (Tex. App.—Austin 2001, no pet.) (finding reports were valuable to the competitor).

83. See *In re Bass*, 113 S.W.3d 735, 742 (Tex. 2003) (finding the data's monetary value between \$800,000 and \$2.2 million was sufficient to satisfy the value requirement).

84. See, e.g., *In re XTO Res. I, LP*, 248 S.W.3d 898, 903 (Tex. App.—Fort Worth 2008, no pet.) (showing thirty-one people in the department had a collective annual salary of \$2 million, and the company paid hundreds of thousands of dollars to consultants to develop the information); *Sharma v. Vinmar Int'l, Ltd.*, 231 S.W.3d 405, 425 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (showing the replacement blade market of which the plaintiff was a part was worth approximately \$12 million each year). *But see* *Global Water Grp., Inc. v. Atchley*, 244 S.W.3d 924, 929 (Tex. App.—Dallas 2008, pet. denied) (finding appellant failed to provide any evidence that the formula was valuable or that it gave appellant a competitive advantage).

85. See *Sharma*, 231 S.W.3d at 425 (showing the market earned the plaintiff a \$5.5 million profit in the first five months of 2005).

86. See *XTO Res. I, LP*, 248 S.W.3d at 902–04.

87. See *IAC, Ltd. V. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 198 (Tex. App.—Fort Worth 2005, no pet.).

88. See *Atchley*, 244 S.W.3d at 929–30.

guidance to both courts and business owners.⁸⁹ Furthermore, this case law appears to be consistent with other states' interpretations of their own UTSA definition, utilizing the Restatement of Torts' factors as a guide.⁹⁰ Texas courts will need to interpret potential value, which is a new concept under the TUTSA, and is presumably tied to protecting negative know-how.

B. The Information Must Not Be Generally Known to Other Persons

Under the TUTSA definition's second prong, the information alleged to be a trade secret must not be generally known to other persons.⁹¹ This corresponds to the first and second factors of the Restatement of Torts, with the "other persons" being those outside the business and those involved in the business, respectively.⁹²

It can be difficult for a business owner to maintain the confidentiality of trade secret information with regards to people outside the business.⁹³ To clearly satisfy this factor, Texas case law interpreting the Restatement of Torts suggests that the information be kept entirely in-house.⁹⁴ This also appears to be the conclusion of those courts that still apply the Restatement of Torts' factors when construing their state's UTSA.⁹⁵ But, under the *Bass* line of

89. See *supra* notes 21–25, 80–88, and accompanying text.

90. See *Tyson Foods, Inc. v. Conagra, Inc.*, 79 S.W.3d 326, 336–37 (Ark. 2002) (finding the defendant satisfied the value requirement by using the secret to save \$1.3 million); *Saforo & Assoc., Inc. v. Porocel Corp.*, 991 S.W.2d 117, 120–21 (Ark. 1999) (determining defendant satisfied the value requirement where the amount to install the plaintiff's system was \$17,000, compared to over \$200,000 for the defendant's installation); *Bond v. Polycycle, Inc.*, 732 A.2d 970, 973–74 (Md. Ct. Spec. App. 1999) (inferring the business information was valuable because the owner went to great lengths to protect it); *Lyn-Flex W., Inc. v. Dieckhaus*, 24 S.W.3d 693, 698–700 (Mo. Ct. App. 1999) (concluding there was sufficient evidence of value where testimony established the pricing information would be advantageous to a competitor).

91. See *supra* notes 21–23.

92. See *Tex. Unif. Trade Secrets Act*, 83d Leg., R.S., ch. 10, § 1, 2013 Tex. Sess. Law Serv. 12 (West) (to be codified at *TEX. CIV. PRAC. & REM. CODE ANN.* § 134A.002) (West Supp. 2013); *RESTATEMENT (FIRST) OF TORTS* § 757 (1939).

93. See generally *Thomas J. Oppold, Top 10 Ways to Help Protect Your Franchise's Trade Secrets*, 35 *FRANCHISING WORLD*, no. 1, 2003, at 57 (discussing disclosures to outsiders); *Thomas J. Scott, Jr. & Eleanor M. Hynes, Reducing Your Risk as a Licensor or Licensee in Patent and Technology Licensing—The Important Terms to Consider*, 28 *LICENSING J.*, no. 6, 2008, at 6 (discussing the risks of licensing and disclosure to outsiders in an intellectual property context).

94. See *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 916 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (finding documents were trade secrets because they were kept in the company's model history, product change notifications, experimental mold design, and adjustment follow-up reports); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 372–73 (Tex. App.—Dallas 2009, pet. denied) (concluding there was a genuine issue of material fact as to trade secret status for a customer list where the plaintiff had never produced the customer list to anyone outside the company and the customer list was not available to the public).

95. See *Tyson Foods, Inc.*, 79 S.W.3d at 336 (Thorton, J., dissenting) (concluding there was no evidence that the secret was known outside the company); *Saforo & Assoc., Inc.*, 991 S.W.2d at 120 (finding that even though two other companies did similar processing, experts testified that they had never seen a similar product from the processing); *Lyn-Flex W., Inc.*, 24 S.W.3d at 699 (noting testimony from a new employee who used to work for the competitor that he did not know the details of the plaintiff's price book until he went to work for the plaintiff).

cases, limited disclosure of the information does not automatically destroy trade secret status as long as the business owner has taken steps to protect the confidentiality of the information.⁹⁶ Again, this is consistent with case law from jurisdictions that still apply the Restatement of Torts' factors when interpreting their respective UTSA definitions.⁹⁷ However, the *Bass* line of cases denies trade secret status where there is substantial evidence that the information was known by people outside the business.⁹⁸ Texas case law again appears to be consistent with at least one other UTSA jurisdiction that still applies the Restatement of Torts' factors.⁹⁹ The comments to § 1 of the UTSA further clarify to what extent the information must be known for protection to be lost.¹⁰⁰ Specifically, the comments provide that the information need not necessarily be known to the public for trade secret status to be lost.¹⁰¹ Instead, it is enough if the person who has the information can obtain an "economic benefit" from it.¹⁰² Unfortunately, the phrase "economic benefit" is not defined in the comments.¹⁰³

In addition to the possible knowledge acquired by those outside the company, the business owner must also consider the extent to which its own employees know the information.¹⁰⁴ This is a concern for companies from the time the employees are hired until they leave the company.¹⁰⁵ The *Bass* line of cases suggests that the more people in the company who know the information,

96. See *INEOS Grp. Ltd. v. Chevron Phillips Chem. Co., LP*, 312 S.W.3d 843, 849, 854 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (affirming the issuance of a temporary injunction even though the trade secret had been disclosed to others under expired secrecy agreements where there was evidence to show that the secrecy remained intact despite the expiration); *In re XTO Res. I, LP*, 248 S.W.3d 898, 903 (Tex. App.—Fort Worth 2008, no pet.) (finding trade secret status for forecasts and conclusions of the company and its consultants where the information was not publicly available although some information was required by the SEC to be disclosed, and, on occasion, the information was given to working interest owners on a need-to-know basis).

97. See *MTG Guarnieri Mfg., Inc. v. Cloutre*, 239 P.3d 202, 211 (Okla. Civ. App. 2010) (concluding this factor was satisfied where there was evidence that the plaintiff was the only company drilling multiple pipe joints).

98. See *Sands v. Estate of Buys*, 160 S.W.3d 684, 688, 691 (Tex. App.—Fort Worth 2005, no pet.) (denying an injunction where the identities of "a lot" of the plaintiff's clients were known outside the plaintiff's business because many of the clients knew each other).

99. See *Colo. Supply Co. v. Stewart*, 797 P.2d 1303, 1306–07 (Colo. App. 1990) (denying trade secret status where the plaintiff's price lists were disclosed to both customers and independent contractors).

100. UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 538 (2005).

101. *Id.*

102. *Id.*

103. *Id.*

104. See generally David R. Hannah, *An Examination of the Factors That Influence Whether Newcomers Protect or Share Secrets of Their Former Employers*, 44 J. MGMT. STUD., no. 4, 2007, at 465 (discussing factors that influence employee disclosure).

105. See generally Douglas E. Dexter & Jessica Beckett-McWalter, *Protecting Trade Secrets: Best Practices from Hiring to Terminating and Everything in Between*, 26 LICENSING J., no. 1, 2006, at 1 (discussing ways to protect trade secrets from misappropriation by employees); Kenneth A. Kovach et al., *Protecting Trade Secrets During Employee Migration: What You Don't Know Can Hurt You*, 55 LAB. L.J., no. 2, 2004, at 69 (discussing trade secret violation problems associated with migrating employees).

the less likely the information is a trade secret.¹⁰⁶ Therefore, trade secret status is assured where disclosure is made only to those employees with a need to know.¹⁰⁷ This is consistent with both the comments to § 1 of the UTSA, as well as the case law from other jurisdictions applying the Restatement of Torts' factors to the definition.¹⁰⁸ Restricting employee access to key information in this way can prevent inadvertent disclosure of the information through email, blogs, or social networking.¹⁰⁹ As a result, electronic communications by those few personnel given access to the trade secret information can be monitored to ensure that trade secret information is not inadvertently disclosed.¹¹⁰ In addition, the *Bass* line of cases advises that employees sign confidentiality agreements as separate agreements or as part of an employee handbook to support trade secret status.¹¹¹ Again, this is consistent with those jurisdictions that continue to apply the Restatement of Torts' factors as a guide to interpret the new UTSA definition.¹¹²

106. See *Sands v. Estate of Buys*, 160 S.W.3d 684, 688 (Tex. App.—Fort Worth 2005, no pet.) (denying an injunction where the clients' identities and addresses were available to all employees and part-time independent contractors for the company, and the information was shared via computer between office sites).

107. See *In re Union Pac. R.R.*, 294 S.W.3d 589, 592 (Tex. 2009) (information was only available to a limited number of employees and certain managers); *In re Bass*, 113 S.W.3d 735, 742 (Tex. 2003) (only four employees had seen the data); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 370 (Tex. App.—Dallas 2009, pet. denied) (employees were only allowed access to the customer list to perform their respective jobs, the customer list was kept on a computer with access restricted to those who needed the list for their jobs, and any hard copy of the list was kept in a file cabinet with restricted access to those employees who needed it for their jobs); *In re XTO Res. I, LP*, 248 S.W.3d 898, 903 (Tex. App.—Fort Worth 2008, no pet.) (disclosed to personnel on a need-to-know basis).

108. UNIF. TRADE SECRETS ACT § 1 (amended 1995), 14 U.L.A. 538 (2005); see also *Tyson Foods, Inc. v. Conagra, Inc.*, 79 S.W.3d 326, 336 (Ark. 2002) (finding trade secret status where only five people in the company knew the formula and each signed a confidentiality agreement); *Saforo & Assoc., Inc. v. Porocel Corp.*, 991 S.W.2d 117, 121 (Ark. 1999) (determining trade secret status where there was evidence that the process was not generally known to the employees); *Colo. Supply Co. v. Stewart*, 797 P.2d 1303, 1306 (Colo. App. 1990) (concluding that the price lists were not trade secrets where the plaintiff disclosed the information to all of the employees); *Bond v. Polycycle, Inc.*, 732 A.2d 970, 974 (Md. Ct. Spec. App. 1999) (finding that there was sufficient evidence for this factor where the owner was the only one who knew all of the secret information); *Lyn-Flex W., Inc. v. Dieckhaus*, 24 S.W.3d 693, 699 (Mo. Ct. App. 1999) (concluding the information in the price book was not known by the employees and even the long-term employees needed to reference the book for information).

109. See generally Brian Van Wyk, Note, *We're Friends, Right? Client List Misappropriation and Online Social Networking in the Workplace*, 11 VAND. J. ENT. & TECH. L. 743 (2009) (discussing blogs and social networking in the workplace).

110. See Matthew A. Chivvis, *Consent to Monitoring of Electronic Communications of Employees as an Aspect of Liberty and Dignity: Looking to Europe*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 799 (2009); Corey A. Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 AM. BUS. L.J. 285 (2011); David Halpern et al., *Management and Legal Issues Regarding Electronic Surveillance of Employees in the Workplace*, 80 J. BUS. ETHICS 175 (2008); Michael L. Rustad & Sandra R. Paulsson, *Monitoring Employee E-Mail and Internet Usage: Avoiding the Omniscient Electronic Sweatshop: Insights from Europe*, 7 U. PA. J. LAB. & EMP. L. 829 (2005) (each discussing electronic surveillance of employees).

111. See *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 916 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

112. See *Stampede Tool Warehouse, Inc. v. May*, 651 N.E.2d 209, 216 (Ill. App. Ct. 1995) (finding that the employees were required to sign confidentiality agreements to satisfy this factor).

C. The Information Must Not Be Readily Ascertainable by Proper Means

The third requirement of the TUTSA definition is that the information must not be “readily ascertainable by proper means.”¹¹³ There are two aspects to this requirement that are problematic. The first concerns the meaning of the phrase “proper means.”¹¹⁴ “Proper means” under the new TUTSA is defined as “discovery by independent development, reverse engineering unless prohibited, or any other means that is not improper.”¹¹⁵ No other state has adopted this definition.¹¹⁶ The comments to § 1 of the UTSA offer at least some guidance by defining “proper means” to include both “[d]iscovery by independent invention” as well as discovery “by ‘reverse engineering.’”¹¹⁷ But there is no indication of what type of reverse engineering would be prohibited as indicated in the TUTSA definition.¹¹⁸ The phrase “any other means that is not improper” presumably would include the remaining “proper means” indicated in the UTSA § 1 comments—that is, “[d]iscovery under license,” “[o]bservation of the item in public use or display,” or “[o]btaining the trade secret from published literature.”¹¹⁹ Additionally, those acts that are listed as “improper” under the TUTSA include “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, to limit use, or to prohibit discovery of a trade secret, or espionage through electronic or other means.”¹²⁰ This list is similar to the UTSA, but further provides that it is improper to “limit use, or to prohibit discovery of a trade secret.”¹²¹ The New Jersey UTSA has a similar addition; its interpretive case law may provide some guidance.¹²²

The phrase “readily ascertainable” presents a second concern for this element because the TUTSA provides no definition.¹²³ The comments to § 1 of the UTSA provide, however, that “[i]nformation is readily ascertainable if it is available in trade journals, reference books, or published materials.”¹²⁴ Courts interpreting their respective UTSA definitions have expanded upon this suggestion by looking at the time or effort required for development, as well as the ease of duplication.¹²⁵ This implicates both factors five and six of the Restatement of Torts factors.¹²⁶

113. TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6)(A) (West Supp. 2013).

114. *Id.*

115. *Id.*

116. See UNIFORM TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 539–44 (2005).

117. *Id.* at 538.

118. See CIV. PRAC. & REM. § 134A.002(5).

119. UNIFORM TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 538 (2005).

120. CIV. PRAC. & REM. § 134A.002(2).

121. *Id.*

122. See N.J. STAT. ANN. § 56:15-2 (West 2012).

123. See CIV. PRAC. & REM. § 134A.002(2)(6)(A).

124. UNIFORM TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 539 (2005).

125. See, e.g., *Basic Am., Inc. v. Shatila*, 992 P.2d 175, 184 (Idaho 1999); *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993).

126. See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

Turning first to the effort involved in development, the *Bass* line of cases concluded that the amount of time spent on development is important evidence for the court to consider when deciding what constitutes a trade secret.¹²⁷ This is consistent with case law from those states that use the Restatement of Torts factors to interpret their respective UTSA definitions.¹²⁸ In addition, the *Bass* line of cases suggests that placing a value on the effort is also helpful.¹²⁹

The sixth factor from the Restatement of Torts ties in with the owner's effort in development because it relates to "the ease or difficulty with which the information could be properly acquired or duplicated."¹³⁰ The *Bass* line of cases makes it clear that if the information is difficult to acquire or duplicate, there is a greater likelihood that the court will consider the information to be a trade secret.¹³¹ This is consistent with state case law using the Restatement of Torts factors to interpret the UTSA.¹³²

127. See *In re Union Pac. R.R.*, 294 S.W.3d 589, 592 (Tex. 2009) (concluding the railroad's rate structures sought to be produced in personal injury action were trade secrets since there was evidence the time, expense, and manpower expended on setting the rates made it extremely difficult to replicate the information); *In re Bass*, 113 S.W.3d 735, 739–40 (Tex. 2003); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 372 n.4 (Tex. App.—Dallas 2009, pet. denied) (finding there was a genuine issue of material fact as to the existence of a trade secret, i.e., there was affidavit evidence that the customer list was created over several years and "cost tens if not hundreds of thousands of dollars over th[o]se years to create"); *Sharma v. Vinmar Int'l, Ltd.*, 231 S.W.3d 405, 425 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (affirming the trial court's issuance of a temporary injunction against defendant former employees, noting it took the plaintiff a year to develop the market and four years for the market to become profitable, which was sufficient to support trade secret status); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 198 (Tex. App.—Fort Worth 2005, no pet.) (concluding sufficient efforts were used to develop the trade secret information as the evidence showed "that thirty to forty thousand hours were required to develop the [plaintiff's blade design] and another thirty to forty thousand hours were needed to develop techniques for its production"); *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 859 (Tex. App.—Fort Worth 2003, no pet.) (affirming the trial court's issuance of a temporary injunction in favor of plaintiff former employer where the confidential information had been "acquired and achieved over a thirty-year period").

128. See, e.g., *Basic Am., Inc.*, 992 P.2d at 184 (concluding the information was not "generally known" or "readily ascertainable" because the owner spent six years developing the product).

129. See *Bass*, 113 S.W.3d at 739–40; *Tex. Integrated Conveyor Sys., Inc.*, 300 S.W.3d at 372; *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 636 (Tex. App.—Fort Worth 2007, pet. denied) (concluding a genuine issue of material fact existed as to trade secret status for the design drawings in question where the plaintiff invested considerable resources to develop the drawings, including purchasing a company with a desired design).

130. See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b.

131. See *Bass*, 113 S.W.3d at 742 (finding that data sought to be produced in an action for breach of implied duty to develop land was a trade secret because there was evidence that the cost to conduct another shoot and acquire the information and defendant's permission would be between \$800,000 and \$2.2 million); *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 918 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (determining documents sought to be produced were generated from unpublished information gathered by the company and could not be easily duplicated); *In re XTO Res. I, LP*, 248 S.W.3d 898, 904 (Tex. App.—Fort Worth 2008, no pet.) (determining information sought to be produced in action for breach of contract was a trade secret because there was evidence that even though the underlying data was publicly available, the plaintiff's process of transforming the data into reserve estimates, along with the reserve estimates themselves, gave the plaintiff a competitive advantage); *Sharma*, 231 S.W.3d at 425 (finding there was evidence that it would be difficult to duplicate the information, i.e., both a former employee and another company tried and failed to access the isoprene market independently); *IAC, Ltd.*, 160 S.W.3d at 198 (affirming the trial court's issuance of a temporary injunction in favor of the plaintiff manufacturer to enjoin use of its trade secrets by its

D. The Information Must Be the Subject of Reasonable Efforts to Maintain Its Secrecy

The last requirement under the TUTSA is that the information must be the subject of reasonable efforts to maintain its secrecy.¹³³ This requirement is similar to factor three from the Restatement of Torts, which looks at the extent of the measures taken to guard the secrecy.¹³⁴ Several other factors within the Restatement of Torts overlap with this requirement.¹³⁵ And in fact, at least one other court has interpreted this phrase using the first three factors from the Restatement of Torts.¹³⁶ The *Bass* cases that have looked at this factor have determined that the greater the number of measures used by the business owner to guard the secrecy of the information, the greater the likelihood the information will be treated as a trade secret.¹³⁷ This case law appears to be

former contractor where testimony showed that it would be impossible to duplicate the specifications of the plaintiff's "blade with the necessary degree of precision through reverse engineering").

132. See, e.g., *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993) (concluding that interpretation of the phrase "not being readily ascertainable" should be interpreted in light of the sixth factor from the Restatement of Torts and if the "duplication or acquisition of alleged trade secret information requires a substantial investment of time, expense, or effort, such information may be found 'not being readily ascertainable' . . . under the Indiana [UTSA]" (internal quotation marks omitted)).

133. TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(2) (West Supp. 2013).

134. See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b; see generally Alice Goldmann, *Strategies for Protecting Your Company's Confidential Information*, 16 J. INTERNET BANKING & COM., no. 1, 2011, at 1 (discussing security measures used by companies); Jermaine S. Grubbs, *Give the Little Guys Equal Opportunity at Trade Secret Protection: Why the "Reasonable Efforts" Taken by Small Businesses Should be Analyzed Less Stringently*, 9 LEWIS & CLARK L. REV. 421, 421 (2005) (discussing standards for evaluating the security measures used by small companies); John M. Halan, *Protecting Trade Secrets: Steps Every Trade Secret Owner Should Know*, 30 EMP. REL. L.J. 22 (2004) (discussing security measures that have worked for companies); David R. Hannah, *Should I Keep a Secret? The Effects of Trade Secret Protection Procedures on Employees' Obligations to Protect Trade Secrets*, 16 ORG. SCI. 71 (2005) (discussing trade secrets in light of how the protection measures affect employees).

135. See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b.

136. See *Colson Co. v. Wittel*, 569 N.E.2d 1082, 1084–86 (Ill. App. Ct. 1991).

137. See *In re Bass*, 113 S.W.3d 735, 742 (Tex. 2003) (finding data sought to be produced in action for breach of implied duty to develop land were trade secrets, because there was evidence that the data were kept in a secured, climate-regulated vault accessible only to those with the combination and a security card); *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 916 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (finding documents sought to be produced satisfied the third factor for trade secret status because the company maintained limited access with tight controls on vendors, business partners, contractors, and non-employees). Controlled access to the technical center and corporate headquarters was accomplished with the use of "special, computerized coded access cards and/or coded keypad access 24 hours a day" and controlled access to the manufacturing plant through an entrance guarded twenty-four hours a day. *Id.*; see also *INEOS Grp. Ltd. v. Chevron Phillips Chem. Co.*, 312 S.W.3d 843, 854 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (concluding there was evidence of strict security measures implemented and maintained over the years to keep its technology confidential); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 370, 373 (Tex. App.—Dallas 2009, pet. denied) (finding there was a genuine issue of material fact regarding the existence of a trade secret because Texas Integrated restricted access to the customer list, including the computer and file cabinets that contained the list, to employees who needed the information to perform their duties); *In re XTO Res. I, LP*, 248 S.W.3d 898, 903 (Tex. App.—Fort Worth 2008, no pet.) (concluding there was evidence that the information was carefully guarded; was "maintained in a secure area above the company's third floor," which could only be accessed with a card key; and was stored offsite using strict security measures); *Sharma v. Vinmar Intern., Ltd.*, 231 S.W.3d 405, 425 (Tex. App.—Houston [14th

consistent with the jurisdictions that continue to use the Restatement of Torts factors.¹³⁸ The *Bass* line of cases also makes it clear that if the company does not provide sufficient security measures for its information, trade secret status can be denied.¹³⁹ There is support for this from at least one other UTSA jurisdiction that follows the Restatement of Torts factors.¹⁴⁰ Confidentiality agreements can provide some protection, which is again supported in at least one other jurisdiction that has continued the use of the Restatement of Torts factors.¹⁴¹

VI. CONCLUSION

While the first reaction to the new TUTSA may be a sigh of relief that Texas has finally joined the crowd for protection of trade secrets, an almost immediate secondary response will be frustration over how to determine trade

Dist.] 2007, no pet.) (finding there was evidence that sufficient security measures were in place, e.g., “controlled access cards . . . ; password protection of computers; requiring all employees to execute confidentiality agreements as a condition of employment; employee manuals that emphasize the confidential nature of [the] business; and limit[ed] access to . . . trade secret information on a need-to-know basis”); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 198 (Tex. App.—Fort Worth 2005, no pet.) (finding sufficient security measures were taken by the plaintiff as it “stor[ed] the originals of its drawings and specifications in a vault, post[ed] security guards at [all] plants, require[ed] persons entering the plant to identify themselves and wear identification badges, check[ed] material going in and out of the plant, limit[ed] access to data on its internal computer system to persons with appropriate system identification and passwords, and us[ed] confidentiality agreements with its vendors to whom it supplied proprietary” information).

138. See *Tyson Foods, Inc. v. Conagra, Inc.*, 79 S.W.3d 326, 337 (Ark. 2002) (finding trade secret status exclusively based on confidentiality procedures used by the company while the individual was employed); *Stamper Tool Warehouse, Inc. v. May*, 651 N.E.2d 209, 216 (Ill. App. Ct. 1995) (determining there were sufficient reasonable measures used, which included locking offices, checking garbage daily, limiting customer information to those who need to know, locking customer lists in the office, locking customer card and call books in the office, and using security cameras); *Bond v. Polycycle, Inc.*, 732 A.2d 970, 974 (Md. Ct. Spec. App. 1999) (concluding there was sufficient evidence of trade secret status where the owner required those who learned the information to sign confidentiality agreements, and the owner never fully disclosed the entire trade secret to others); *Lyn-Flex W., Inc. v. Dieckhaus*, 24 S.W.3d 693, 699 (Mo. Ct. App. 1999) (finding there was sufficient evidence of trade secret status where there was evidence that the employees knew the price book was confidential, access to the price book was limited, the book was not taken from the office except during sales calls, and only one employee was able to print the price book); *MTG Guarnieri Mfg., Inc. v. Clouatre*, 239 P.3d 202, 210 (Okla. Civ. App. 2010) (determining there was sufficient evidence to establish a genuine issue of material fact regarding trade secret status where the plaintiff required employees to sign confidentiality agreements).

139. See *Sands v. Estate of Buys*, 160 S.W.3d 684, 688–89 (Tex. App.—Fort Worth 2005, no pet.) (concluding very few, if any, security precautions were taken to guard the clients’ identities because the company gave complete access to both employees and independent contractors without confidentiality or nondisclosure agreements; the computers were left on twenty-four hours a day; the information was accessible from other office sites; and although each computer had its own password and firewall protection, the passwords were generally known to everyone in the office).

140. See *Colo. Supply Co. v. Stewart*, 797 P.2d 1303, 1306 (Colo. App. 1990) (finding there was no trade secret where the only security measures taken by the plaintiff were normal business precautions).

141. See, e.g., *Saforo & Assocs., Inc. v. Porocel Corp.*, 991 S.W.2d 117, 121 (Ark. 1999) (finding there was a trade secret where the plaintiff used confidentiality agreements and limited access to protect the secret); *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 635 (Tex. App.—Fort Worth 2007, pet. denied) (evaluating that all disclosures outside the company were only made upon agreement of confidentiality).

secret status under the new statute. At its outset, the statute has several problems, namely its complexity and its failure to include an express grandfather clause for continued trade secret protection of information protected under the old law.¹⁴² Furthermore, there is limited guidance for interpretation provided by the uniform statute, and it is unclear upon which state's laws Texas courts will rely for persuasive authority.¹⁴³ Therefore, the use of the Restatement of Torts factors would be a useful starting point for Texas attorneys when advising business clients, as well as when arguing before Texas courts.¹⁴⁴ This approach will provide consistency to both business owners and courts as the new law is applied.

142. See sources cited *supra* note 30.

143. See *supra* Part III.

144. See *supra* Part III.