

Vermont

1. What is the statutory authority for trade secret protection in your state?

The Vermont Trade Secrets Act is the statutory authority for trade secrets in Vermont; it is found at 9 V.S.A. §§ 4601-4609.

2. What are the elements of a trade secret claim in your state, and are any unique?

The elements of a trade secret claim in Vermont are: 1) Misappropriation of 2) a trade secret by 3) improper means. 9 V.S.A. § 4601.

“Misappropriation” is defined as either:

acquisition a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

Disclosure of a trade secret of another without express or implied consent by a person who:

used improper means to acquire knowledge of the trade secret; or

at the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

derived from or through a person who had utilized improper means to acquire it;

acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. 9 V.S.A. § 4601(2).

“Trade secret” is defined as information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

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*

is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. 9 V.S.A. § 4601(3) (emphasis added).

“Improper means” is defined to include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

Vermont’s Trade Secrets act is based on the Uniform Trade Secrets Act, and none of its elements are unique.

3. How specific do your courts require the plaintiff to be in defining its “trade secrets?” (This could include discussing discovery case law requiring particularity.)

While Vermont courts have not addressed the issue of sufficient particularity in trade secrets cases, the Vermont Supreme Court has addressed the issue of particularity in other areas of law, most notably fraud. The Court has stated that where claims must be stated with particularity, “one of the primary objectives... is to provide the defendant with sufficient information to enable them to effectively prepare a response. *Sutton v. Vermont Regional Ctr.*, 2019 VT 71A, ¶ 73. The Court went on to state that the plaintiff “may not lump together in vague and collective allegations, but must with particularity describe the nature of each defendant’s alleged participation.” *Id.*

4. What is required in your state for a plaintiff to show it has taken reasonable measures to protect its trade secrets? (Preferably answer with practical, factual requirements from decisions.)

The Vermont Supreme Court has indicated, without deciding, that reasonable measures to protect trade secrets could include whether parties had a written agreement not to compete, whether knowledge was confined to a restricted group of employees, and the extent of measures to guard access to the information. “[T]he burden is on the plaintiff to demonstrate that he pursued an active course of conduct designed to inform his employees that such secrets and information were to remain confidential” and a trade secret claim may be denied because the “information was not protected by [a] substantial element of secrecy so that [the information was] not obtainable without improper means.” *Dicks v. Jensen*, 172 Vt. 43, 50 (2001).

The landmark case in Vermont is *Dicks*, *supra*. In *Dicks*, a lodge owner brought an action, alleging that former managers violated the Trade Secrets Act by stealing a customer list for bus tours to attract business to their new employer. The Court determined that while a customer list could be a trade secret, and while such a customer list was not “reasonably ascertainable” simply because it did not take “extraordinary efforts” to reproduce from publicly ascertainable sources, the customer list in *Jensen* was not a trade secret because no “efforts... reasonable under the circumstances” were made to protect its secrecy – in fact, for much of the period where the defendants worked at the lodge, the names of the tour groups were “posted on a large reservation board in an office where all employees and any office visitor could see.” *Jensen* at 50.

5. Does your state apply the inevitable disclosure doctrine? If so, how is it applied?

Courts in Vermont have not addressed the inevitable disclosure doctrine. However, given that the Vermont Trade Secrets Act is based on the UTSA and provides for injunctive relief for “actual or threatened” misappropriation of a trade secret,⁹ V.S.A. § 4602(a), Vermont courts would likely follow the example of other states with state laws based on the UTSA and apply the inevitable disclosure doctrine in some form.

6. How have courts in your state addressed the defense that an alleged trade secret is “reasonably ascertainable?” What needs to be shown to prevail on that theory?

The Vermont Supreme Court has cautioned that whether a trade secret is “reasonably ascertainable” is extremely fact-specific, and to be decided on a case-by-case basis. In *Dicks*, supra, the Vermont Supreme Court overruled the trial court’s decision that a trade secret is “reasonably ascertainable” if it can be recreated from publicly ascertainable sources unless “extraordinary efforts” would be necessary to reproduce the information. While the Court determined *Dickson* on the grounds of the second prong of the Vermont test – the information being “the subject of efforts that are reasonable under the circumstances to maintain its secrecy” – the Court indicated that the Vermont standard for demonstrating that information is reasonably attainable from public sources is lower than the “extraordinary efforts” standard endorsed by the trial court. In considering the issue, the Court stated that “in a trade secret case no general and invariable rule can be laid down, but rather we must look to the conduct of each party and the particular information at issue.” *Dicks* at 49. The Court also looked to apparently contradictory New York decisions, specifically *Leo Silfen v. Cream*, 278 N.E.2d 636 (1972) (customer list for a building maintenance supply business determined to be “reasonably ascertainable” despite significant culling being necessary before becoming customers) and *Town & Country House & Home Service v. Newbery*, 147 N.E.2d 724 (1958)(customer list for personalized house cleaning business determined not to be reasonably ascertainable because it was the result of screening of publicly ascertainable telephone solicitations by the plaintiff) in its decision and in its emphasis that any determination must be fact-specific.

7. What are the most recent “hot button” issues addressed by courts in your state regarding trade secret claims?

The most recent trade secrets cases in Vermont have focused on the trade secrets exemption in the Public Records Act (1 V.S.A. §§ 315-319), which defines trade secrets as follows:

“[C]onfidential business records or information, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it” 1 V.S.A. § 317(9).

Of particular note is the inclusion of the term “plan” in the definition of “trade secrets.” In *Long v. City of Burlington*, the Vermont Supreme Court determined that an unredacted market feasibility study for a proposed development project was exempt under the PRA trade secrets exemption despite the voluntary submission of a redacted version of the study to the City. The Court determined that developer made reasonable efforts to protect the confidentiality of information contained in the study through redacting particularly sensitive information and by having the City sign a non-disclosure agreement when it voluntarily submitted the redacted version.

8. How does your state’s Trade Secret law differ from the DTSA, as the latter is applied in your Circuit?

The DTSA closely tracks the UTSA and, thus, the Vermont Trade Secrets Act. The primary difference between the two is that the Vermont Trade Secrets Act requires a trade secret to be the subject of efforts to maintain its secrecy “that are reasonable under the circumstances,” whereas the DTSA uses the phrase “reasonable measures.” Neither Courts in Vermont nor the Second Circuit Court of Appeals have yet addressed this difference, which may turn out to be a difference without a distinction.