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The Nevada Independent v. Whitley, 138 Nev. Adv. Op. 15 (Mar. 24, 2022)

Tali Frey

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Trade Secrets: State District Court has Subject Matter Jurisdiction Over Fraudulent Conveyance Actions

Summary:

The Nevada Supreme Court considered whether, under the Nevada Public Records Act (NPRA), the federal Defend Trade Secrets Act (DTSA) prohibits disclosure of documents from pharmaceutical companies and pharmacy benefit managers collected under S.B. 539. The Court concluded that NAC 439.730-.740 are valid regulations and, the NPRA permits the disclosure of government documents that are not declared by law to be confidential.[2]

Facts and Procedural History:

The DTSA, passed by Congress to compliment state trade secret laws, created a federal cause of action for misappropriation of trade secrets and defined "misappropriation" to include disclosure of a trade secret without the owner's consent, among other things.[3] One year after the DTSA was passed, the governor signed S.B. 539 into law in response to the rapidly increasing price of insulin for Nevada residents.[4] That bill was codified in NRS 439B.600-.695. The statute requires pharmaceutical manufacturers and pharmacy benefit managers (PBMs) to submit to the Department of Health and Human Services (DHHS) documentation regarding the cost structure of insulin medication in Nevada. S.B. 539 requires PBMs to disclose the rebates they negotiate, and DHHS to compile lists of essential diabetes medications, manufacturers to report the pricing information of these drugs and justify any price increases.[5] DHHS promulgated regulations, NAC 439.730-.740, to harmonize S.B. 539, the NPRA, and the DTSA.

A reporter for The Nevada Inependent (TNI) later made a public records request to DHHS for all reports submitted by pharmaceutical manufacturers and PBMs under S.B. 539. DHHS provided the names of manufacturers and PBMs and some general information about the diabetes drugs but did not disclose other parts of the Manufacturer Essential Diabetes Drug Reports, including (1) the cost of producing the drug, (2) the total administrative expenditure relating to the drug, and (3) the profit margin the manufacturer earned by producing the drug. DHHS argued that, pursuant to NAC 439.730- .740, disclosing this information would constitute misappropriating trade secrets under the DTSA.

TNI filed a mandamus action in the district court to compel disclosure of the requested information under the NPRA, and challenged the validity of NAC 439.730-

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[1] By Tali Frey.
[2] *In re* Gruntz, 202 F.3d 1074; *In re* McCarthy, 230 B.R. 414.
[3] 18 U.S.C. §§ 1836, 1839(5)(b).
[4] 2017 NEV. STAT., ch. 592.
[5] NEV. REV. STAT. § 439B.630-.645.

.740. Sanofi-Aventis U.S. LLC, a pharmaceutical company that submitted records pursuant to S.B. 539, moved to intervene. Sanofi submitted an affidavit from its Vice President and Head of Diabetes and Primary Care Sales, James Borneman, who attested to the precautions Sanofi implements to safeguard its trade secrets and the potential economic hardship Sanofi would suffer from the trade secrets' disclosure.

The district court denied TNI's writ petition. The district court determined that "[t]he DTSA's definition for trade secrets places these reports *squarely* under confidentiality protections," since DHHS demonstrated that the reports are subject to reasonable efforts to maintain their secrecy and that the reports derive independent economic value from such secrecy.[6] Next, the district court found that NAC 439.730-.740 are valid regulations because DHHS has broad discretion to develop regulations that "foster efficient enforcement of codified legislation" (in this case, S.B. 539) and DHHS reasonably interpreted the governing statute in adopting the regulations. The district court opined that these "regulations ensured that NPRA requests for information DHHS had gathered due to S.B. 539 did not run afoul of the DTSA because, while the regulations' 'confidentiality protections are not automatic,' they ensured that the affected entity had the opportunity to contest the release of what it believes to be confidential information in court."[7] This appeal followed.

Discussion:

TNI has not demonstrated that NAC 439.730-.740 are invalid regulations

TNI argued that NAC 439.730-.740 are invalid regulations because they were not authorized by the Nevada Legislature, and they conflict with S.B. 539. The Court denied all of TNI's arguments. The Court held that DHHS utilized the provision in NRS 439B.685, which allows DHHS to adopt regulations it deems "necessary or advisable to carry out the provisions of NRS 439B.600 to 439B.695, inclusive," to promulgate NAC 439.735 and NAC 439.740 in order to harmonize S.B. 539, the NPRA, and the DTSA.[8]

The Court "generally defers to an agency's interpretation of a statute that the agency is tasked with enforcing,[9] but the regulation cannot contradict or conflict with the statute it is intended to implement.[10] Here, the Court found that NAC 439.735 does not contradict S.B. 539, but instead creates a process by which DHHS can determine whether the requested records fall within the DTSA's protection of trade secrets. If DHHS does not believe that the requested records require such protection, the burden then falls on the pharmaceutical company to challenge DHHS's finding in court. Therefore, it is not DHHS who makes the ultimate decision regarding confidentiality, but a district court judge.

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[6] *See* 18 U.S.C. § 1839(3).
[7] *The Nev. Independent v. Whitley*, 138 Nev. Adv. Op. 15 (Mar. 24, 2022).
[8] NEV. REV. STAT. 439B.685.
[9] *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000).
[10] *Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988); *accord Clark Cty. Social Serv. Dep't v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990).

TNI then argued that NAC 439.740 directly conflicts with the legislative intent in passing S.B. 539. The Court held that the plain language of NRS 439B.650 is clear. It does not, as TNI maintains, prohibit DHHS from anonymizing the data it collects per S.B. 539. Thus, NAC 439.740 does not conflict with NRS 439B.650, and DHHS had the authority to promulgate the regulation under NRS 439B.685. Therefore, the Court concluded that TNIs challenge of NAC 439.740 fails and the regulation is valid.

The district court did not abuse its discretion by admitting James Borneman's declaration

The DTSA classifies as trade secrets information (A) that the owner has taken "reasonable measures" to keep secret and (B) from which the owner "derives independent economic value" that is not "readily ascertainable through proper means by an entity that can obtain economic benefit from the information's disclosure.[11] "[T]he definition of what may be considered a 'trade secret is broad."[12] The government bears the burden of demonstrating by a preponderance of the evidence that the public records at issue are confidential.[13]

The first element to determine whether information is a protected trade secret is whether its owners have taken "reasonable measures" to keep the information secret.[14] The Court determined that the measures that manufacturers and PBMs have taken to protect their information are sufficient to meet the first prong of the DTSA. The district court noted that DHHS places significant limitations on who has access to the requested records and privatizes the information that is shared, and that manufacturers and PBMs have submitted requests for confidentiality to prevent the release of their trade secrets. Even Borneman's declaration added support, stating that Sanofi restricts access to pricing information and rationale using need-to-know basis and nondisclosure agreements. These confidentiality provisions are sufficient to constitute "reasonable measures" at preserving the information's secrecy under the DTSA.[15]

The Court denied TNIs argument that manufacturers and PBMs have waived any trade secret protections they may have had by voluntarily submitting the requested documents to DHHS. TNI's argument relied on *Amgen*.[16] The Court did not buy this argument, however, and made a point to distinguish California law from Nevada law. The Court held that it is fundamentally unfair to conclude that a manufacturer or PBM waives its trade secret protections in the requested records by submitting them to DHHS pursuant to S.B. 539—a mandate it is powerless to ignore.[17] Therefore, because manufacturers and PBMs turned over these documents with the expectation of confidentiality, such disclosure is not inconsistent with the determination that the company has taken "reasonable measures" to keep the information secret with respect to the DTSA.[18]

Next, the Court considered the second element of the DTSA's trade secret test: whether the owner derives economic value from the information's nondisclosure and whether the information is not "readily ascertainable through proper means" by an entity that can obtain

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[11] 18 U.S.C. § 1839(3).
[12] *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 657 (9th Cir. 2020).
[13] NEV. REV. STAT. 239.0113; *Pub. Emps. Ret. Sys. of Nev. v. Nev. Policy Research Inst., Inc.,* 134 Nev. 669, 671, 429 P.3d 280, 283 (2018).
[14] 18 U.S.C. § 1893(3).
[15] *Cf. InteliClear*, 978 F.3d at 660- 61.
[16] *Amgen, Inc. v. California Health Care Services*, 260 Cal. Rptr. 3d 873 (Ct. App. 2020).
[17] *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 149 (D.C. Cir. 2001).
[18] *See InteliClear*, 978 F.3d at 660-61.

economic benefit from the information's disclosure.[19] The Court held that the district court was within its discretion to conclude that the requested records, which identified "drug cost structure, marketing and advertising costs, rebate strategies, and profit information," comprised trade secrets under the DTSA because the manufacturers and PBMs "derive[ ] independent economic value . . . from [this information] not being generally known."[20] Thus, the Court concluded that the district court appropriately determined that manufacturers and PBMs gain an economic benefit by keeping the requested documents confidential from their competitors and the public.

As the Court has noted before, "The obligation to disclose . . . is not without limits."[21] Since the documents are declared by law (i.e., the DTSA) to be confidential trade secrets, the Court concluded that they are exempt from disclosure under the NPRA.[22] Therefore, the Court concluded that the district court's denial of the writ petition was within its discretion. DHHS demonstrated that the requested records satisfy the DTSA's twostep test for confidentiality by showing that manufacturers and PBMs have taken reasonable measures to shield the requested records from disclosure and that these entities derive economic value from the requested records' secrecy.

Conclusion:

The NPRA permits the disclosure of government documents that are not declared by law to be confidential. In this opinion, the Court held that the requested documents are confidential under the DTSA and are thus exempted from disclosure under the NPRA. The Court also determined that TNI has not demonstrated that NAC 439.730-.740 are invalid regulations and that the district court reached the correct outcome in admitting James Borneman's declaration. For these reasons, district court's judgment is affirmed.

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[19] 18 U.S.C. § 1839(3).

[20] *Id*.

[21] Republican Att'ys Gen. Asen v. Las Vegas Metro. Police Dep't, 136 Nev. 28, 31, 458 P.3d 328, 331 (2020).

[22] *See* NEV. REV. STAT. 239.010(1) (permitting public examination of governmental records unless those records are "declared by law to be confidential"); *Republican Att'ys Gen. Ass'n*, 136 Nev. at 31, 458 P.3d at 331 ("The NPRA yields to more than 400 explicitly named statutes, many of which prohibit the disclosure of public records that contain confidential information.").