

# **The Key to a Trade Secret Is Secrecy: Third Circuit Agrees Ownership Is Sufficient but Not Necessary to Maintain a Trade Secret Misappropriation Claim**

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In a case telling a “sorry story of disloyalty and deception piled upon deception,” the Third Circuit has held that licensees, not only owners, have standing to protect the confidentiality of trade secrets and the right to be compensated for their unlawful use and disclosure.

## **The Third Circuit Follows Sister Circuits’ Lead**

*Advanced Fluid Sys., Inc. v. Huber*, 958 F.3d 168 (3d Cir. Apr. 30, 2020), involved a sales engineer who unlawfully disclosed and used his employer’s confidential information to ingratiate himself with a competitor and to create his own company. The employer did not “own” the trade secrets at issue. However, the Third Circuit rejected the defendant employee’s ownership argument because the Pennsylvania Uniform Trade Secrets Act only requires a plaintiff to “lawfully possess the trade secrets it wishes to vindicate.”

The Third Circuit adopted the Fourth Circuit’s reasoning from *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001), where that court based its decision on the idea that the proprietary aspect of any trade secret flows, “not from the knowledge itself, *but from its secrecy*, because it is the secret aspect of the knowledge that provides value to the person having the knowledge.” (*Emphasis added.*) Just as personal property can be transferred, so, too, can the information forming the basis of a trade secret be transferred, and “continuing secrecy provides the value, [while] any general disclosure destroys the value.”

The Third Circuit further explained that while traditional ownership “is sufficient to maintain a trade secret misappropriation claim because the complete bundle of rights related to trade secrets includes the right to enjoy the value of the information’s secrecy, it is not a necessary condition.” A *per se* ownership requirement for misappropriation claims would miss the mark because such a prerequisite would not take account of “the substantial interest that lawful possessors of the secrets have in the value of that secrecy” or “the statutory language that creates the protection for trade secrets while saying nothing of ownership as an element of a claim for misappropriation.”

The Tenth Circuit in *Gaedeke Holdings VII LTD v. Baker*, 683 F. App’x 677, 684 (10th Cir. 2017),

applied the Fourth Circuit's reasoning in DTM. However, the District Court of Utah has declined to follow DTM and adhered to a strict ownership requirement. See *Brigham Young Univ. v. Pfizer, Inc.*, No. 2:06-CV-890 TS, 2012 WL 1032769, at 2 n.13 (D. Utah Mar. 27, 2012). No Circuit Courts of Appeal appear to have disagreed with the Fourth and Tenth Circuits' approach.

## Pennsylvania State Courts' Approach

No Pennsylvania state courts have addressed the ownership issue explicitly. As the Middle District of Pennsylvania pointed out in its decision in *Advanced Fluid Sys.*, 28 F. Supp. 3d 306 (M.D. Pa. 2014), "[Few] courts have spoken on the issue. Neither the Commonwealth's courts nor the Third Circuit Court of Appeals have addressed the question," until now. The District Court explained that the language of the Pennsylvania Uniform Trade Secrets Act "offers little guidance." However, the Middle District recognized that the statute's definition of "trade secret" does not ascribe a traditional ownership requirement and that "it merely proscribes misappropriation of the 'trade secret of another.'" (*Emphasis in original.*)

## New Jersey's Approach

While New Jersey's state courts have not yet addressed the issue, one came close in *Rycoline Prod., Inc. v. Walsh*, 334 N.J. Super. 62 (App. Div. 2000). There, the Appellate Division discussed the elements of a trade secret misappropriation claim and stated that "a trade secret owner must establish" these requirements, but it did not address whether a possessory interest would suffice for standing purposes. The New Jersey Trade Secrets Act also is silent regarding ownership.

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