

- SUBJECT:** Extending statute of limitations for misappropriating trade secrets.
- COMMITTEE:** Civil Practices — favorable, without amendment
- VOTE:** 7 ayes — Gray, Alvarado, Bosse, Dutton, Goodman, Roman, Zbranek
0 nays
2 absent — Hilbert, Nixon
- WITNESSES:** For — Christopher Cole, DSC Communications; Mike Slack, Texas Trial Lawyers Association; Roger Minard, Texas Association of Business and Chambers of Commerce.
Against — none
On — C. Steven McDaniel
- BACKGROUND :** A trade secret is any formula, pattern, device or compilation of information that could give a business a competitive advantage. Misappropriating a trade secret occurs when a competitor actually uses another's secret.

The Texas Supreme Court was recently asked to determine if the statute of limitations, the time allowed to bring a suit, for misappropriation of trade secrets in Texas was subject to the discovery exception rule. *Computer Assoc. Int'l Inc. v. Altai Inc.*, 918 S.W.2d 453 (Tex. 1996). The discovery exception rule states that the statute of limitation period does not begin to run until the plaintiff actually knows or should have known about the cause of action. The court held that the exception did not apply to misappropriation of trade secrets.
- DIGEST:** HB 368 would extend from two years to three years the period for filing a suit alleging misappropriation of trade secrets. It would also apply a specific discovery rule exception so that the three-year period would not begin to run until the time the plaintiff actually discovered or should have discovered the misappropriation through the exercise of reasonable diligence.

HB 368 would take immediate effect if approved by two-thirds of the membership of each house. The new limitations period would apply to all cases on or after the effective date and all cases pending on the effective date except those for which a trial is in progress.

SUPPORTERS
SAY:

Misappropriation of trade secrets is a significant threat to the high-technology and computer industries, which are growing rapidly in Texas. HB 368 would bring Texas in line with 40 other states and the District of Columbia that use an extended limitations period. The limitations language used in HB 368 is set forth in the Uniform Trade Secrets Act of 1985 (U.L.A. § 6).

The current Texas statute of limitations is ineffective because the nature of high tech industry makes it nearly impossible to discover misappropriation of a trade secret within a short time after the actual act. For example, if a software engineer moves to a competing company and uses the source code developed at his prior job in developing an application for the competitor, that application may not be available to the public for two to three years after the code has been stolen. It could take the original developer some time later to determine if the code was stolen.

In the 1996 *Computer Associates* case before the Texas Supreme Court, the stolen code was actually used by Altai in 1985, but Computer Associates was not aware until 1988 that the code was used. The development of hardware technology may take even longer, sometimes up to five years. With the extension of the time limitation and the inclusion of the discovery exception, a company that has lost its competitive advantage through theft has a much better chance of successfully bringing a cause of action.

The extended discovery rule would not be used to keep watch over former employees indefinitely, but merely allow companies to keep their competitive advantage. Case law sets limits on how long the work of a former employee can remain subject to misappropriation of trade secrets depending on the nature of the information the employee has. For example, this year 11 developers from Informix, Inc., a California database company, left to work for rival Oracle Systems. The Informix developers were working on a new database program designed to give the company an advantage over industry-leader Oracle. Informix will likely scrutinize

closely over the next few years the products of these developers to determine if they have misappropriated an Informix trade secret. However, Informix cannot restrict the actions of its former employees forever as any trade secrets that might be misappropriated would normally be out of date in three to five years.

The extension of the statute of limitations would not increase litigation and would help ensure that trade secret misappropriation cases are litigated on their merits rather than dismissed on a technicality. Applying HB 368 to pending cases would also prevent defendants from rushing to dismiss these cases before the new limitations period becomes effective. Although many such cases are tried in federal court in order also to sue under federal copyright law, federal courts must apply the law of the applicable state in determining limitations periods for tort claims.

**OPPONENTS
SAY:**

Applying the extended discovery rule to misappropriation of high-tech trade secrets would mean that whenever an employee leaves a high-tech company, almost anything that the employee did at the next company would be subject to a misappropriation action. For example, if ten years after leaving a company an engineer develops hardware or software similar to that developed while at the first company, both the engineer and the competing company could be sued. Existing law provides a reasonable limit on how long a former employee's work should be subject to scrutiny without infringing on an employee's right to change jobs.

Increasing limitations periods for any tort action will necessarily mean that more cases will be filed further clogging the overburdened Texas court system.