Texas Trade Secrets Decision Helps Energy Companies

Law360, New York (February 05, 2014, 6:03 PM ET) -- Seismic information about potential oil and gas reservoirs and other sensitive data are regularly used by energy companies to make business decisions and compete in the market. Energy companies must take reasonable precautions to protect such trade secrets. For example, trade secret status may be destroyed if the trade secret is disclosed to a party that has not signed a confidentiality and nondisclosure agreement. This area of Texas law continues to develop, as illustrated by an important new case, Lamont v. Vaquillas Energy Lopeno Ltd., No. 04-12-00219-CV (Tex. App. — San Antonio, Dec. 11, 2013).

Background

Hamblin and Lamont owned Ricochet, which entered into a prospect generation agreement with Vaquillas and JOB. Pursuant to the agreement, Ricochet agreed to generate oil and gas prospects and give Vaquillas and JOB a right of first refusal for exploration and development. The agreement also vested Vaquillas and JOB with a proprietary interest in all acquired or generated data and interpretations of any accepted prospects.

In September 2004, Ricochet's geologist identified the Lopeno Prospect gas reservoir, which covered 161 acres in South Texas and contained an estimated $40 million to $60 million in natural gas. The Lopeno Prospect overlapped two contiguous tracts of property, Worley property and El Milagro property. A seismic map of the Lopeno Prospect was created.

In September of 2005, Hamblin and Lamont met with Vaquillas and JOB to discuss the Lopeno Prospect. Vaquillas agreed to participate as a 20 percent working-interest owner and JOB agreed to participate as a 15 percent working-interest owner. Recochet retained the remaining percentage of the working-interest in the Lopeno Prospect. Ricochet then obtained a lease on only the Worley property because the El Milagro property was in litigation at the time over a previous lease.

Richchet only showed the seismic map of the Lopeno Prospect to working-interest investors. There was no evidence it was ever made public.

In August 2006, Lamont notified Hamblin that he wanted to separate from Ricochet. In February 2007, agreements were signed dividing Ricochet's oil and gas prospects between Lamont and Hamblin (and made them retroactive to Dec. 31, 2006) and Lamont tendered his resignation, which he also said was retroactive to Dec. 31, 2006. At the same time, Lamont signed a joint operation agreement with Ricochet for the Lopeno Prospect as a 29 percent working-interest owner.

In February 2007, Lamont met with Carranco, a CPA and oil and gas investor, to offer him 10 percent of Lamont's 29 percent working-interest. Ricochet's geologist, at the direction of Hamblin, emailed Lamont the seismic map of the Lopeno Prospect. The purpose of sending the map was so that Lamont could entice Carranco to invest in the Lopeno Prospect. Carranco then purchased the 10 percent of Lamont's 29 percent working-interest in the Lopeno Prospect. Lamont and Carranco were not required to sign a confidentiality agreement before receiving the seismic map.

Lamont and Carraco then formed a new entity and secretly leased the adjoining El Milagro property, paying an up-front cash bonus of $1 million. Ricochet was attempting to secure a

lease on the El Milagro property at the same time. During the next six months, a company owned by Lamont depleted the Lopeno Prospect gas reservoir, thereby preventing Recochet from withdrawing the same.

Trial

Vaquillas and JOB then sued Lamont and Carranco for trade secret misappropriation and other torts. At trial, the jury awarded Vaquillas and JOB $4.9 million in damages.

On appeal, Lamont argued that the map was not a trade secret because its secrecy was forfeited when it was disclosed to him and other potential investors who did not sign confidentiality/nondisclosure agreements. One key issue is whether, at the time the seismic was emailed, Lamont was in a confidential relationship with Ricochet. Lamont argued that he was not because he made his resignation letter (which was given after the email) retroactive to a date before the email with the secret map was sent.

The court pointed out that Lamont, as a former employee/officer of Ricochet, had a common law duty to protect and not disclose the confidential information learned during his employment, a duty which continues after the employment ends. The court found that Lamont was, at the very least, a prospective investor when Ricochet's geologist emailed him the map. Carranco was also a prospective investor when he was shown the map.

The court of appeals rejected Lamont's argument and held that "[t]rade secret status is not destroyed simply by showing the protected item to prospective buyers, customers, or licensees." In other words, the disclosure of a trade secret to potential investors to enable them to decide whether to invest does not destroy secrecy. Those who learn of the confidential information under such circumstances are not authorized to destroy its protection and may not use the information in a manner harmful to the interests of the one making the disclosure, even if they were not required to sign confidentiality/non-disclosure agreements.

Lamont and Carranco were also unsuccessful in trying to argue they obtained information that lead them to lease the El Milagro property by means independent of Ricochet's information. Information taken from the seismic data and other information from Ricochet was used by Lamont and Carranco in documents to obtain a bank loan necessary to pay for the working-interest in the El Milagro wells. The evidence also indicated that Lamont and Carranco did not conduct any independent research of the gas reservoir before leasing the El Milagro property.

Lessons Learned

The most significant development from this case is further clarification that companies may be protected by common law if they disclose trade secret information to an investor without a confidentiality and nondisclosure agreement in place.

When consulted by energy companies regarding their internal practices, it is important to consider the use of confidentiality agreements. Despite the holding in Lamont, it is important for energy companies to require confidentiality and non-disclosure agreements with their employees, potential investors, contractors, vendors and others who may come in contact with their confidential and trade secret information. While common law and other protections do provide some protection in some circumstances, such as those described in Lamont, the best practice is to also have agreements in place to provide an extra layer of protection.

If a confidentiality and nondisclosure agreement is in place and there is a breach of the agreement, companies have a much better chance of being awarded attorneys' fees in the course of any subsequent litigation. Attorneys' fees have traditionally not been available when suing the disclosing party for a breach of their common law duty (as opposed to a contractual duty due to a confidentiality agreement), although the ability to recover attorneys' fees has improved with the recent adoption of the Texas Uniform Trade Secrets Act.

Confidentiality and nondisclosure agreements also allow companies to broadly define what information is confidential so that it is difficult to argue otherwise in litigation. Confidentiality and nondisclosure agreements also help combat a defense commonly raised in this type of litigation — that the holder of the confidential or trade secret information did not take steps to protect the confidentiality of the information. The bottom line is that companies have significantly more protection when they have confidentiality and non-disclosure agreements in place.

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