

## Decision Insights: Publicly Available Ingredients Do Not Invalidate Source Code's Trade Secret Status

Insights

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The recent decision in *Decision Insights, Inc. v. Sentia Group, Inc.*, No. 09-2300 [4th Cir., Jan. 28, 2011], features two reversals of district court decisions involving a bedrock trade secrets principle: just because a secret recipe uses publicly available ingredients, it does not necessarily mean that the recipe is not a secret.

As in the recent cases involving Goldman Sachs and Société Générale covered by this Blog, the crux of the of corporate espionage claims in *Decision Insights* involve the purported pilfering of computer source code against the familiar backdrop of sharp competition between two companies and employee defection. As described in the appellate court's opinion, *Decision Insights* developed and owned software called the "Dynamic Expected Utility Model." It is an analytical tool used to prepare negotiating strategies using modeling techniques similar to game theory analyses: the application "assesses risk, compares the impact of different operating positions, and details the relative effects of selecting various alternatives." *Id.* at pages 3 – 4. Three of the *Decision Insight* employees who developed the software formed a competitor, *Sentia*.

According to the appellate court, *Sentia* initially tried to obtain a software license from *Decision Insights* that would allow *Sentia* to use the software, but this effort failed. *Sentia* then hired a former *Decision Insights* consultant, who worked on the source code for *Decision Insights'* software, to develop a product that would compete directly with *Decision Insights'* software. The consultant completed this task in approximately six weeks, which *Decision Insights* alleged was impossible

unless Sentia used Decision Insights' source code. Id. at page 5. Also, Decision Insights claimed that its software was nearly identical to Sentia's, in terms of its analytical methodology and the results obtained when the two programs were run. This alleged misuse of Decision Insights' source code was the basis of Decision Insights' claims under the Virginia Trade Secrets Misappropriations Act.

The disposition of Decision Insights' claims took the scenic route through the federal courts, but this aspect of the case is instructive as to the substantive law and the procedural stages of litigation for companies who might one day be involved in a trade secrets action. The case involved several decisions by the district and appellate courts. Initially, the district court granted Sentia summary judgment, which dismissed all of Decision Insights' claims. This decision was reversed in part, and affirmed in part, by the appellate court. It held that alleged "production of source code is an acceptable method of identifying an alleged compilation of a trade secret." The appellate court sent the case back to the district court in order to determine whether Decision Insights' software application, as a total compilation, could qualify as a trade secret under Virginia law focusing on three factors: whether the compilation has independent economic value, is generally known or readily ascertainable by proper means, and is subject to reasonable efforts to maintain its secrecy.

In its analysis of these three factors, the district court held that aspects of the source code were generally known or ascertainable. Decision Insights conceded that certain elements of its source code, for example, the mathematical formulae and algorithms, were publicly available. The district court concluded that under Virginia law, this public availability meant that the application could not qualify as a trade secret.

This decision was reversed by the appellate court. It noted that "a trade secret 'might consist of several discrete elements, any one of which could have been discovered by study of material available to the public.'" However, the compilation of these publicly available ingredients can still qualify for trade secret protection "if the method by which that information is compiled is not generally known." Id. at page 11 (emphasis added). The appellate court observed that testimony offered in the case established that the source code was protected from disclosure, proprietary to Decision Insights and not available to the public. A current Decision Insights employee and co-author of the source code testified that "many aspects of the source code, and hence the compilation of the source code as a whole, were not public knowledge or readily ascertainable by proper means." Citing this and related evidence, the appellate court concluded that the district court committed reversible error in holding Decision Insights failed to show its software was not generally know or readily ascertainable by proper means.

A copy of the 4th Circuit's opinion is available in pdf format below.

*Brent Cossrow is a member of Fisher Phillips' Employee Defection & Trade Secrets Practice Group. Mr. Cossrow's practice focuses on e-discovery and other electronically stored information issues in the employee defection and trade secret context. As always, please feel free to share your thoughts and questions in the comment space below.*

[Decision Insights v. Sentia.pdf \(43.87 kb\)](#)

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