

Is Grandma's Secret Recipe a Trade Secret?

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The formula for Coca-Cola. The herbs and spices in Kentucky Fried Chicken. The ingredients for the secret sauce on a Big Mac (spoiler alert, it is mostly mayo and French dressing). Some of the most iconic trade secrets involve recipes for food and

beverages. But when exactly a recipe is distinctive enough to warrant protection as a trade secret can be a difficult question.

Lawyers practicing in downtown Cleveland may remember the late Tomaydo-Tomahhdo restaurant, which once was a popular spot to grab a quick lunch to bring back to the office. Unfortunately, it was not popular enough and closed. The circumstances surrounding that closing gave an Ohio court the opportunity to explore when a recipe is sufficiently distinctive to constitute a trade secret.

In *Tomaydo-Tomahhdo L.L.C. v. Vozary*, 2017-Ohio-4292, 82 N.E.3d 1180 (8th Dist.) the court considered a claim by the owner of Tomaydo-Tomahhdo that a former partner and employee misappropriated trade secrets by using recipes for certain menu items. *Id.* at ¶ 21. The court started with the basics. It explained that R.C. 1336.61(D) defines a trade secret as:

[I]nformation, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. at ¶ 10. The court then noted that in analyzing a trade secret claim it must consider;

The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

Id. at ¶ 11 (citations and quotations omitted).

The court then turned to the recipe issue. It held that “[t]he law is clear that lists of needed ingredients and directions for combining them generally require no expressive elaboration or minimal level of creativity.” *Id.* at ¶ 21 (citation and quotation omitted). The court rejected the argument that serving similar items on both restaurants’ menus could constitute a theft of trade secrets because the items on both menus were “typical catering fare.” *Id.* at ¶ 22 (although if a competitor copies

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a restaurant's atmosphere, theme and décor, that could be the basis for a trade dress claim. *Cf. Two Pesos Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 (1992)). Finally, it noted that even minor differences in ingredients for the menu items were enough to defeat any trade secret claim because at some level, every "turkey sandwich" is a turkey sandwich. *Id.* at ¶ 25. It is the ingredients or preparation that make a recipe unique that matter.

An Ohio bankruptcy court, while not directly ruling on whether a recipe was a trade secret, illustrated some of the elements that go into such an analysis. Readers of a certain age might remember the television show *M.A.S.H.* and Klinger's frequent reference to Tony Packo's Café in Toledo, Ohio. The descendants of the original owners of Tony Packo's unfortunately ended up in multiple proceedings in common pleas, probate and ultimately bankruptcy court fighting over the ownership of recipes from the family business. The recipes, including recipes for chili soup and hot dog sauce, were passed down through the family and apparently written in a spiral notebook in the 1960's.

In *Parker v. Horvath (In re Horvath)*, 2016 Bankr. LEXIS 3658 (Bankr. N.D. Ohio Oct. 7, 2016), the court entered an injunction prohibiting one of the family members from disclosing the chili soup and hot dog sauce recipes to other parties. The court found that it was undisputed that the recipes were not known to the public and had significant economic value to the company. *Id.* at *57. It therefore recognized them as trade secrets and held that disclosure of the recipes to third parties would work irreparable harm on the bankruptcy estate. *Id.* at *58.

So when will grandma's secret recipe be a trade secret? The answer depends on whether the recipe is unique enough to meet the definition of a trade secret and whether the recipe is in fact treated like one. Evidence that the recipe is truly distinct, rather than merely a version of a "turkey sandwich" will be

critical to the argument. *Cf. Buffets Inc. v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996) (denying trade secret claim where recipes were "basic American dishes that are served in buffets across the United States" and it was not "a case where material from the public domain ha[d] been refashioned or recreated in such a way to be an original product, but is rather an instance where the end-product is itself unoriginal."); *Hui Kun Li v. Schuman*, No. 5:14-cv-00300, 2016 U.S. Dist. LEXIS 171009, *55 (W.D. Va. Dec. 9, 2016) (rejecting trade secret claim for dishes that were common in Asian cuisine where there was no evidence recipes were different from those generally known in the industry); *Vrainment Hospitality, LLC v. Binkowskii*, No. 8-11-CV-1240-T-33TGW, 2012 U.S. Dist. LEXIS 59331, *39-40 (M.D. Fla. Mar. 19, 2012) (denying preliminary injunction for use of a salted caramel brownie recipe where the alleged secret ingredient was included in salted caramel brownie recipes widely available on internet); *H.E. Butt Grocery Co. v. Moody's Quality Meats*, 951 S.W.2d 33, 38 (Tex. App. 1997) (reversing jury verdict that fajita marinade recipe was trade secret where essential elements of recipe had been published in Annual Meat Institute Seminar paper); *but see Mason v. Jack Daniel Distillery*, 518 So.2d 130, 133 (Ala. Civ. App. 1987) (affirming jury verdict that recipe for Lynchburg Lemonade was trade secret despite evidence bartenders could easily identify ingredients, which were included in many other alcoholic drinks, because jury could have found that method of combining these common ingredients into successful beverage was a trade secret).

Thus, evidence that a menu item would be difficult to recreate without access to the original recipe will support the trade secret claim. *Cf. 205 Corp. v. Brandow*, 517 N.W.2d 548, 550 (Iowa 1994) (affirming permanent injunction and citing testimony from a department chairman of the Culinary Institute of America that it could not determine ingredients in pizza sauce, pizza crust, and grinder recipes without

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access to prohibitively expensive chemical analysis machine, and even then could not determine how ingredients were combined).

Finally, evidence that the recipe was treated as confidential and efforts were taken to protect it from disclosure will be important in proving the recipe is a trade secret. *205 Corp.*, 517 N.W.2d at 550-51 (discussing evidence that recipes were purchased for value, sauce recipes were kept confidential and while crust recipe had to be disclosed to employees making crust, there was evidence they were told to keep it confidential); *Sysco Corp. v. FW Chocolatier*, Pa. Super. No. 1492 WDA 2012, 2013 Pa. Super. LEXIS 1801 *17-19 (Aug. 27, 2013) (affirming grant of preliminary injunction based on testimony that fudge recipe was not written down, apprenticeship program was used to teach recipe only to those with a “need to know,” and that anyone with expertise in confectionery industry was not allowed around the recipe); *Vrainment Hospitality*, 2012 U.S. Dist. LEXIS 59331 at *40-41 (rejecting trade secret claim, despite fact plaintiff had employees sign confidentiality agreements concerning recipe,

because the recipe had been published in local magazines except for single secret ingredient the court found was not actually secret); *Peggy Lawton Kitchens, Inc. v. Hogan*, 466 N.E.2d 138, 139 (Mass App. 1984) (affirming finding chocolate chip cookie recipe was trade secret in part based on evidence only copies of recipe were locked in safe and desk and ingredients were prepared in such way to keep overall recipe secret).

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