Client Advisory

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January 19, 2017

The Defend Trade Secrets Act – 2016 In Review

As we previously wrote in May and August, the Defend Trade Secrets Act of 2016 ("DTSA" or "Act"),[1] which became law in May of 2016, opened up federal courts to anyone seeking to protect sensitive information from unscrupulous competitors and former employees. With 2016 behind us, we review some of the emerging threads with regard to cases filed under the Act.

The DTSA Is Applied Expansively

Litigants from a broad range of industries – including manufacturers, software developers, consumer product companies, and electrical contractors – have utilized the Act to bring claims in federal courts. These claims were not limited to actions that occurred exclusively after the effective date of the Act, as "partial recovery is available" where some conduct occurred after May of 2016.[2] Specifically, even if the misappropriation occurred prior to the effective date, post-enactment "disclosure or use of a trade secret" is actionable under the DTSA.[3]

Federal Courts Continue To Look To State Law

As expected, many plaintiffs bring claims based both on the DTSA and their state's trade secret law (oftentimes modeled on the Uniform Trade Secrets Act, or UTSA). Although, as we previously noted, the definition of what constitutes a trade secret under the DTSA is slightly broader than what New York law and the UTSA provide, federal courts continue to largely rely on pre-DTSA analysis in deciding whether a trade secret was misused.[4] Therefore, while one court has acknowledged that the DTSA provides a slightly broader

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[1] Defend Trade Secrets Act ("DTSA"), Pub. L. No. 114-153, 130 Stat. 376 (2016) (codified in scattered sections of 18 U.S.C.).

[2] *Adams Arms, LLC v. Unified Weapon Sys., Inc.*, No. 8:16-cv-1503-T-33AEP, 2016 WL 5391394, at *6 (M.D. Fla. Sept. 27, 2016) (observing that the plain language of the DTSA indicates that recovery is available for "any misappropriation . . . for which any act occurs" after its effective date).

[3] *See Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Grp., Inc.*, No. 15-CV-211 (LGS) (RLE), 2016 WL 5338550, at *6 (S.D.N.Y. Sept. 23, 2016).

[4] *See, e.g.*, *HealthBanc Int'l, LLC v. Synergy Worldwide, Inc.*, No. 2:16-cv-00135-JNP-PMW, 2016 WL 5255163, at *6 (D. Utah Sept. 22, 2016) (comparing the DTSA to Utah law, finding the two "identical"); *Phyllis Schlafly Revocable Trust v. Cori*, No. 4:16CV01631 JAR, 2016 WL 6611133, at *2–4 (E.D. Mo. Nov. 9, 2016) (comparing the DTSA to the Missouri Uniform Trade Secrets Act); *Panera, LLC v. Nettles*, No. 4:16-cv-1181-JAR, 2016 WL 4124114, at *4 n.2 (E.D. Mo. Aug. 3, 2016) ("the Court's analysis has focused on Panera's Missouri trade secrets claim, an analysis under the Defend Trade Secrets Act would likely reach a similar conclusion"); *Henry Schein, Inc. v. Cook*, No. 16-cv-03166-

definition than the UTSA, this difference has proven inconsequential.[5] Federal courts also continue to be mindful of the prohibition against awarding injunctive relief under the Act that conflicts "with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business."[6]

Pleading Standards Applicable To DTSA Claims

Recent case law is perhaps most instructive on the DTSA's pleading requirements.[7] Pleading standards in federal court, even under Fed. R. Civ. P. 8, are higher than what state law often provides. This can be particularly problematic in the trade secrets context, where one must balance the detailed pleading requirements against the danger of exposing too much information about the trade secret in a pleading. Emerging case law makes clear that in order to satisfy federal pleading requirements, a claimant must actually plead the general contours of the alleged trade secret.[8] Moreover, in addition to affirmatively pleading the existence of a trade secret under the DTSA, a plaintiff also must plead misappropriation of that trade secret via improper means.[9]

Ex Parte Seizure, Temporary Restraining Orders & Injunctive Relief

One aspect of the Act that received a lot of coverage is the *ex parte* seizure mechanism of the DTSA.[10] To date, there is no published decision (or a report of one) that suggests this mechanism has been successfully utilized. As previously explained, there is good reason for that. The DTSA sets a high threshold for civil forfeiture, including requiring the owner of the trade secret to show, among other things, that an injunction would be inadequate because the other party would evade, avoid or otherwise not comply with such an order.

JST, 2016 WL 3212457, at *3 (N.D. Cal. June 10, 2016) (comparing the DTSA to the California Uniform Trade Secrets Act, reaching the same conclusion under both laws); *Engility Corp. v. Daniels*, No. 16-cv-2473-WJM-MEH, 2016 WL 7034976, at *8-10 (D. Colo. Dec. 2, 2016) (finding existence of a trade secret under the DTSA and Colorado law).

[5] *Earthbound Corp. v. MiTek USA, Inc.*, No. C16-1150 RSM, 2016 WL 4418013, at *10 (W.D. Wash. Aug. 19, 2016) (finding the definition of trade secrets in the federal Economic Espionage Act, as amended by the DTSA, broader than Washington's UTSA).

[6] *Engility Corp. v. Daniels*, No. 16-cv-2473-WJM-MEH, 2016 WL 7034976, at *10 (D. Colo. Dec. 2, 2016) (citing 18 U.S.C. § 1836(b)(3)(A)(i)(I)) (analyzing Colorado's prohibition on injunctive relief that "prevents a person from entering into an employment relationship" and its applicable exceptions).

[7] For a detailed description of pleading requirements under the DTSA, *see Syntel Sterling*, 2016 WL 5338550, at *6.

[8] *Chatterplug, Inc. v. Digital Intent, LLC*, No. 1:16-cv-4056, 2016 WL 6395409, at *3 (N.D. Ill. Oct. 28, 2016).

[9] *M.C. Dean, Inc. v. City of Miami Beach*, No. 16-21731-CIV-ALTONAGA, 2016 WL 4179807, at *5–8 (S.D. Fla. Aug. 8, 2016) (dismissing claim because the plaintiff failed to show the reasonable steps taken by him to preserve confidentiality and, in addition, failed to demonstrate that the trade secrets were disclosed by improper means).

[10] *See* Section 2(b)(2) of the DTSA.

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However, courts appear to be willing to grant injunctions and temporary restraining orders in cases brought under the DTSA in appropriate circumstances.[11]

Conclusion

Given the expedience with which litigants have utilized the DTSA, and its broad, industry-wide application, it is clear that federal courts will continue to flesh out the case law as time goes on. To date, the biggest impact appears to be the wider availability of federal courts to plaintiffs seeking redress, but not a substantive change in the applicable law.

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[11] *See, e.g., Unum Grp. v. Loftus*, No. 4:16-CV-40154-TSH, 2016 WL 7115967 (D. Mass. Dec. 6, 2016); *Engility Corp. v. Daniels*, 2016 WL 7034976; *Earthbound Corp. v. MiTek USA, Inc.*, 2016 WL 4418013; *Panera, LLC v. Nettles*, 2016 WL 4124114.