Trends & Insights: The Defend Trade Secrets Act Nine Months Later

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It has been nine months since enactment of the Defend Trade Secrets Act (DTSA) (18 U.S.C. § 1832, et seq.), which amended the Economic Espionage Act of 1996 (18 U.S.C. § 1831, et seq.) and created a new federal civil cause of action for misappropriation of trade secrets. Since that time, hundreds of DTSA claims have been filed throughout the country, often with parallel state law claims (the DTSA does not preempt state law). The initial wave of DTSA litigation suggests a number of trends: (1) interestingly, and despite the creation of a new federal cause of action, the number of misappropriation cases filed in federal court have not increased; (2) the new ex parte seizure process has been used sparingly; (3) temporary restraining orders (TRO) and efforts to seek "expedited discovery" remain the most common forms of pre-trial relief; and (4) open questions remain as to the scope and application of the DTSA.

DTSA Filing Trends

The number of misappropriation claims filed in federal court has not increased since enactment of the DTSA. A survey of cases filed in federal court in the year preceding the DTSA shows approximately 500 cases filed with at least one cause of action asserting a claim for misappropriation of trade secrets under state law. In the nine months following enactment of the DTSA, approximately 227 cases have been filed asserting a claim for trade secret misappropriation under either the DTSA and/or state law, with the greatest number of cases being filed in the Northern and Central Districts of California, the Southern District of New York, and the Northern District of Illinois. Whether and to what extent filings under the DTSA increase in the future remains to be seen.

Ex Parte Seizure Orders - Few and Far Between

A unique feature of the DTSA is that it allows the owner of a trade secret to apply ex parte for an order directing the seizure of property "necessary to prevent the dissemination of the trade secret that is the subject of the action." 18 U.S.C. § 1836(b)(2)(A)(i). But less than a dozen applications for seizure have been requested in the hundreds of DTSA cases filed, and courts have been reluctant to grant such relief. Courts generally have concluded that the moving party has failed to allege facts sufficient to satisfy the DTSA's seizure requirements. *See Jones Printing LLC v. Adams*, 1:16-cv-442 (E.D. Tenn. Nov. 3, 2016). At least one court has in part granted an ex parte seizure request under 18 U.S.C. § 1836(b)(2)(A)(i). *Mission Capital Advisors LLC v. Christopher D. Romaka*, Case No. 1:16-cv-05878-LLS (S.D.N.Y. Jul. 29, 2016) (denying request for broader seizure order, but granting seizure of contact list). Other courts, including the Western District of Washington, the Southern District of Florida, and the Eastern District of Michigan, have granted seizures under more common forms of pre-trial relief, such as expedited discovery and TROs. *See Earthbound Corp., MiTek USA, Inc.*, 2016 WL 4418018, *11 (W.D. Wash. Aug. 19, 2016) (granting seizure of property under TRO and expedited discovery requests); *Baleria Caribbean Ltd., Corp. v. Calvo*, 16 2330-CIV-WILLIAMS (S.D. Fla. Aug. 5, 2016) (granting ex parte application for a seizure order as a form of expedited

discovery); *Dazzle Software II, LLC, et al. v. Kinney*, 16-12191 (E.D. Mich. June 15, 2016) (denying application for seizure order, but permitting "expedited discovery"). Thus, expedited discovery and TROs remain the most commonly granted forms of pre-trial relief under the DTSA. *See Trulite Glass and Aluminum Solutions, LLC v. Smith*, 2016 WL 5858498, *2 (E.D. Cal. Oct. 6, 2016) (granting TRO); *Allstate Ins. Co. v. Rote*, 2016 WL 4191015, *7 (D. Or. Aug. 7, 2016) (same); *OOO Brunswick Rail Management v. Sultanov*, 2017 WL 67119, *3-4 (N.D. Cal. Jan. 6, 2017) (same).

Additional TRO Trends

A survey of TROs granted in conjunction with DTSA claims reveals courts are concerned with: (1) the degree to which a TRO might inhibit a defendant's ability to work; and (2) the sensitivity of the information misappropriated. Where there is a non-compete agreement in place, courts have granted a TRO as a means of enforcing the agreement. *See*, *e.g.*, *Allstate Insurance Company v. Rote*, 2016 WL 4191015, *5 (D. Or. Aug. 7, 2016); *Engility Corporation v. Daniels*, 2016 WL 7034976, *11 (D. Colo. Dec. 2, 2016). That said, courts may permit defendants to continue to solicit customers where appropriate. *See*, *e.g.*, *Free County LTD v. Drennen*, 2016 WL 7635516, *7 (S.D.N.Y. Dec. 30, 2016) (granting TRO to prevent defendants from disseminating information, but denying request that defendants be prohibited from soliciting customers); *Henry Schein, Inc. v. Cook,* 191 F. Supp. 3d 1072, *1079 (N.D. Cal. June 10, 2016) (granting TRO except for prohibition on solicitation of customers). Some courts have issued a TRO where personal identifying information is at issue. *See*, *e.g.*, *OOO Brunswick*, 2017 WL 67119 at *3; *Unum Group v. Loftus*, 2016 WL 7115967, *3-4 (D. Mass. Dec. 6, 2016).

Extraterritoriality

The DTSA expressly applies to conduct outside the United States if: (1) the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or any of its states; or (2) an act in furtherance of the offense was committed in the United States. 18 U.S.C. § 1837. No case has yet expanded on the application of the DTSA to extraterritorial conduct. How courts will interpret the phrase "in furtherance of the offense" within a DTSA claim remains to be seen.

Whistleblower Immunity Trends

Another open question under the DTSA is whether and to what extent its whistleblower protections may extend to non-natural persons. Under the DTSA, whistleblower protection extends to any "individual" who discloses a trade secret made "in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and solely for the purpose of reporting or investigating a suspected violation of law." 18 U.S.C. § 1833(b)(1). For an employer to be eligible to recover exemplary damages and attorneys' fees under the statute, it must provide notice of the immunity provisions in any new agreement governing trade secrets or other confidential information. 18 U.S.C. § 1833(b)(3). Whether and to what extent this protection extends to non-natural persons has not yet been tested in the courts. And the ability of individual employees to seek immunity under the DTSA may be tested at the pleadings stage. *See Unum Group*, 2016 WL 7115967 at *2. (D. Mass. Dec. 6, 2016) (denying motion to dismiss on the basis of individual immunity because the defendant employee failed to plead sufficient facts establishing immunity).

Conclusion

Although the DTSA is still in its infancy, recent rulings have begun to flesh out the scope and application of the ex

parte seizure process. Trends in filings indicate plaintiffs are rarely utilizing ex parte seizures, instead preferring to rely on TROs or requests for “expedited discovery.” As the law continues to develop, the Dentons Litigation and Dispute Resolution Group can provide guidance on trade secret protection policies, and can assist with all aspects of trade secrets litigation.

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