

May 2017

Client Advisory

A Year with the DTSA - Will This One-Year-Old Protect Your Trade Secrets?

Happy Birthday to the Defend Trade Secrets Act ("DTSA"). As we noted in our [alert](#) one year ago today, on May 11, 2016, President Obama signed into law the DTSA for the purpose of protecting American businesses from economic espionage by providing easier access to federal courts as well as the possibility of double damages, attorneys' fees, and the right to ex parte seizure of misappropriated information.

A year later, federal courts all over the country have addressed the language in the DTSA. However, with the exception of the recent "fig spread" case, discussed in our [Dalmatia Import Group, Inc. v. Foodmatch, Inc., et al. alert](#), none of the cases have substantively addressed the issue of damages and attorneys' fees, as many dealt with prejudgment relief, motions to amend, and of course, motions to dismiss.

Nevertheless, one principle has crystallized; namely, that the DTSA may protect against a misappropriation that started before May 11, 2016. Briefly, the DTSA provides wronged parties with three theories on which to base statutory recovery: (1) wrongful acquisition (someone steals your trade secret), (2) disclosure (someone wrongfully discloses your trade secret), or (3) use of a trade secret (self-explanatory). However, it was not determined until after the DTSA was enacted whether these theories provided a remedy for misappropriations that began prior to the DTSA's enactment.

A majority of the federal courts around the country have concluded that DTSA does provide a remedy for misappropriations that began prior to the DTSA's enactment in certain circumstances. Specifically, many courts have found that if there is a "continuing access or use" of the trade secret that is rooted in conduct before the DTSA's enactment, full recovery for damages may be possible. On the other hand, no recovery may be permitted under the DTSA if there is merely a continuing wrongful "disclosure" of the trade secret (as opposed to a continuing use of the trade secret). We will continue to track how damages will be assessed in this latter type of case.

The point is, if you are concerned about someone who may have stolen your trade secrets, you may still be able to avail yourself of this new federal remedy—including the added remedies of double damages, attorneys' fees and the ex parte seizure of misappropriated information—if the misappropriating conduct occurred before May 11, 2016. Therefore, we urge you to contact an attorney as soon as possible.

If you have any questions about the DTSA, or would like to further explore the ways in which you can further protect your trade secrets, please contact [Ashley Le Brun, Esq.](#) or [Daniel DeFiglio, Esq.](#) or any member of the [Trade Secret and Non Compete Practice Group](#) in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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