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New Jersey Trade Secrets Act Signed Into Law

By Jedd Mendelson

On January 9, 2012, New Jersey Governor Chris Christie signed into law the New Jersey Trade Secrets Act, which establishes principles governing protection of trade secrets and remedies for their misappropriation. In doing so, New Jersey has joined the mainstream in the trade secrets arena: New York, North Carolina, Massachusetts, and Texas are the only remaining states without a statute modeled on the Uniform Trade Secrets Act. While the New Jersey Trade Secrets Act introduces a statutory framework governing trade secret protection, in many respects it does no more than codify existing case law. The Act became effective on January 9, 2012.

In effect, the statutory definition of a "trade secret" is not particularly different from how New Jersey courts have defined the term. As before, a trade secret fundamentally is information, in any of a number of possible formats, with respect to which efforts are undertaken to maintain its secrecy and that derives current or potential economic value from not being known generally. It is worth noting that New Jersey already had a definition of "trade secret" under its criminal statutes. While the text of the criminal statute's definition reads differently, its meaning and interpretation are consistent with the newly-enacted civil statute's definition.

The Trade Secrets Act sets forth a variety of remedies for trade secret misappropriation. These include entry of injunctive or other relief to protect a trade secret, extension of an injunction beyond the term that was initially contemplated or established to prevent a wrongdoer from gaining commercial advantage, and payment of a reasonable royalty from the wrongdoer to the trade secret owner. The statute also sets forth a framework for awarding damages. The most obvious measure of damages is actual loss caused by the misappropriation. Another is the economic gain or "unjust enrichment" attained by the wrongdoer. These damage remedies are not mutually exclusive, meaning that both can be awarded to the victim of the misappropriation. In contrast, the statute indicates that the award of a reasonable royalty referenced above is an alternative remedy but one that is not to be joined with an award of damages of actual loss or the wrongdoer's unjust gain.

The Trade Secrets Act establishes other powerful remedies. One is punitive damages, which are recognized under New Jersey common law, but the statute caps them at double any award of the various kinds of damages (including the reasonable royalty) referenced above. Punitive damages can be awarded if the misappropriation was "willful and malicious," a standard consistent with an award of punitive damages under common law.

Another remedy, which is a departure from New Jersey common law but not uncommon in the statutory arena, is an award of reasonable attorneys' fees and costs to the prevailing party. This provision is significant because it should force both purported trade secret owners and wrongdoers to assess their conduct realistically lest they mount a lawsuit or defend against one unreasonably and risk sizeable attorneys' fee awards. The statute provides that courts can award fees and costs against wrongdoers for, once again, "willful and malicious" misappropriation, supposed owners of trade secrets for making misappropriation claims in "bad faith," and a party in either position for moving to terminate an injunction or resisting such an application in "bad faith."

The Trade Secrets Act provides that the inclusion of the above-referenced remedies does not foreclose a court from ordering a remedy not listed in the statute, but awarded before the statute's enactment. The statute also establishes a three-year statute of limitations for misappropriation claims, running from when the misappropriation was discovered or should have been discovered by the exercise of reasonable diligence. Additionally, the Trade Secrets Act only applies prospectively, *i.e.*, from the date of enactment. It does not cover any misappropriation that occurred prior to the January 9, 2012 effective date or one that continues at present, but began before the effective date.

Finally, the statute recognizes the difficulty presented by cases of this kind in view of the principle that lawsuits are public proceedings. Notwithstanding the well-recognized principle that such proceedings should be open to scrutiny to the maximum extent possible, the Trade Secrets Act provides that courts should use reasonable means to preserve the secrecy of alleged trade secrets. The statute indicates that courts should take such reasonable steps consistent with the New Jersey Rules of Court, which recognize the utility of protective orders and the like to limit disclosure of information where necessary. Notably, language that would have established a presumption in favor of protective orders, including "attorneys' eyes only" discovery, was rejected. This suggests the legislature believes that judges have done a satisfactory job of protecting trade secret information and that continued application of the judgment and discretion exercised to date will suffice.

For practitioners in other jurisdictions familiar with the Uniform Trade Secrets Act, enactment of the New Jersey law probably does not herald much, if anything, that is new or unusual. For New Jersey practitioners, the statute means that there will be some interesting development of state trade secret law, but most likely nothing extraordinary, because the Trade Secrets Act builds on a common law edifice that largely has been effective in enabling parties to know their rights and restrictions. One year from now, it will be interesting to see whether practice and law in this area is fundamentally the same as before, although certainly one may expect a few modifications and new wrinkles.

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