

## BUSINESS LITIGATION ALERT

JANUARY 2012

### Governor Christie Signed This Important Statute on Monday, January 9, 2012:

### Protection of Trade Secrets by Statute in New Jersey

**Passed on December 5, 2011 by both Houses of the Legislature without a single dissenting vote, New Jersey's Trade Secrets Act awaited only Governor Christie's signature.** The Act protects the holder of information of economic value from misappropriation if they can demonstrate reasonable efforts to maintain the secrecy of that information. The Governor has signed the Act as passed by the Legislature. New Jersey has become the forty-fourth state to adopt its own version of the U.S. Uniform Trade Secrets Act.<sup>1</sup> The New Jersey version has modified the Uniform Act to conform to the State's common law trade secrets jurisprudence.

The Prefatory Note to the 1985 Amendments to the Uniform Act stresses the importance of state trade secret protection alongside federal patent law:

A valid patent provides a legal monopoly for **seventeen years** in exchange for **public disclosure** of an invention. If, however, the courts ultimately decide that the Patent Office improperly issued a patent, an invention will have been disclosed to competitors with no corresponding benefit. In view of the substantial number of patents that

are invalidated by the courts, many businesses now elect to protect commercially valuable information through reliance upon the state law of trade secret protection.

*Uniform Trade Secrets Act with 1985 Amendments*, Prefatory Note at 6 (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974)) (emphasis added).<sup>2</sup> There is no statutory time limitation for the life of a trade secret, but an action for misappropriation must be filed in court within three years of the discovery of that misappropriation.

The New Jersey Act defines trade secret information more broadly than the Uniform Act by adding "business data," and "design, diagram, drawing, invention, plan, procedure, and prototype" to the Uniform Act's listing of "formula, pattern, compilation, program, device, method, technique, or process." If information qualifies as "trade secret" under this Act, it

(i) [d]erives 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, and (ii)

<sup>1</sup> Currently, trade secrets protection in New York, Pennsylvania, Massachusetts, Tennessee, Texas, and Wyoming depends on unique Acts and/or the common law.

<sup>2</sup> Trade secret theft may be subject to criminal liability under Economic Espionage Act, Pub. L. No. 1094-294, 110 Stat. 3488 (1966).

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[i]s the subject of efforts that are reasonable under circumstances to maintain its secrecy.

New Jersey Trade Secrets Act, Ass'y No. 921, § 2(1)(2) (emphasis added).<sup>3</sup>

Under this legislation, the court may enjoin actual or threatened misappropriation -- acquisition or disclosure of another's trade secrets by "improper means," that is, by "theft, bribery, misrepresentation, and breach or inducement of a breach of a defined duty to maintain secrecy." Damages under the Act can include actual loss, unjust enrichment not included in that loss, or alternatively, imposition of liability for royalty payment. For "willful and malicious misappropriation" and/or "bad faith," the court may impose double damages, counsel fees, costs, and services of experts. *Id.* §§ 3-4, 6.

The court, in a proceeding under the Act, must preserve the trade secret from disclosure during and after discovery and hearings, pursuant to New Jersey Court Rules. The Act supersedes any other trade secrets law of the State, except those protecting the rights the

trade secret owner may have under any other civil remedy or prohibition under common law or other statute, which rights are not to be denied or impaired. *Id.* §§ 7, 9. The single exception to this application of the Act is an action brought under the New Jersey Tort Claims Act (N.J.S.A. 59:1-1 *et seq.* against a public entity or public employee as to any conflicting provisions. *Id.*

The strength of the Act rests initially on the trade secret owner's reasonable precautions as to limitation on the recipients and on the circumstances of shared information. The secret character of the information and the consequences of misappropriation should be clearly and repeatedly communicated to each recipient. The signature of the recipient on an appropriate confidentiality agreement before the secret information is shared will confirm the awareness of the protected character of the shared information and the liability for misappropriation. ■

<sup>3</sup> "Reverse Engineering" is included by definition of "**proper means**" in the pending statute "so long as the acquisition of the known product was lawful or from sources having the legal right to convey it, such as purchase on the open market." *Id.*

For more information about any of the topics covered in this issue of the Business Litigation Alert, please contact a Bressler, Amery & Ross Business Litigation Attorney:

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