

New Jersey Adopts Uniform Trade Secrets Act

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On December 5, 2011 the New Jersey Assembly approved the passage of the New Jersey Trade Secrets Act. Governor Christie signed the bill on January 9, 2012, which made New Jersey the 47th state to adopt some version of the Uniform Trade Secrets Act. The Act largely codifies existing case law in New Jersey. It is effective immediately but does not apply to misappropriations of trade secrets that pre-date the effective date, even in the case of misappropriations that continue after the effective date.

A trade secret is defined in the Act as:

[I]nformation, held by one or more people, without regard to form, including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:

(1) Derives 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

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Act authorizes the recovery of damages for misappropriation of trade secrets, measured by both actual loss and unjust enrichment, as well as injunctive relief.

A court may award attorney's fees and the costs of expert witnesses to the prevailing party in a misappropriation case if

- a. willful and malicious misappropriation exists;
- b. a claim of misappropriation is made in bad faith; or

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c. a motion to terminate an injunction is made or resisted in bad faith. Bad faith is that which is undertaken or continued solely to harass or maliciously injure another, or to delay or prolong the resolution of the litigation, or that which is without any reasonable basis in fact or law and not capable of support by a good faith argument for an extension, modification or reversal of existing law.

As originally proposed, the legislation created a presumption in favor of granting protective orders in trade secret litigation. As adopted, however, the Act authorizes the court to presume the secrecy of an alleged trade secret in a manner consistent with the New Jersey Court Rules.

The Act establishes a three-year statute of limitations that begins to run when the misappropriation was discovered or should have been discovered, using "reasonable diligence." The rights created under the Act are in addition to, rather than in abrogation of, other common law and statutory rights.

In response to the Act, businesses should continue to maintain a strong trade secrets policy, to limit access to such secrets to individuals with a need to know, to require strict non-disclosure agreements and to monitor and pursue potential misappropriations vigilantly.

Author of this Alert:

W. Raymond Felton is the Chair of the Corporate Department and Co-Managing Partner of the firm. He was selected as Best Lawyers "Mergers & Acquisitions Law Lawyer of the Year - Woodbridge", 2012. Mr. Felton's practice focuses in the areas of corporate, LLC and securities law with an emphasis on mergers & acquisitions and financing transactions through both the public and private equity and debt markets. He represents start-up and emerging companies in many industries including high-tech, as well as a number of mature and established companies.