

Protecting Valuable Business Information with the New Jersey Trade Secrets Act

To take advantage of the protections offered by the NJTSA, businesses must put reasonable policies and procedures in place to protect their trade secrets in the ordinary course of business, before any disputes arise.



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WHETHER IT'S GROUNDBREAKING technical innovations or the identity and requirements of customers, a company can rise or fall on its ability to protect the confidentiality of its valuable information. Until January 2012, the only legal recourse for a New Jersey business faced with the potentially devastating misappropriation of such information was under the common law, arising out of decisions by New Jersey judges.

Most states had adopted the Uniform Trade Secret Act (UTSA), but not New Jersey. This made it difficult for New Jersey companies doing business in other states to plan to protect their information in a consistent and effective way. In addition, New Jersey did not provide businesses with some important tools to pursue violators who misappropriated their valuable information.

These problems were remedied when New Jersey adopted the New Jersey Trade Secrets Act (NJTSA) last year, covering any misappropriations occurring after Jan. 9, 2012.

Similar and consistent versions of the UTSA exist in 46 other states and the District of Columbia, excluding only New York, Massachusetts and Texas. Consequently, when developing strategies to protect their information and deciding whether to sue for misappropriation, New Jersey businesses will be able to rely on a clear set of rules that has already been applied by courts throughout the country.

The NJTSA provides remedies for misappropriation of trade secrets. It defines "misappropriation" as acquisition of trade secrets by improper means as well as disclosure and use. "Improper means" includes theft, bribery, misrepresentation and espionage, whereas "proper means"

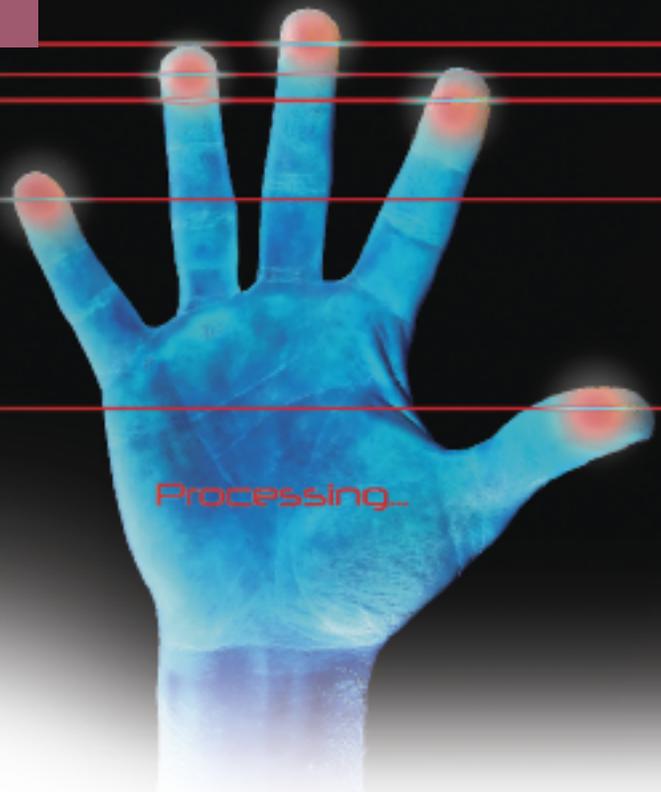
includes independent invention, reverse engineering and through public use or literature.

Importantly, the NJTSA changes the meaning of "trade secrets." Under common law, courts would consider various factors on a case-by-case basis to determine whether an alleged trade secret was protectable. Under the NJTSA, "trade secret" is defined and includes information held, in any form, so long as it both: (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."

This definition has several important consequences. Businesses won't be able to assert claims for misappropriation of their valuable information unless they have reasonable procedures and policies designed to maintain the secrecy of that information. Previously, this was just one of several factors that a court would consider. Also, information can be protected under the NJTSA, even if it is in development. Previously, information could not be protected unless it had already been used by the plaintiff.

Another important change is that, under common law, someone who used improper means to acquire a business's trade secrets could defend against a misappropriation claim by arguing that he could have acquired the same information by proper means (such as reverse engineering). The NJTSA specifically rejects this defense.

The NJTSA also significantly changes the remedies available to New Jersey businesses in trade secret cases. As before, injunctive equitable relief and/or money damages may be available, but the NJTSA clarifies that dam-



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ages can be based on the plaintiff's loss, the defendant's gain, or a reasonable royalty. Perhaps more importantly, the NJTSA makes it possible to recover punitive damages and/or attorneys' fees in certain extreme cases. These changes will likely put pressure on parties to consider early settlements.

Businesses should also be aware that, under the NJTSA, they have only three years to bring a claim. The former statute of limitations was six years.

The NJTSA will also make it easier for businesses to avoid disclosing their trade secrets during litigation. Courts are directed to use reasonable means consistent with the Court Rules to preserve the secrecy of the information.

The NJTSA will provide uniformity and predictability and will make it easier for businesses to bring claims for trade secret misappropriation, and provide them with additional remedies. It will also tend to encourage early settlement of cases. However, to take advantage of these protections, businesses must put reasonable policies and procedures in place to protect their trade secrets in the ordinary course of business, before any disputes arise. ■

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