

CLIENT ALERTS

What Should Your Company Know as the Defend Trade Secret Act Turns Three Years Old?

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Three years ago this week, on May 11, 2016, the federal Defend Trade Secrets Act of 2016 (the “DTSA”) was signed into law. Butzel Long was one of the first law firms in the nation to report on the passage of this Act. Shortly after, Butzel Long successfully defended against the very first application for an Ex Parte Seizure in the nation in the case of *Dazzle Software II, LLC v. Kinney*, Case No. 16-cv-12191 (E.D. Michigan, Slip Op. July 18, 2016). Since that time, Butzel Long has continued to defend, litigate, and be a leader on the topic of the Defend Trade Secrets Act.

Butzel has informed its clients about how the DTSA may impact the automotive industry and its supply chain. We’ve assisted the Federal Judicial Center to formulate the Trade Secret Seizure Best Practices that were published nationwide. We’ve written about some of the largest cases in the nation, including the *Waymo v. Uber* case. We’ve warned against the criminal implications of trade secret theft. And, of course, we’ve represented our clients in state and federal courts throughout the country in cases alleging DTSA violations.

Is trade secret theft a big deal? It certainly is to those whose intellectual property has been stolen, as well as those who have been caught stealing it. One report estimates that the U.S. economy suffers about \$300 billion in losses annually from trade secret misappropriation. Another report estimates that the value of trade secret theft in the U.S. is approximately 1%-3% of the U.S. gross domestic product (GDP). And those who have been caught (or even accused) of stealing trade secrets have faced criminal prosecution and have seen damages awards in the tens and even hundreds of millions of dollars. These are, to understate it, very large numbers with a very large impact.

While much of the attention in the press is focused on trade secret theft by China and Chinese entities (and understandably so), it remains true that the most likely actors to steal your

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company's trade secrets are within your building. Employees, former employees, and other partners or vendors are the most likely people to take your confidential information. For a few dollars, an employee can purchase a two-inch thumb drive that can hold as much data as it used to take a warehouse to hold. That employee can then walk right out the front door with everything that sets your company apart from your competitors literally in his or her pocket. It is, therefore, vital that your company has the proper agreements in place, technology set up, and protocols and policies to protect itself. If you do not have such protective measures in place—or if you fear they may be outdated (which they probably are)—contact Butzel Long to conduct a Trade Secret Audit today.

The amount of trade secret litigation has increased since the passage of the DTSA and it is not likely to decline appreciably anytime soon. Innovation is now ingrained into our economy and technology continues to evolve and expand. It is more important than ever to protect your trade secrets.

Since the passage of the DTSA, the Act continues to be interpreted and applied by the courts throughout the nation. Many companies have seen their attempts to protect their trade secrets fail because they have not taken "reasonable measures to keep such information secret." Others have failed to properly plead that their trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce, which is a necessary element to bring the federal claim. While courts have generally been liberal as to the specificity with which trade secrets need to be identified at the initial pleading stage, plaintiffs will have to ultimately plead with specificity and even disclose (although potentially under seal) their trade secrets in order to properly litigate a claim. These are all issues that continue to be worked out by the lower courts and monitored by Butzel Long.

And as the DTSA celebrates its third birthday and continues to grow in its toddler years we will continue to learn more as even more cases make it to the Circuit Court of Appeals level. And in the not-too-distant future, we may even have our first ruling from the U.S. Supreme Court on an issue stemming from the DTSA. As the courts continue to shape and interpret the Act, companies should continue to hone their practices to protect themselves.

Until then, continue to follow Butzel Long's client alerts and, if you ever find yourself embroiled in a trade secret dispute, make sure you contact us to assist you.

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