The DTSA and Federal Court

Insights
5.20.16

On April 27, 2016, Congress passed federal trade secrets legislation known as the "Defend Trade Secrets Act" ("DTSA"). On May 11, 2016, President Obama signed DTSA into law. The enactment of DTSA creates, among other things, a federal civil remedy for the misappropriation of trade secret business information. However, DTSA will not preempt or otherwise override state laws concerning trade secrets, such as the Uniform Trade Secrets Act ("UTSA"), which many states have adopted. Further, the rights to recovery under DTSA and UTSA are very similar. For example, both statutes provide a right to recover exemplary damages equal to twice the amount of actual damages awarded and attorney's fees.

Based on the foregoing, the question is: How will DTSA help a party attempting to prosecute a misappropriation of trade secrets claim against, for example, a former employee? Obviously, the full picture has yet to be seen, but for starters, DTSA will open the door to federal court for claims involving misappropriation of trade secrets, through what is known as federal question jurisdiction.

By way of background, there are two primary ways to establish federal jurisdiction, a necessary condition precedent to filing a lawsuit in federal court, as opposed to state court: (i) diversity jurisdiction; and (ii) federal question jurisdiction. Prior to DTSA, most misappropriation of trade secrets lawsuits could be filed in federal court only through diversity jurisdiction (i.e., where a plaintiff and defendant are citizens of different states and the amount in controversy exceeded $75,000). For example, if a plaintiff is a Delaware corporation with a principal place of business in Pennsylvania, it is a citizen of both Pennsylvania and Delaware. If the defendant it seeks to sue also resides in either Pennsylvania or Delaware, the plaintiff cannot establish diversity jurisdiction, and claims such as a claim under UTSA must be filed in state court.

Diversity is not required, however, where a party is filing suit under a federal statute, such as DTSA because a claim under a federal statute provides federal question jurisdiction. Further, once a party has a claim under a federal statute, it typically can include additional state law claims, such as a claim under UTSA, without losing federal jurisdiction over the case. Moreover, federal question jurisdiction does not have an amount in controversy requirement.

In light of the foregoing, DTSA will likely be a new useful forum selection tool in trade secrets litigation because it will provide access to the various benefits of federal court litigation. The benefits of pursuing claims in federal court as opposed to state court can vary from state-to-state, and even

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among the various courts within a single state. However, at a minimum, federal courts offer nationally uniform procedures and rules, as well as a generally high-level judiciary that is often very familiar with trade secrets litigation. So, for parties looking to protect their trade secrets, federal court can often remove some of the variables and guess-work encountered across state court jurisdictions. In addition, federal courts are often very familiar with the complex electronic discovery necessary to prosecute a modern trade secrets claim. Thus, federal court is frequently the forum of choice for parties seeking to enforce trade secrets protections. Finally, conducting multistate discovery is easier in federal court. Now, based on DTSA, passing the threshold issue of federal jurisdiction should be much easier.

One interesting possibility resulting from the passage of DTSA is the potential effect on bringing claims under the Computer Fraud and Abuse Act ("CFAA"). Plaintiffs that prefer federal court often bring CFAA claims to establish federal question jurisdiction. These claims are common because the act of trade secret misappropriation often involves taking and/or deleting materials from a protected computer system, which in some (but not all) federal circuits can create liability under the CFAA. The CFAA will no longer be required as a ticket to federal court, although it should be mentioned that the CFAA brings advantages other than federal question jurisdiction, such as the ability to obtain relief without showing the existence of a trade secret. So will some plaintiffs no longer bring CFAA claims?

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