

[View Online \(/eBlasts/business_newsletter\)](#)



<https://www.facebook.com/SBMBusinessLawSection>



<http://www.linkedin.com/groups?mostPopular=&gid=3251208>



Business Law Section e-Newsletter

<http://connect.michbar.org/businesslaw/home>

August 5, 2016

From the Desk of Chair Douglas L. Toering

The Defend Trade Secrets Act of 2016: A New Federal Action for Businesses in Trade Secret Litigation

Businesses increasingly rely on the secrecy of their proprietary information. Thus, on May 11, 2016, President Obama signed the Defend Trade Secrets Act (DTSA). 18 U.S.C. 1836(b). The law creates a new federal cause of action for disclosing a trade secret and provides a wide variety of remedies. The remedies include: actual damages; injunctive relief; attorney fees; and treble (exemplary) damages, if the trade secret is “willfully and maliciously misappropriated.” 18 U.S.C. 1836(b)(3)(C). Finally, the DTSA creates a civil seizure remedy that, in “extraordinary circumstances,” permits a court to order the civil seizure of property “necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.”



Additionally, the act provides immunity for anyone who discloses a trade secret, in confidence, to a government official (federal, state, or local) or to an attorney for the sole purpose of reporting or investigating a suspected legal violation. The DTSA also protects against liability for disclosure of a trade secret in a complaint or other lawsuit-related document if the filing is made under seal.

To be eligible to recover exemplary damages or attorney fees, or to be eligible to seize property under the civil seizure provision, the trade secret owner must have provided notice in a “contract or agreement with an employee that governs the use of a trade secret or other confidential information.” 18 U.S.C. 1833(b)(3)(A). The contractual notice may be in the form of “a cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of law.” 18 U.S.C. 1833(b)(3)(B). Lawyers who represent clients that maintain substantial trade secrets may

wish to advise those clients to add such a notice to their policy manuals and standard agreements. As an aside, if those clients do not have employee handbooks or policy manuals, now might be the time to recommend that the clients consider having such documents drafted.

The law does not preempt state law. Indeed, 48 states have adopted the Uniform Trade Secrets Act. (Massachusetts and New York are the only hold-outs.) Michigan's Trade Secrets Act is MCL 445.1901 *et seq.* Plaintiffs can now bring a federal action under the DTSA with federal question jurisdiction or sue in state court.

As with many new causes of action, much about the DTSA is still unsettled, and further guidance from the courts may be necessary. Before the act was even passed, one commentator, noting the uncertainties in the act, called the DTSA a "litigator's full-employment act." Sharon K. Sandeen, *The DTSA: The Litigator's Full-Employment Act*, 72 Wash. & Lee L. Rev. 308 (2015). For example, the law does not provide much guidance on seizure of assets. What exactly constitutes "extraordinary circumstances" justifying an asset seizure? What assets can be seized? Are both intangible and tangible assets included?

In any event, the DTSA provides a new avenue for businesses and owners of trade secrets to protect their rights. Thus, their legal counsel should be aware of the new protections provided by the DTSA. Thank you to Jordan B. Segal for his contribution to this newsletter.

If you would like to become involved in the Corporate Laws Committee or the LLCs & Partnerships Committee, please contact the chair of that committee, Justin G. Klimko or James L. Carey, respectively.

Douglas L. Toering

dtoering@manteselaw.com (<mailto:dtoering@manteselaw.com>)

(248) 457-9200

Section Events

Debtor-Creditor Rights Committee Meeting

([http://connect.michbar.org/businesslaw/events/eventdescription?](http://connect.michbar.org/businesslaw/events/eventdescription?CalendarEventKey=e4c40bd1-017c-4a9c-af02-ccaaad137d6d&Home=/businesslaw/events/recentcommunityeventsdashboard)

CalendarEventKey=e4c40bd1-017c-4a9c-af02-

ccaaad137d6d&Home=/businesslaw/events/recentcommunityeventsdashboard)

August 17; Southfield

Business Law Institute, Annual Meeting, & Award Presentation

([http://connect.michbar.org/businesslaw/events/eventdescription?](http://connect.michbar.org/businesslaw/events/eventdescription?CalendarEventKey=1c6813c5-ba61-4411-81f0-)

CalendarEventKey=1c6813c5-ba61-4411-81f0-

[0462895b1fa3&Home=/businesslaw/events/recentcommunityeventsdashboard\)](#)

October 7; Grand Rapids

Regulation of Securities Committee Meeting

<http://connect.michbar.org/businesslaw/events/eventdescription?>

[CalendarEventKey=a44a6906-067d-40c9-9b75-](#)

[f9f92b7ec700&Home=/businesslaw/events/recentcommunityeventsdashboard\)](#)

October 11; Southfield

Business Boot Camp 1—West Michigan

<http://connect.michbar.org/businesslaw/events/eventdescription?>

[CalendarEventKey=5010c051-6df1-4d48-9185-](#)

[79bdb6f01f26&Home=/businesslaw/events/recentcommunityeventsdashboard\)](#)

November 3–4; Grand Rapids

Council Meeting (<http://connect.michbar.org/businesslaw/events/eventdescription?>

[CalendarEventKey=6d644896-2f7c-47a1-ad7b-](#)

[ef4a45c93496&Home=/businesslaw/events/recentcommunityeventsdashboard\)](#)

December 3; Southfield

Business Boot Camp 1—Metro Detroit

<http://connect.michbar.org/businesslaw/events/eventdescription?>

[CalendarEventKey=aa70b016-f3be-4372-bdb5-](#)

[f95cc3c78eea&Home=%2fbusinesslaw%2fevents%2frecentcommunityeventsdashboard\)](#)

January 30–31; Plymouth