

WSGR ALERT

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NEW JERSEY ADOPTS UNIFORM TRADE SECRETS ACT

On January 9, 2012, New Jersey joined 45 other states and the District of Columbia in adopting a form of the Uniform Trade Secrets Act (UTSA). This means that trade secrets law in New Jersey is no longer governed by the common law—in all its various historical types of claims dating back more than 100 years—but rather by a single statutory set of definitions. The statute, the New Jersey Trade Secrets Act (NJTSA), applies only to new claims arising on or after the date of its enactment.

In enacting the NJTSA, the legislature made clear that, while it was based on the UTSA, the NJTSA reflects New Jersey's "common law trade secret jurisprudence." For example, New Jersey did not enact the UTSA clause directing courts to seek harmony with UTSA rulings in other states. As a result, while one of the UTSA's objectives was to create greater uniformity among the states as to trade secret law, it is unclear to what extent New Jersey courts will look to UTSA rulings in other states to interpret the NJTSA.

What is certain is that the NJTSA now will dictate the analysis used to determine trade secret cases instead of the Restatement of Torts, which had been used for nearly half a century pursuant to New Jersey cases such as *Sun Dial Corp. v. Rideout* (1954). The NJTSA sets forth what constitutes a trade secret, defines misappropriation, and explains improper and proper means with respect to the acquisition of alleged trade secrets.

Similar to the UTSA statutes of most other

states, the NJTSA permits injunctions for "actual" or "threatened" misappropriation, a reasonable royalty, the potential for treble damages, and prevailing party attorneys' fees under certain circumstances, such as the prosecution of a claim in bad faith (a term defined by the statute). In addition, the NJTSA provides for the recovery of damages representing the actual losses and the unjust enrichment caused by the misappropriation.

The NJTSA also poses interesting questions that mirror those seen in other UTSA states in recent years:

- How will New Jersey interpret the phrase "threatened misappropriation"? In some UTSA states the phrase is tantamount to "inevitable disclosure." In others, courts allow injunctive relief in narrower contexts, and in some the phrase is not interpreted to permit a prohibition on competitive employment.
- How will New Jersey decide the question of UTSA preemption of common law claims that seek to regulate nonpublic commercial information? The NJTSA explicitly states that its rights, remedies, and prohibitions "are in addition to and cumulative of any other right, remedy or prohibition provided under the common law or statutory law" of the state, and that they are not intended to impair such rights except as provided in the statute. Some older New Jersey cases suggest that "secret" and "confidential" information are not the

same. For example, in *Platinum Management, Inc. v. Dahms*, the court made clear that under New Jersey law, "to be judicially protected, misappropriated information need not rise to the level of the usual trade secret, and indeed, may otherwise be publicly available." What effect will such cases have going forward? A majority of UTSA jurisdictions take a broad view of UTSA preemption and would displace such claims.

- Apart from Texas, the UTSA holdouts for many years were clustered in the northeast. But with Pennsylvania adopting the UTSA in 2004 and New Jersey adopting the statute in 2012, will New York and Massachusetts continue to be outliers governed by common law?
- With Congress expressing some interest in allowing a federal civil trade secret cause of action, will New Jersey's enactment slow down any push to federalize trade secret law?

Wilson Sonsini Goodrich & Rosati is actively following developments with respect to the New Jersey trade secret law, and the firm is available to assist employers, employees, newly formed businesses, and investors with protecting trade secrets and addressing any questions or issues raised by the new act. For more information, please contact Marina Tsatalis, Rico Rosales, Charles Tait Graves, or another member of the firm's trade secrets and employee mobility practice.

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650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsgr_resource@wsgr.com

www.wsgr.com

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