

IDI CONFERENCE 2018

PROTECTING TRADE SECRETS IN COURT

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Trade Secrets

- Defend Trade Secrets Act (DTSA), 18 USC § 1836 (2016)
- State Trade Secret Acts
- Both provide remedy for trade secret theft
- DTSA provides more protection for trade secrets in court



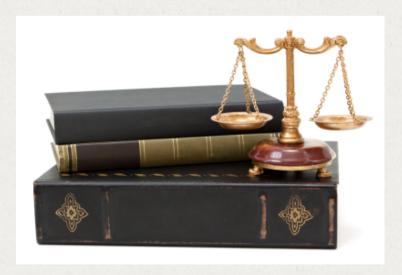


State Trade Secret Laws

- Usual protections:
 - Protective Orders
- Problems:
 - Often Ineffective
 - Allows too wide permitted disclosure

DTSA

- Protective measures:
 - Protective Orders
 - Seizure and Sequestration





Seizure and Sequestration

- Court can order immediate seizure on application by trade secret owner
- Application can be ex parte, without appearance by accused thief
- DTSA prescribes detailed process
- Encourages fast action by courts





Seizure and Sequestration

- Problems:
 - Whistleblower Provisions, 18 USC § 1833 (b)
 - Risk of disclosure where foreign assistance necessary,
 USC § 1782 (a)
 - Difficult to justify seizure
 - May not be fast enough
 - Opposition can challenge secrecy



DTSA - Best Practices

- Seizure
 - Forensic expert
 - Technical expert
 - Identify objects of seizure
 - Seizure officer
 - Transportation of products of seizure
 - Law enforcement assistance





DTSA - Best Practices

- Sequestration
 - Custodian
 - Separation from non-trade secrets
 - Reasonable security bond



Trade Secret Seizure

- "Trade Secret Seizure Best Practices Under the Defend Trade Secrets Act of 2016"
- Federal Judicial Center
- www.fjc.gov/sites/files/
 DTSA_Best_Practices_FJC_June_2017.pdf





Shhh! It's a Trade Secret

Trade secrets -v- other IPR

- •The importance of Trade Secrets in Distribution Networks if never disclosed, trade secrets remain secret
- •Difference between how European civil law countries protect trade secrets (unfair competition laws; labour law, etc) and the English common law system (doctrine of breach of confidence and case law)
- •Various forms of trade secret protection in European litigation





European Trade Secrets Directive ("TSD") 2016/943

- •To date the protection of trade secrets within the EU was fragmented making companies reluctant to resort to litigation
- •TSD seeks to improve the effectiveness of legal protection of trade secrets against misappropriation on the Internal Market
- •The TSD introduces measures, injunctions and corrective measures or allocation of damages



Article 9 of the TSD

- Article 9: "preservation of confidentiality of trade secrets in the course of legal proceedings"
- An attempt to harmonise the regulations concerning protecting trade secrets in litigation – how?
- How will it affect the current level of protection and regulation of trade secrets during litigation?





Discovery vs confidentiality: how to find the right balance

- Clash between Article 9 and the right to a fair trial
- Protecting the trade secret before; during and after the hearing
- Confidentiality Rings



Questions?



secret

(noun)

something you tell everybody to tell nobody.