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Ruling may impact DTSA pleading standards nationwide

A recent opinion by the 3rd Circuit clarified the standard for pleading a trade secret misappropriation claim under the federal Defend Trade Secrets Act. The precedential decision could have implications for future DTSA claims both within and outside of the 3rd Circuit.

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In *Oakwood Laboratories LLC v. Thanoo*, 999 F.3d 892 (2021), the 3rd U.S. Circuit Court of Appeals clarified the standard for pleading a trade secret misappropriation claim under the federal Defend Trade Secrets Act. The precedential decision could have implications for future DTSA claims both within and outside of the 3rd Circuit.

The Oakwood Case

Oakwood is a "technology-based specialty pharmaceutical company," that spent over two decades and in excess of $130 million developing valuable and proprietary microsphere technology. Dr. Thanoo, designed the company's microsphere technology and was primarily responsible for the development of Oakwood's products that used this technology.

After nearly two decades of developing its microsphere technology, in 2013, Aurobindo approached Oakwood to discuss a potential collaboration. At the time, Aurobindo had no experience in the highly specialized microsphere space. In connection with the parties' business discussions, Oakwood shared certain proprietary microsphere information with Aurobindo subject to a nondisclosure agreement. Aurobindo subsequently pulled out of the deal "due to financial considerations." A few months later, Aurobindo created its own microsphere product development group and hired Oakwood's long-time employee, Dr. Thanoo, to be a part of it. Not long after Dr. Thanoo joined Aurobindo, Aurobindo told investors that it was currently working on four microsphere products and presented a relatively short development period for the new products. Aurobindo also noted that at the end of its fiscal year, it expects it would have invested about $6 million in the microsphere space, for an "addressable market" of "$3 billion in the US."

Oakwood sued Aurobindo for, among other things, trade secret misappropriation under the DTSA. Oakwood alleged that Aurobindo has misappropriated trade secrets related to its research, design and development of its sustained release injectable drugs involving microsphere systems. Oakwood's claim for misappropriation was based on Aurobindo's alleged *use* of Oakwood's trade secrets (as opposed to improper acquisition or disclosure).

Despite the increasing level of detail contained in Oakwood's successive complaints, the district court dismissed Oakwood's DTSA claims not once or twice, but *four* times. After each dismissal, Oakwood added more and more specificity in each subsequent iteration of the complaint, but the district court was never satisfied with Oakwood's allegations -- even when Oakwood attached more than 16 detailed exhibits identifying the allegedly misappropriated trade secrets. Even after the district court agreed that Oakwood had properly alleged its trade secrets, the district court continued to criticize Oakwood for not explaining which trade secrets were misappropriated, how they were misappropriated, or the resulting harm Oakwood purportedly suffered. Oakwood appealed the district court's fourth dismissal of its complaint.

The 3rd Circuit rejected the district court's overly exacting standard for pleading a DTSA claim. In doing so, the 3rd Circuit made several key rulings:

Whether a plaintiff has sufficiently identified its trade secrets is a fact-specific inquiry. The 3rd Circuit took issue with the district court's finding that in order to adequately identify the trade secrets at issue, the plaintiff must identify which one of its trade secrets the defendant misappropriated. Instead the 3rd Circuit held that where the plaintiff has identified certain of its trade secrets, the only

reasonable inference is that the trade secrets identified are the ones claimed to have been misappropriated, and that a "demand for further precision in the pleading is ... misplaced and ignores the challenges a trade secret plaintiff commonly faces when only discovery will reveal exactly what the defendants are up to."

Use is not limited to replication. With respect to a claim for misappropriation based on "use," the 3rd Circuit held that "use" under the DTSA is not limited to replication, and, instead, it "encompasses all the ways one can take advantage of trade secret information to obtain an economic benefit, competitive advantage, or other commercial value, or to accomplish a similar exploitative purpose, such as 'assist[ing] or accelerat[ing] research or development." (Citing *Gen. Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 450-51 (5th Cir. 2007).)

Direct proof of misappropriation is not required. The 3rd Circuit made clear that direct proof of misappropriation is not required at the pleading stage. In addition, whether a competitor could have developed its product using proper means is irrelevant, and "[w]e do not require a trade secret plaintiff to allege that its trade secret information was the only source by which a defendant might develop its product."

Misappropriation is harm. Finally, the 3rd Circuit held that, "By statutory definition, trade secret misappropriation *is* harm." Specifically, "[t]he trade secret's economic value depreciates or is eliminated altogether upon its loss of secrecy when a competitor obtains and uses that information without the owner's consent. Thus, cognizable harm is pled when a plaintiff adequately alleges the existence of a trade secret and its misappropriation."

Applying these principles, the 3rd Court held that Oakwood had more than adequately pled a DTSA claim and the district court should not have dismissed Oakwood's complaint. In fact, the court even noted that, "a complaint could no doubt feature far fewer supporting factual allegations and still survive dismissal."

Why It Matters

Oakwood made clear that pleading a DTSA claim should be about plausibility -- not probability. This "plausibility" approach makes sense because, as the 3rd Circuit recognized, discovery is often necessary to uncover direct evidence of misappropriation.

While only time will tell whether the other circuits will follow the 3rd Circuit's approach when it comes to pleading a DTSA claim, at least some district courts within other circuits already seem to be taking a similar approach. *See, e.g.*, *Applied Biological Laboratories, Inc. v. Diomics Corp.*, 2021 WL 4060531 (S.D. Cal. Sept. 7, 2021) (denying motion to dismiss DTSA claim and explaining that "Each of [the alleged] facts work in concert to provide insight into which trade secrets were used and how Defendants used the trade secrets. Considering the covert nature of trade secret misappropriation, the

exact means of knowing what was used is nearly impossible for Plaintiff to know without discovery.").

While *Oakwood* teaches that litigants in the 3rd Circuit should focus on plausibility at the pleading stage, the 3rd Circuit recently held in a different case that preliminary injunction orders based on trade secret claims must identify the trade secrets allegedly misappropriated with specificity. *See Mallet and Company Inc. v. Lacayo*, 2021 WL 4810168 (3d Cir. Sept. 24, 2021) (vacating injunction order, remanding for reconsideration, and explaining that "Because the District Court did not identify with specificity the information it found to be Mallet's trade secrets, we are not in a position to make an informed decision as to whether Mallet is likely to prevail on its trade secret misappropriation claims."). Thus, the takeaway from both of these cases is that even if a claim may be plausible for purposes of satisfying the relevant pleading requirements, more specificity may be required to obtain a preliminary injunction, which is often an important remedy for litigants bringing claims for trade secret misappropriation.

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