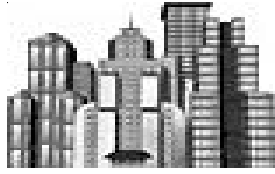


NEWS



# BUSINESS LAW

LETTER

MSBA SECTION OF BUSINESS LAW

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## Chair's Report

By Eric G. Orlinsky

Fellow Business Lawyers:

With the end of summer rapidly approaching and children returning to school, it is that time of the year when the activities of the Business Law Section resume once again with newfound purpose, energy, and enthusiasm. I am pleased to be taking over the stewardship of the Section from Tea Carnell who has served the Section so well over the last 18 months (an unusually long period due to the passing of our colleague Steve Mandell). We all owe Tea a debt of gratitude for her leadership and hard work over that time and thank her for her service to the Section, the Bar, and the Bar Association.

I am pleased to report that at the end of the year, just in time for our Annual Meeting in Ocean City, the Section, together with the Section of Real Property, Planning and Zoning, completed the 2007 Report On Lawyers' Opinions In Business Transactions. This publication is available to be downloaded from the Section's webpage at [http://www.msba.org/sec\\_comm/sections/business/index.htm](http://www.msba.org/sec_comm/sections/business/index.htm) and should prove to be a useful tool for Maryland business and real estate law practitioners for many years to come. In addition, the report breaks new ground in the national discourse on opinion letters on several issues. The Section hopes to get the Report or excerpts from it published by the ABA Section of Business Law in *The Business Lawyer*. Kudos go to Edward J. Levin, Charles J. Morton, Jr. and D. Scott Freed for their successful leadership of this project, Katherine L. Bishop for her Herculean efforts as the Reporter, the Steering Committee, and all of the other members of both Sections who participated in the project and who are specifically identified in the Report.

Last year, we also completed our first survey of our membership and thank all of you who participated for taking the time to do so. The leadership of the Section has heard the membership and we intend to try to make changes to increase the value of your membership in the Section and the services that we provide to you.

Among the interesting feedback that the survey yielded was the suggestion that the Section improve its web presence and provide access to more information and CLE on-line. As a result, the Section appointed a technology committee at our first meeting which will be chaired by Bill McComas. This committee will begin work revamping our website and examining ways in which to provide richer section content through the website and may include an analysis of whether we can and should provide Section CLE by webcast, a suggestion made by several members. In response to feedback that many members do not become more active in the Section and its committees or attend section related CLE because of inconvenient locations (Ocean City for the Annual Meeting and Baltimore City for most Section Council meetings) the leadership and the technology committee will work to have a satellite video-conference meeting location for each of our Section Council meetings this year in Montgomery County (we hope to have this available in time for our

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# ITT Corporation - Lessons for Export Compliance

By Joseph J. Dyer  
Seyfarth Shaw LLP

“That’s a lot of money in anybody’s book.” You can say that again. In March, the Department of Justice announced that ITT Corporation agreed to plead guilty to exporting defense related technical data without required licenses, and to misrepresenting its knowledge of such exports in reports to the State Department in violation of United States export control laws, and to pay a \$100 million fine.<sup>1</sup> The fine was the largest ever imposed for violation of export control laws – by good measure. The second largest fine to date was \$32 million imposed on Hughes Electronics in 2003.<sup>2</sup>

The ITT case is instructive of several matters – perhaps most significant is the importance of promptly and accurately reporting violations. Exports from the United States are regulated, for the most part, by the International Traffic In Arms Regulations (“ITAR”) and the Export Administration Regulations (“EAR”). The ITAR regulates the export of defense related items.<sup>3</sup> The EAR regulates the export of non-defense related items.<sup>4</sup> The Department of State administers the ITAR.<sup>5</sup> The Department of Commerce administers the EAR.<sup>6</sup>

The ITAR scheme is simple. With very limited exceptions, one is required to obtain State Department authorization before exporting any defense item.<sup>7</sup> Regulating a wider range of items, the EAR scheme is more complex. Whether one is required to obtain Commerce Department authorization before exporting a non-defense items depends on the nature of the item and the country of destination.<sup>8</sup> The more sophisticated the item, the less accommodating the country of destination is to United States interests – the more likely it is that authorization is required.

The heart of both sets of regulations is, of course, their prohibition on unauthorized exports. Significant penalties can be imposed on their account.<sup>9</sup> In line with that, both Departments, along with related Federal agencies, maintain rigorous enforcement of the laws. At the same time, the Departments’ interests lie more in encouraging compliance than in collecting fines. And this is where the ITT case is particularly instructive.

Perforce, both Departments rely heavily on voluntary compliance and voluntary reporting of violations. Both strongly encourage companies voluntarily to disclose violations. And both consider voluntary disclosure to be a mitigating factor in determining what penalty, if any, to impose on the violator.<sup>10</sup> Federal Sentencing Guidelines provide the same.<sup>11</sup>

Relying as they do on voluntary compliance, the Depart-

ments can take a particularly dim view of companies deliberately masking violations. ITT agreed to plead guilty to exporting night vision technology without authorization to, among other countries, the Peoples Republic of China. ITT agreed also to plead guilty to “knowingly and willful omitting material facts from required reports that were necessary to make the statements in the reports not misleading.”<sup>12</sup> The statement of facts accompanying the agreement elaborated on the matter. ITT, in voluntarily reporting violations stated that it had “recently discovered” the reported violations, and that it had “[u]pon realizing that it had a compliance issue ... [taken] corrective action.”<sup>13</sup> In fact, ITT had not “recently discovered” the violations. It had been aware of violations for some years. Nor had ITT taken action to correct its defective compliance “upon realizing” the violations. It had, again, delayed years before taking corrective action.<sup>14</sup>

Export of night vision technology to China is serious (by contrast, however, Hughes Electronics was fined only \$32 million for exporting arguably more sensitive, satellite technology, to the Peoples Republic of China).<sup>15</sup> One suspects, then, that the government was more concerned that ITT knowingly and willfully misrepresented its disclosure and corrective action than it was about the unauthorized export itself. Relying on voluntary compliance, it is understandable that the government would be especially concerned with persons deliberately misrepresenting their compliance. It appears that this was a prime factor in the Department of Justice demanding such a significant fine.

So, what lessons does the ITT case hold? First, one should be scrupulously accurate in reporting export violations. One should be careful, both in what one says and in what one does not say, to accurately report the violation and the response thereto. One should avoid general characterizations in favor of specific facts. Had ITT, for example, stated the date(s) on which it discovered the violations instead of stating generally that the discoveries were “recent,” it could have avoided, at least, part of the misrepresentation to which it pled guilty.

Second, one should thoroughly investigate violations before finally reporting them (both the ITAR and EAR encourage persons to report violations “immediately” on learning of them, and to follow-up with a final report of the violation after investigating it).<sup>16</sup> Unless one thoroughly investigates the violations it is difficult to accurately represent the facts

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# Corporate Governance for Non-Profits

By Stephanie Tsacoumis  
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Recent events involving the Smithsonian Institution testify to the continuing importance of governance practices at nonprofit organizations. In many ways, nonprofit governance is more complex than for-profit governance.

First, nonprofits have multiple constituencies: members, donors, those served by the organization, volunteers and others (such as state attorneys general).

Second, nonprofit boards must attend to business objectives as well as the organization's mission and fundraising responsibilities.

Third, nonprofit organizations are diverse: labor unions, foundations, schools, social clubs, trade associations, sports leagues, religious, civic and health organizations, social service agencies, cultural and recreational institutions. Some are membership organizations; some are not. Some have large budgets and thousands of employees; some rely entirely on volunteers. Many employ a federated structure with a national organization and local affiliates.

While nonprofit governance reflects the great variety in nonprofits, some general themes have emerged.

■ *Fiduciary duties.* Good governance is predicated upon the duties of care and loyalty. In the nonprofit context, a duty of obedience to pursue the organization's mission is a component of the duty of care.

■ *Board role.* The appropriate role of the board is one of oversight and policy direction rather than day-to-day management.

■ *Board size.* Smaller boards generally are more effective; some experts advocate a maximum nonprofit board of 15 members. While some nonprofits prefer larger boards for fundraising or diversity purposes, large size can impair efficiency. The trend – as evidenced by recent developments at the American Red Cross, The Nature Conservancy and the United Way – is to reduce board size.

■ *Independence.* Situations involving excessive compensation, corporate waste and “insider” transactions have placed a premium on independent boards. The Panel on the Nonprofit Sector – a coalition of nonprofit leaders con-

vened with encouragement of the U.S. Senate Finance Committee to prepare recommendations to improve governance of nonprofits – recommends that nonprofit boards have at least one-third independent members.

■ *Conflicts of interest.* Conflicts of interest should be disclosed and considered by disinterested directors against a rigorous standard. Consideration of interested-party transactions should include comparable arms-length transactions and how the transaction furthers the organization's mission and interests.

■ *Audit committee.* Every nonprofit with significant financial resources or operations should establish an audit committee with independent, financially literate members; other nonprofits should seriously consider an audit committee. The California Nonprofit Integrity Act of 2004, specifically California Government Code, Section 12586(e)(2), mandates audit committees for large nonprofits, and other states have adopted or proposed similar requirements.

■ *Compensation committee.* Excessive compensation for nonprofit executives can raise duty-of-care issues and jeopardize tax-exempt status. Executive compensation either should be approved by the full board or by an independent compensation committee. Compensation decisions should be informed by the example of compensation of similarly-situated executives and outside advice as appropriate.

■ *Whistleblower procedures.* Many organizations have adopted whistleblower processes either as a Sarbanes-Oxley requirement, under the Federal Sentencing Guidelines or as good practice. Sarbanes-Oxley makes it a crime for any organization – nonprofit or for-profit – to retaliate against a whistleblower. Because whistleblower concerns may involve financial abuses or fraud, whistleblower processes often are overseen by the audit committee.

In the current environment, governance practices are just as important in nonprofit organizations as in the private sector. Nonprofit boards and management thus must be prepared to take a fresh look at their governance in light of current best practices.

# The Maryland Uniform Trade Secrets Act<sup>1</sup>

By Milton E. Babirak, Jr.  
Babirak, Vangellow & Carr P.C.

The Maryland Uniform Trade Secrets Act (hereinafter “Maryland Act”)<sup>2</sup> was enacted in Maryland, with some modifications to the Uniform Trade Secrets Act<sup>3</sup>, and became effective on July 1, 1989. In light of the seemingly ever increasing application of the Maryland Act in contemporary litigation, it is appropriate at this time to review the significant provisions of the Maryland Act as well as discuss recent Maryland trade secret case law.

## I. The Maryland Uniform Trade Secrets Act

### A. Definition of “Trade Secret”

“[A]n exact definition of a trade secret is not possible.”<sup>4</sup> In recognition of this difficulty, the Maryland Act definition of a trade secret is not specific and is defined as any “information, including but not limited to, a formula, pattern, compilation, program, device, method, technique or process.”<sup>5</sup> The definition of a trade secret does not require that the information exist in some tangible format or be a high tech secret.<sup>6</sup> It need not be more than an idea, theory or concept. Further, this definition of a trade secret does not require that the trade secret be novel.<sup>7</sup> The definition does not impose any limit on the length of time that a trade secret can be protected, and may be protected as long as its secrecy is maintained, it is not generally known, and it is not readily ascertainable.

### B. Requirement That Trade Secret Not Be Generally Known

The Maryland Act definition of a trade secret further requires that the trade secret not be generally known.<sup>8</sup> In trade secrets cases, the requirement that the information not be generally known is often a vigorously contested issue and it can be a close factual issue for a judge or jury to decide. For example, consider whether a particular method of selling a product is or is not generally known. A company may argue that it has developed a particular sales method on which it has spent considerable time and money, while maintaining the strict secrecy of the method. On the other hand, a departing employee of that company who wants to use the method for her own benefit may argue that the method is most certainly generally known because you can simply read a book on sales or marketing to find information on almost any sales method or because competitors of the company use the same or a similar method. This scenario is not unlikely in a mature competitive industry.

### C. Requirement That Trade Secrets Not Be Readily Ascertainable

The Maryland Act also requires that a trade secret not be readily ascertainable by proper means, such as discovery by independent invention or reverse engineering.<sup>9</sup> The requirement that a trade secret not be readily ascertainable is a factual issue which is often litigated. A common example in trade secret litigation is the case of a departing employee who takes the customer list with him to a competing business. The former employer of the departing employee will argue that its customer list was developed only after many years of effort and great expenditures on advertising and client development. On the other hand, the departing employee, who has appropriated the list, will argue that the list is comprised of information which is readily ascertainable through publicly available sources.

### D. Requirement of Reasonable Efforts to Maintain Secrecy

The Maryland Act also provides that a trade secret is protectable only if it “...is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”<sup>10</sup> Generally speaking, if trade secret information is disclosed to outsiders or the public, trade secret protection is lost. Trade secret protection is not lost if the trade secret is disclosed in confidence to those who need to know it, such as employees or subcontractors.<sup>11</sup> However, courts have also interpreted the Act to require that a trade secret owner demonstrate that he pursued an active course of conduct to keep the information secret.<sup>12</sup>

Lawyers can provide an important service to their clients by advising them to implement a trade secret protection program. Today’s numerous trade secret law suits are *ad hoc* testimonials to the fact that many companies still do not take measures that are reasonable under the circumstances to protect their trade secrets.<sup>13</sup>

### E. Definition of Misappropriation

The language of the Maryland Act defines the misappropriation of a trade secret as the “. . . acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or the disclosure or use of a trade secret of another without express or implied consent . . .”<sup>14</sup> Misappropriation by improper includes “. . . theft, bribery, misrepresentation, breach of a duty or inducement of a breach of a duty to maintain secrecy . . .”<sup>15</sup> Interestingly, the Act also defines misappropriation as

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# Employment Agreements: Are They Necessary?

By Michael S. Gottlieb

Selzer Gurvitch Rabin & Obecnny, Chartered

If you have business clients who hesitate to enter into employment agreements with their employees for any reason — the time, the legal expense of drafting them, the possible reluctance of employees to sign — here is a basic appeal for such clients, explaining protections of such agreements and the hazards of doing without them.

As an employer, do you require your employees to enter into employment agreements at the inception of their employment relationship? Should you? Many employers do not require their employees to enter into employment agreements because they don't see the necessity of doing so. As Maryland is an "at-will" employment state, absent an employment agreement and subject to a few caveats (collective bargaining, discrimination, etc.), the employer or the employee may terminate the employment relationship, with or without cause, at any time. Thus, if you can fire an employee for any reason or no reason, what's the need of an employment agreement that may serve only to muddy the waters?

## Are Employment Agreements Right for My Business?

Depending on your business, and the role of the employee, it may make sense to require your employees to enter into employment agreements at the outset of the employment relationship, though employment agreements executed after the start of the employment relationship may be enforceable under certain circumstances. Does your company have a need to protect confidential or proprietary information? Do you wish to prohibit (for a period of time) your former employees from soliciting your: (a) current employees to leave your employ, (b) customers, or (c) referral sources? Do you wish to prohibit them from interfering with your other relationships, such as your distributors, vendors and the like?

It is important to recognize that an employment agreement need not bind the employer and employee into a defined employment term, i.e., the employment relationship can still be "at-will." As you will see below, there are many provisions that can and should be in an employment agreement that can prove to be beneficial to the employer.

## Protections Afforded by Employment Agreements

The following are but a handful of the reasons for an employer to enter into an employment agreement with its employees:

1. Memorialized in Writing: Having the basic terms of employment in writing helps ensure that both employer and employee understand the terms of the relationship so as to minimize the likelihood of misunderstandings in the future.

2. Leave time: Without an employment agreement, there may be questions as to how many days of leave the employee may be granted, whether leave may be carried over from year to year (there's no legal requirement under Maryland law that it must be), or whether leave will be paid out upon the termination of employment (again, there's no requirement under Maryland law that it must be).

3. Deductions from Pay: Section 3-503(2) of the Labor and Employment Article of the Maryland Code states that an employer may not make any deductions from an employee's pay without the employee's express prior authorization. Thus, for example, if your employee fails, upon the termination of employment, to return the cell phone you provided him, unless you have a written agreement that you can deduct the value or the cost of the phone from the employee's final paycheck, you may not do so.

4. Restrictive Covenants: Absent a written agreement, a former employee can compete with you by soliciting your employees, customers, referral sources, and otherwise interfering with your business relationships; and may even be able to use your confidential and proprietary information (including your trade secrets, customer lists and the like).

5. Jurisdiction/Venue: In the event of a dispute, an employment agreement can and should dictate where a lawsuit must be brought and which jurisdiction's laws govern. This can be of vital importance for employers that do business in multiple jurisdictions, so as to avoid having to litigate cases in inconvenient jurisdictions or otherwise becoming subject to unfavorable laws.

6. Attorney's Fees: Assuming you prevail, there are only two ways that you can recover your attorney's fees: (1) if attorney's fees are statutorily provided for; or (2) the parties agree to such a provision.

## Conclusion

Though employment agreements are not always necessary, if you desire to: (a) protect your company's confidential and/

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# Corporate Legislative Update

*By Whiteford, Taylor & Preston L.L.P.*

Listed below are several bills of general interest to corporate attorneys. This list only highlights certain bills before and/or passed by the Maryland legislature, and is not meant to include a full list or discussion of each and every bill.

1. Personal Information Protection Act (01/01/08)

SB 194 and HB 208 require all businesses and their contracted third parties to take reasonable steps to protect against unauthorized access to or use of such information when destroying customer records. Businesses that own or license the personal information of Maryland residents must implement and maintain reasonable security procedures and practices (including the retention of certain records for a period of time) and notify a consumer if their personal information was inadvertently disclosed.

2. Physical Therapists (10/01/07)

SB 483 and HB 386 include the services of a physical therapist as a “professional service” that may be rendered through a Maryland professional corporation.

3. Maryland Small Business Development Financing Authority Financing Limitations (10/01/07)

HB 989 alters the limitations on lending, guarantees, and equity participation financing by the Maryland Small Business Development Financing Authority. The maximum amount payable under a loan or guaranty increased to \$2,000,000, and the authority may now guarantee any surety to the lesser of 90% or \$5,000,000 of the surety’s losses incurred under a bid bond or a performance bond. An applicant’s minimum qualifications are altered to add a “combination of minimum net worth pledged as security and equity investment equal to at least 5% of the total cost of the acquisition” to the list of net worth and equity investment requirements.

4. Execution Requirements for Business Trusts (06/01/07)

HB 1165 amends Section 1-301 of the Corporations and Association Article to extend to Business Trusts the requirements applicable to corporations and real estate investment trusts (REITs) for signing, acknowledging, witnessing, attesting, and verifying specified charter documents.

5. Captive Real Estate Investment Trusts (07/01/07)

SB 945 and HB 1257 require that a “captive” Real Estate Investment Trust (REIT) add back any amounts claimed as dividend deductions to its calculation of federal taxable income for the purpose of calculating its Maryland modified income. Companies can no longer avoid portions of Maryland income tax by establishing captive REITs to own real property, leasing the property back to the company, and returning the lease payments back to the company as a deductible dividend. A captive REIT is one owned 50% or more by a single entity that is taxed under Subchapter C of the Internal Revenue Code.

6. Solar Energy Grants and Devices (06/01/07)

HB 590 grants a property tax exemption for solar energy devices used to heat, cool, generate electricity or provide hot water for dwellings in Maryland. It also permits amounts received as grants under the State’s Solar Energy Grant Program to be subtracted from a taxpayer’s calculation of their federal adjusted gross income for the purposes of calculating their Maryland adjusted gross income.

7. Income Tax Withholding Non-resident Contractors (07/01/07)

HB 1143 repeals the former Tax-General Section 13-803 that requires persons doing business with non-resident contractors on contracts that are, or are expected to be, in excess of \$50,000 to withhold three percent of the contract price until the Comptroller has issued a tax clearance certificate.

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## Employment Agreements . . .

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or proprietary information; (b) prevent former employees from poaching your clients or existing employees or otherwise disrupting your relationships with referral sources or other parties; or (c) create uniformity and consistency in your staff’s relationship with you, then it may make sense to have your employees enter into employment agreements.

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## Trade Secrets . . .

(continued from page 4)

the mere acquisition of a trade secret. The Fourth Circuit has held that the mere acquisition of a trade secret of another by improper means is a sufficient misappropriation under the Maryland Act.<sup>16</sup>

### II. Other Provisions of the Act

#### Equitable Relief

Because of the nature of trade secrets cases, monetary damages may be an inadequate remedy and injunctive relief may be necessary. In recognition of this, section 11-1202(a) of the Maryland Act specifically provides that a court may order an injunction in the case of actual or threatened misappropriation. The court order imposing the injunction can specify that the injunction shall terminate when the trade secret has ceased to exist or continue for an even longer period in order to eliminate any commercial advantage that otherwise would be derived from the misappropriation.

Importantly, this equitable form of relief is also encompassed in the doctrine of inevitable disclosure. The inevitable disclosure doctrine is applied to enjoin or limit the subsequent employment of a departing employee who leaves the employment of his employer to work for a competitor of his employer at a job where it is alleged that it is inevitable that the employee will use or disclose the trade secrets of his employer in order to perform his new job at the employer's competitor.<sup>17</sup> However, the Court of Appeals of Maryland, in *LeJeune v. Coin Acceptors, Inc.*, rejected the inevitable disclosure doctrine, holding that inevitable disclosure did not serve as a basis for granting a plaintiff injunctive relief under the Maryland Act because it created a de facto covenant not to compete and ran counter to the strong public policy favoring employee mobility.<sup>18</sup>

#### Damages and Attorney's Fees

Section 11-1203 of the Maryland Act provides that damages for the misappropriation of a trade secret can include damages for actual loss to the trade secret owner and unjust enrichment damages or, in lieu of other damages, damages measured by a reasonable royalty.<sup>19</sup>

Measuring damages by a royalty amount instead of by actual loss or unjust enrichment may be advantageous for some plaintiffs. Plaintiffs may not easily be able to determine their own actual losses because the defendant has kept secret his misappropriation and the plaintiff may not be aware of, or be able to reasonably calculate the effects of the defendant's misappropriation on plaintiff's business. A royalty amount may be much easier for the plaintiff to prove because plaintiff has the information concerning its trade secret and may already know its value. From a defendant's

point of view, measuring damages by a royalty amount may be disadvantageous. The defendant may have had the secret for only a short time and may not have been able to use it to its full potential.

Exemplary damages may also be awarded under section 11-1203(d) of the Maryland Act if there is a finding of willful and malicious misappropriation.<sup>20</sup> In addition, section 11-1204 of the Maryland Act provides that the Court may award reasonable attorney's fees to the prevailing party if there is willful and malicious misappropriation or if the claim of misappropriation is made in bad faith.<sup>21</sup>

#### Preservation of Secrecy and Statute of Limitations

During the course of a court proceeding, section 11-1205 of the Maryland Act requires that a court preserve the secrecy of any alleged trade secret by reasonable means which may include protective orders or sealed records.<sup>22</sup> Quite frequently in trade secret litigation, the alleged trade secrets of both plaintiff and defendant are discoverable. In such cases, counsel for both parties may negotiate, prepare, and submit to the court a stipulated protective order, applicable to all parties, restricting the disclosure of information in discovery, depositions, and at trial.

Section 11-1206 of the Maryland Act sets forth a statute of limitations of three years for misappropriation actions. This three year period starts after the misappropriation is discovered or should have been discovered by the exercise of reasonable diligence.

### III. Conclusion

After seventeen years since the Maryland Uniform Trade Secret Act's enactment, Maryland courts have decided numerous cases under the Act which have interpreted its provisions. A critical review of the Act and much of the reported Maryland trade secrets case law suggests that the Maryland Act currently meets the needs of trade secret litigants for a unified and comprehensive body of law. This case law also suggests that many Maryland businesses are not making efforts that are reasonable under the circumstances to maintain the secrecy of their trade secrets. Accordingly, Maryland lawyers should advise their clients as to the need for a comprehensive and demonstrable program to establish and maintain efforts that are reasonable under the circumstances to maintain the secrecy of such trade secrets.

#### ENDNOTES

<sup>1</sup>This article is derived from a law review article entitled *The Maryland Uniform Trade Secrets Act: A Critical Summary of the Act and Case Law*, 31 U. Balt. L. Rev. 181 (2002).

(continued on page 11)

**Trade Secrets . . .**

*(continued from page 10)*

<sup>2</sup>Md. Code Ann., Com. Law II § 11-1201 to 1209 (2000).  
<sup>3</sup>Uniform Trade Secrets Act, 14 U.L.A. 437, et seq. (1990).  
<sup>4</sup>See, Restatement of Torts, § 757, comment b.  
<sup>5</sup>Md. Code Ann., Com. Law II § 11-1201(e).  
<sup>6</sup>See, e.g., Home Paramount v. FMC, 107 F. Supp. 2d 684, 692 (2000) (holding that a customer list is a trade secret).  
<sup>7</sup>See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974) (noting that “novelty in the patent law sense is not required for a trade secret”).  
<sup>8</sup>See, Md. Code Ann., Com. Law II § 11-1201(e)(1) (stating that a required element of a trade secret is that it “[d]erives independent economic value, actual or potential from not being generally known”).  
<sup>9</sup>Uniform Trade Secrets Act, §1, 14 U.L.A. 439 (1990) Commissioners’ Comment.  
<sup>10</sup>Md. Code Ann., Com. Law II § 11-1201(e)(2). See also, *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 657 (4th Cir. 1993) (holding that the trade secret owner made reasonable efforts to maintain secrecy).  
<sup>11</sup>*Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974).  
<sup>12</sup>*Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 925 (Mass. 1972)  
<sup>13</sup>See, Richard C. McCrea, Jr., *Protecting Trade Secrets & Confidential Business Information* (with Forms) 44 No. 5 Prac. Law. 71 (July 1998).  
<sup>14</sup>Md. Code Ann., Com. Law II § 11-1201.  
<sup>15</sup>*Id.* at § 11-1201(b).  
<sup>16</sup>See, *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 657 (4th Cir. 1993).  
<sup>17</sup>See supra note 1 for a more complete discussion of inevitable disclosure doctrine.  
<sup>18</sup>See, *LeJeune v. Coin Acceptors*, 381 Md. 288 (2003) (citing Milton Babirak, Jr., *The Maryland Uniform Trade Secrets Act: A Critical Summary of the Act and Case Law*, 31 U. Balt. L. Rev. 181 (2002)).  
<sup>19</sup>Md. Code Ann., Com. Law II § 11-1203.  
<sup>20</sup>Md. Code Ann., Com. Law II § 11-1203(d).  
<sup>21</sup>See, e.g., *Optic Graphic v. Agee*, 87 Md. App. 770 (1991).  
<sup>22</sup>*Id.* at § 11-1205.

**Chair's Report . . .**

*(continued from page 1)*

October meeting). This video link should allow us to reach out to and engage our colleagues in the DC suburbs.

Our membership also made it clear that they wanted enhanced CLE offerings at times and in locations other than Ocean City. As a result, the Section appointed a Spring Meeting Planning Committee at our first meeting to be Chaired by Debbie Diehl that will look into the feasibility of planning (perhaps for 2009) a stand-alone Annual Business Law Section Spring Meeting to provide all day Section CLE together with a lunch meeting and a Section dinner open to all members who attend.

Many of our committees continue to be very active. In particular, the securities law committee has been very active over the summer and expects to be commenting on recent proposed SEC regulations involving private offerings under Regulation D. The emerging companies committee is expecting to publish its revised *Entrepreneur’s Almanac* in 2008 or 2009, which has not been updated since 1996.

We encourage each of you to consider getting involved in one of these projects or in any of our other committees that may be important to further developing your business law practice. A complete listing of committees is included in this newsletter. Please contact our committee chairs directly and they will be happy to assist you in getting added to a committee roster and getting involved in substantive committee work.

We look forward to the Section having a highly productive year.

Regards,

*Eric G. Orlinsky*

**Section Council Roster . . .**

*(continued from page 9)*

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## Export Compliance . . .

(continued from page 2)

surrounding the violations and the corrective actions that one should take in response thereto (the Departments recognize that the final report, having the benefit of the investigation, may report different facts from those initially reported).

Third, one should act promptly after discovering a possible violation. The longer one delays, the less likely it is that one can thoroughly investigate and accurately report the violations. As time passes, evidence stales. At the least, delay will make the task of investigating and accurately reporting the violation more difficult. And, of course, the longer one delays, the less credible is one's commitment to compliance.

The good news is that the Departments are more interested in encouraging compliance than in collecting fines. Most voluntary disclosures are resolved – where the violation is thoroughly investigated and accurately reported - with the imposition of no penalties beyond the implementation of corrective action to attempt to avoid future violations. Companies maintaining reasonable compliance procedures and promptly and accurately reporting violations can, therefore, expect to avoid any significant penalties. Companies that don't should start setting aside reserves for the significant fines that are to come.<sup>17</sup>

### FOOTNOTES

<sup>1</sup> Press Release U.S. Department of Justice, ITT Corporation to pay \$100 million penalty and plead guilty to illegally exporting secret military data overseas (March 27, 2007). [www.usdoj.gov/opa/pr/2007/March/07\\_nsd\\_192.html](http://www.usdoj.gov/opa/pr/2007/March/07_nsd_192.html).

<sup>2</sup> Renae Merle, Hughes, Boeing Settle with U.S., Washington Post, March 6, 2003, at E1. [www.washingtonpost.com/wp-dyn/content/article/2007/03/27/AR2007032702105.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/03/27/AR2007032702105.html).

<sup>3</sup> 22 C.F.R. §120.5.

<sup>4</sup> 15 C.F.R. §§730.3 and 730.4.

<sup>5</sup> 22 C.F.R. §120.1(a).

<sup>6</sup> 15 C.F.R. §730.1.

<sup>7</sup> 22 C.F.R. §§123.1(a), 125.2(a) and 125.3(a).

<sup>8</sup> 15 C.F.R. Part 738.

<sup>9</sup> See 22 C.F.R. §127.3; 15 C.F.R. §764.3.

<sup>10</sup> 22 C.F.R. §127.12(a); 15 C.F.R. §764.5(a).

<sup>11</sup> Federal Sentencing Commission, Guidelines Manual, §5K2.26 (Nov. 2006).

<sup>12</sup> United States v. ITT Corporation, No. 07-22 (W.D. Va. 2007), Information at 2.

<sup>13</sup> Id. at Deferred Prosecution Agreement, Statement of Facts, Appendix A at 4.

<sup>14</sup> *supra* note 12, at 2.

<sup>15</sup> Renae Merle, Hughes, Boeing Settle with U.S., Washington Post, March 6, 2003, at E1. [www.washingtonpost.com/wp-dyn/content/article/2007/03/27/AR2007032702105.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/03/27/AR2007032702105.html).

<sup>16</sup> 22 C.F.R. §127.12(c)(1). The EAR uses the phrase “as soon as possible.” 15 C.F.R. §765.4(c)(1).

<sup>17</sup> Export compliance programs is address in “Export Control Compliance Programs – An Ounce Of Prevention,” Maryland State Bar Association, Business Law section Newsletter (Vol. 6, No. 1, Winter 2002).

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