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IMPROVING THE DEFEND TRADE SECRETS ACT OF 2016: AGAINST PREEMPTING STATE TRADE SECRET LAW

Victoria Hanson

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INTRODUCTION

Generally, trade secrets have been protected under the law for more than 200 years.[1] Trade secrets, such as Google's algorithm and New York Times Best Sellers List,[2] have proven to be valuable assets to their respective companies. According to the U.S. Chambers of Commerce, publicly traded corporations hold trade secrets valuing 5 trillion dollars.[3] However, in the wake of modern digital technology advancement, trade secrets have become more vulnerable to loss or dissemination.[4] From 2000 to 2001, Fortune 1000 companies reported losses totaling $53 to $59 million in trade secret violations.[5] Further, in 2008, companies worldwide lost about $4.6 million on average due to security breaches and trade secret theft.[6] Many of these breaches come not from international data threats but from ordinary company employees–rogue employees who steal valuable trade secrets from their previous employers.[7]

In order to better protect companies from losing their valuable trade secrets and preventing irreparable harm, Congress enacted the

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[·] Victoria Hanson is an intellectual property associate at Irwin IP LLC in Chicago, Illinois. She has a Juris Doctorate from Notre Dame Law School (2020) and a Bachelor of Arts in Media Studies from University of California Berkeley (2017). The opinions and views of the author are hers alone. Special thanks to Stephen Yelderman for his guidance and assistance in the creation of this article, and to her family for their encouragement, love, and support.

[1] Douglas R. Nemec, P. Anthony Sammi & Scott M. Flanz, *The Rise of Trade Secret Litigation in the Digital Age*, SKADDEN (Jan. 31, 2018), https://www.skadden.com/insights/publications/2018/01/2018-insights/the-rise-of trade-secret-litigation.

[2] Charles Vethan, *Trade Secrets: 10 of the Most Famous Examples*, LINKEDIN (NOV. 8, 2016) https://www.linkedin.com/pulse/trade-secrets-10-most-famous-examples-charles-vethan/.

[3] Alissa Cardillo, Note, *Another Bite at the Apple for Trade Secret Protection: Why Stronger Federal Laws Are Needed to Protect a Corporation's Most Valuable Property*, 10 BROOK. J. CORP. FIN. & COM. L. 577, 579 (2016).

[4] *See* James Pooley, *The Myth of the Trade Secret Troll: Why the Defend Trade Secrets Act Improves the Protection of Commercial Information*, 23 GEO. MASON L. REV. 1045, 1069 (2016).

[5] Cardillo, *supra* note 3, at 582.

[6] *Id.* at 578.

[7] *See* Kaylee Beauchamp, Comment, *The Failures of Federalizing Trade Secrets: Why the Defend Trade Secrets Act of 2016 Should Preempt State Law*, 86 MISS. L.J. 1031, 1037 (2017).

Defend Trade Secrets Act of 2016 (DTSA),[8] the first federal civil protection given for trade secrets.[9] Before the DTSA, state and common laws individually protected trade secrets, which resulted in varying protections across the United States.[10] The DTSA was passed in order to unify trade secret law and provide clear guidelines for claims brought in federal court.[11] The DTSA has been around for almost three years now, yet critics of the statute have questioned whether the statute has met its purported goals of uniformity, providing clarity and predictability, drawing a narrow federal civil cause of action, and increasing the efficiency of litigation.[12] To better meet its goals, scholars have suggested that the DTSA preempt state law and get rid of state trade secret law altogether.[13]

In this paper, I argue that the DTSA has indeed not met its supposed goals, but the solution does not lie in preempting state law. Firstly, I explain the history, goals, and provisions of the DTSA and how it has failed to meet the original goals over the past three years. Secondly, I explain the argument for the DTSA to preempt state law and its supposed remedies. Thirdly, I reject the preemption argument and argue that to do so would leave some trade secrets without a remedy, harm state interests, take away an additional cause of action to trade secret theft victims, overburden the federal courts, and would not clarify the DTSA. Lastly, I provide recommendations for how to better improve the DTSA to meet its goals and create more consistent and clear trade secret jurisprudence.

I. HISTORY OF THE DEFEND TRADE SECRETS ACT 2016

A. Before Federal Trade Secret Protection

Before federal protection was given to trade secrets, trade secrets were protected by state and common law.[14] State laws, governed by their respective jurisdictions, provided remedies for trade secret violations, though state courts have fewer resources and less experience for handling complex trade secret issues.[15] The Uniform Trade Secrets Act (UTSA) was enacted in 1979[16] as the first real effort to unify trade secrets across states and codify trade secret protection.[17] However, it did not work as

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[8] Defend Trade Secrets Act of 2016, § 2, Pub. L. No. 114-153, 18 U.S.C. §1836, 130 Stat. 376 (2016).

[9] *See e.g.*, Brittany S. Bruns, Note, *Trade Secret: Criticism of the Defend Trade Secrets Act of 2016: Failure to Preempt*, 32 BERKELEY TECH. L.J. 469 (2017).

[10] *See, e.g.*, Conor Tucker, *The DTSA's Federalism Problem: Federal Court Jurisdiction over Trade Secrets*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 4 (2017).

[11] *See* S. REP. NO. 114-220, at 14-15 (2016).

[12] *Id.*

[13] *See generally*, Bruns, *supra* note 9, at 470.

[14] Pooley, *supra* note 4, at 1048.

[15] *See* Christopher B. Seaman, *The Case Against Federalizing Trade Secrecy*, 101 VA. L. REV. 317, 368 (2015).

[16] *Unif. Trade Secrets Act*, 14 U.L.A. 438 (1985).

[17] Edward T. Kang, *Defend Trade Secrets Act of 2016-One-Year Later, Now What?; Civil Litigation*, LEGAL INTELLIGENCER, May 18, 2017.

intended. Forty-seven states adopted the UTSA[18] and some only adopted certain portions of the act or altered their adoptions.[19] Therefore, with the variations in state applications of the UTSA, the extent of uniformity desired was not achieved.

Federal protection began with the Trade Secrets Act of 1948[20] which was enacted to prevent confidential information from being disclosed by federal employees and contractors.[21] In 1996, however, the Economic Espionage Act (EEA) was ratified in order to deal with international cyberattacks on important information and secrets.[22] This provided a federal criminal remedy for trade secret misappropriation and therefore broadened trade secret protection.[23] However, the EEA was amended in 2016 with the Defend Trade Secrets Act, which provided the first federal civil action for trade secret misappropriation.[24]

The DTSA expanded protection for trade secrets on a broader level. Under the act, a plaintiff can "seek nationwide relief and avoid the challenges of working through different state trade secret laws."[25] Under the Commerce Clause, the DTSA federalized trade secrets and subjected them to a jurisdictional requirement in which they must be "used in, or intended for use in, interstate or foreign commerce."[26] Furthermore, these trade secrets must be related to a product or service.[27] Congress's power, however, is limited in regards to federal trade secret protection.[28] Through the DTSA, the federal courts are more adept at addressing certain multifaceted issues with trade secrets arising in these cases.[29] Significantly, unlike copyright and patent law, the DTSA does not preempt state law.[30]

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[18] To see which states have enacted the UTSA, see generally *Trade Secret Act*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792.

[19] Bruns, *supra* note 9, at 475.

[20] 18 U.S.C. § 1905.

[21] Cardillo, *supra* note 3, at 587.

[22] 18 U.S.C. §§ 1831–1839 (2012).; *See, e.g.*, Tucker, *supra* note 10, at 6.

[23] *See, e.g.*, Bruns, *supra* note 9, at 480.

[24] *Id.* at 469.

[25] Ali Dhanani, *The New Defend Trade Secrets Act: Finally, a Federal Tool to Protect Your Trade Secrets*, BAKER BOTTS (July 2016), https://www.bakerbotts.com/thought-leadership/publications/2016/07/ip-report-a-dhanani.

[26] *Defend Trade Secrets Act of 2016*, §2(b)(1), 130 Stat. at 376.

[27] *Id.*

[28] *See In re* Trade-Mark Cases, 100 U.S. 82, 89 (1879) (Congress has limited powers to legislate under the Commerce Clause.).

[29] Bret Cohen, *Defend Trade Secrets Act (DTSA) and Other Legal Claims and Recourse to Protect Employers' Confidential Information and Trade Secrets*, NELSON MULLINS, https://www.nelsonmullins.com/storage/O2eyX5bMhAu9bx5wNmq0ce0NNtxK2qmPRZop4W6e.pdf (last visited Jan. 29, 2021).

[30] *See, e.g.*, Austin Champion, *Updates in Federal Trade Secret Law*, CORPORATE COUNSEL, April 1, 2017.

B. The Goals of the Defend Trade Secrets Act of 2016

Congress, in envisioning a more uniform trade secret law across the United States, created the DTSA with certain goals in mind. The DTSA seeks to: (1) provide clear rules and predictability, (2) narrowly draw federal civil causes of action, (3) create faster and efficient trade secret litigation and encourage innovation, and (4) promote uniformity across trade secret claims.[31]

Firstly, the DTSA is meant to provide clear rules and predictability for trade secret litigation.[32] If a trade secret claim is brought under the DTSA and federal protection, Congress sought for the DTSA to have sufficiently unambiguous rules for how to apply the law and predictability for what the outcome would be. Secondly, the DTSA aims to build narrowly drawn federal civil causes of action for dealing with trade secret misappropriation.[33] By providing specific causes that apply to certain trade secrets, trade secret cases will be handled in similar, foreseeable ways which will provide for consistency and stability. This predictability will contribute toward an efficient and effective system for protecting trade secrets. Thirdly, the DTSA's narrow restrictions and clear rules hope to provide faster relief and protection, as well as less disruption in business transactions and dealings.[34] By doing so, companies and businesses will not be affected in case a trade secret violation occurs and they will be able to resume work efficiently. Through this lack of interference with business work, DTSA encourages innovation for businesses to continue producing materials. Lastly, the DTSA's main goal is to promote a more uniform body of law for overseeing trade secret claims.[35] The DTSA provides provisions, definitions, and requirements to achieve this purpose. Making trade secret claims predictable and efficient contributes toward uniformity with how the DTSA is applied to trade secret cases.[36]

C. Provisions of the Defend Trade Secret Act of 2016

In addition to creating a federal civil action for trade secrets, the DTSA was instrumental in creating several new provisions: a jurisdictional requirement, ex parte seizure, and whistleblower immunity.[37] These provisions were used to help narrow the scope of the DTSA and its application, so as not to let the DTSA overstep its boundaries.[38]

1. Jurisdictional requirement. - The DTSA uses its jurisdictional element to maintain the balance between federal and state trade secret law. The jurisdictional element serves as a way of sorting through cases

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[31] *See* S. REP. NO. 114-220, at 14-15.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See* Beauchamp, *supra* note 7, at 1067.

[37] *Defend Trade Secrets Act of 2016*, §2(b)(1), §2(b)(2), §(7), 130 Stat. at 376, 384; *see also* Champion, *supra* note 30, at 2.

[38] *Id.*

by providing federal protection for certain types of trade secrets and using state law to protect all of the other trade secrets.[39] Congress intended for only those trade secrets that are "related to a product or service used in, or intended for use in, interstate or foreign commerce."[40]

There are two requirements in order for the DTSA to apply to a certain trade secret. The first requirement is the nexus requirement, in which a product or service must be used in interstate commerce and actually flow through it.[41] The second requirement is the relationship requirement, in which a trade secret must be directly related to a product or service.[42] This requirement limits the application of the DTSA to trade secrets which depend on a physical item and does not apply to trade secrets which stand on their own. These requirements and restrictions on the jurisdictional element to the DTSA operates to reduce the incidence of trolling and control what gets litigated.[43] Furthermore, by having a trade secret meet the nexus and relationship requirements, these criteria act to create greater uniformity for trade secrets that are litigated under the DTSA.

Amending the EEA with the DTSA also brought new definitions to the act, such as "trade secret" and "misappropriation."[44] The trade secret definition requires the trade secret to derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by "another person who can obtain economic value from the disclosure or use."[45] Misappropriation is defined as "acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means; or . . . disclosure or use of a trade secret . . . without express or implied consent."[46] These definitions are very similar to the UTSA's respective definitions, though different from various state laws that have modified their adoptions of the UTSA.[47]

Since the DTSA has been enacted, the jurisdictional requirement of the DTSA has acted in capacity to limit the amount of trade secrets that are litigated under the DTSA.[48] However, the scope of trade secrets has favored technical trade secrets, such as manufacturing processes, formulae, and others, since these trade secrets are most likely to "direct value toward a product or service" and "actually flows in [commerce]."[49] Some other types of trade secrets such as business information, including financials, strategies, and customer information, cannot meet the DTSA

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[39] Tucker, *supra* note 10, at 8–9.

[40] Defend Trade Secrets Act of 2016 §2(b)(1), 130 Stat. at 376.

[41] *Id.*

[42] *Id.*

[43] *See* Pooley, *supra* note 4, at 1077.

[44] Defend Trade Secrets Act of 2016 §2(b)(1), 130 Stat. 376, 380-81 (2016).

[45] The EEA's definition of trade secret was amended to reflect this definition. *Id.* at 376, 380.

[46] Defend Trade Secrets Act of 2016 §2(a)-(b)(III), 130 Stat. 376, 381 (2016).

[47] Bruns, *supra* note 9, at 482-83.

[48] If a plaintiff fails to prove that their trade secret meets the jurisdictional requirement, then they cannot seek relief in federal court. *See* Defend Trade Secrets Act of 2016 §2, 130 Stat. at 376.

[49] Tucker, *supra* note 10, at 50.

criteria unless they relate to something outside of the business and in commerce. For example, in *Hydrogen Master Rights, Ltd. v. Weston*, partners who developed hydrogen technology brought action against a former partner who knew the secret formula.[50] The complaint, however, was dismissed since it failed to allege any nexus between interstate or foreign commerce and the confidential recordings or hydrogen technology formula.[51] Often times, these types of business trade secrets are connected to contract, tort, or fiduciary law, which are all under state law.[52] This divide has manifested as a result of the nexus and relationship requirements, which limits the number of cases under the DTSA that are permitted under the Commerce Clause.

There is also a timing element for when a trade secret violation may receive a remedy under the DTSA. In the DTSA provisions, it is not explicitly stated when misappropriation must occur to fall under the DTSA. One instrumental case, *Brand Energy & Infrastructure Servs. v. Irex Contracting Grp.,* determined when DTSA applies to misappropriation of a certain trade secret.[53] In that case, a construction company claimed several of its former employees stole its trade secrets and then began working for a competitor.[54] The competitor argued that the DTSA did not apply to this action because it was enacted after the acts took place.[55] However, the court asserted that the DTSA applies to acts of misappropriation occurring on or after the date of enactment.[56] Thus, the DTSA is appropriate when misappropriation began prior to the enactment date of the DTSA if misappropriation continues after that date. Therefore*, Brand Energy* established that the DTSA applies to almost all acts of misappropriation, thus broadening the scope of the DTSA's timing element.

As for the DTSA's language, there is some lack of clarity as to what certain definitions mean. For example, the trade secret definition makes it unclear what kinds of information is considered a trade secret to fall under the DTSA. Although there is a jurisdictional requirement, it does not explicitly include types of trade secrets that should be covered. Therefore, there may be an imbalance in certain types of trade secrets that receive coverage more than others. Furthermore, the misappropriation definition is unclear in what it constitutes. This may be a problem in determining whether remembering or memorizing trade secret information creates a violation.[57] To further the problem, states vary on what they define misappropriation to be, and therefore may reach different legal conclusions by applying their respective state laws.

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[50] Hydrogen Master Rts., Ltd. v. Weston, 228 F.Supp.3d 320 (D. Del. 2017).

[51] *Id.* at 338.

[52] *See id.* at 336.

[53] Brand Energy & Infrastructure Servs. v. Irex Contracting Grp., No. 16-2499, 2017 U.S. Dist. LEXIS 43497, 2017 WL 1105648, at *1 (E.D. Pa. Mar. 24, 2017).

[54] *See id.* at *1.

[55] *See id.* at *3.

[56] *See id.* at *8.

[57] Daniel Winston & Irina O. Khagi, *DTSA's Promise Of Uniformity Remains Unfulfilled*, LAW360 (June 15, 2016, 11:07 AM), https://www.law360.com/articles/806189/dtsa-s-promise-of-uniformity-remains-unfulfilled.

Moreover, in terms of improper means, the statute does not define what "other lawful means of acquisition" includes, thus creating ambiguity.[58]

2. Ex parte seizure provision. - The ex parte seizure under 13 U.S.C. §1836(b)(2) comes into play when a party requests for the court to seize the stolen trade secret property from the violator.[59] Courts only issue an order granting seizure of the property under necessary and extraordinary circumstances in order to prevent the distribution of that trade secret to other people or the public.[60] Congress understood the power of this provision, and imposed certain requirements that plaintiffs must meet in order to be granted such a seizure.[61]

To be granted ex parte seizure, a plaintiff must meet the following requirements. A plaintiff must show that a preliminary injunction or temporary restraining order is not adequate to provide relief.[62] Additionally, a plaintiff needs to "provide sufficient evidence for the court" on their case in order for the court to make several findings, which imposes a high burden on the parties so early on in litigation.[63] Due to these aspects that must be met, Congress sought to restrict the flippant granting of this provision so as not to abuse its power and burden defendants.[64]

Critics were concerned about the abuse of the ex parte seizure provision of the DTSA when the act was first enacted and even before then.[65] People feared of the adverse effect on the employee who would be subject to the merciless seizure. However, in actual application the courts have been hesitant to grant these seizure requests.[66] Only a handful of requests have been granted the ex parte seizure remedy.[67] The act asserts that the provision will only be granted where extreme necessity is shown and not doing so would result in disastrous losses of information and assets. The courts require convincing proof of a real risk of disappearance or destruction of the trade secret information by the violator.[68] Therefore, some argue that the ex parte seizure provision is properly narrowed in order to allow intervention only in cases required to disincentivize against abuse.[69]

3. Whistleblower immunity provision. - The whistleblower immunity provision under 18 U.S.C. §1833(b) exempts employees from criminal or civil liability for disclosing a trade secret in confidence to a higher authority.[70] The provision acts as a safe harbor for people who

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[58] Defend Trade Secrets Act of 2016, § 2(b)(3), 130 Stat. 376, 381 (2016).

[59] *See* Bruns, *supra* note 9, at 485.

[60] Defend Trade Secrets Act of 2016, § 2(a)(2)(A), 130 Stat. 376, 376.

[61] *See generally* S. REP. NO. 114-220, at 9, 14 (2016).

[62] Defend Trade Secrets Act of 2016, § 2(a)(2)(A), 130 Stat. 376 (2016).

[63] Bruns, *supra* note 9, at 486.

[64] *See* S. REP. NO. 114-220, at 14 (2016).

[65] *See, e.g.,* Pooley, *supra* note 4, at 1054.

[66] *The Defend Trade Secrets Act: One Year Later,* A.B.A., April 27, 2017, https://www.americanbar.org/groups/business_law/publications/blt/2017/04/02_newman/.

[67] *See id.*

[68] Pooley, *supra* note 4, at 1070.

[69] *See, e.g., id.* at 1069.

[70] Defend Trade Secrets Act of 2016, § 7, 130 Stat. 376, 384-86 (2016).

assist with bringing forth trade secret violations and protects them from "painful and relentless retaliation."[71] Without this protection, businesses may be at risk of big losses and those who may have important information to prevent further losses may not come forward in fear of facing backlash.[72]

In order for employees to benefit from this provision, employers must notify their employees in their contracts with employees of this immunity and explain how confidentiality works with the immunity provision.[73] This notice is important for employers who have trade secret violations to receive attorneys' fees and punitive damages.[74] This provision is the only part of the DTSA that preempts state law since it is an entirely new provision that was never a part of the UTSA or state laws.[75]

The whistleblower immunity exception has provided the appropriate defense to protect those that reveal trade secret violators. It is an important safe harbor, but it has not been an absolute protection from liability. To receive protection, an employee must present evidence that they planned to use whatever important documents or information they have to reveal a violation. However, it is not entirely clear what the minimum is to receive this protection. For example, in *Unum Group v. Loftus*, an employee took company documents and refused to return them.[76] The employee argued that he was protected under the DTSA whistleblower immunity exception, but could not present his reason for taking the documents or what he planned to use the documents for.[77] Therefore, he could not receive protection under the whistleblower immunity provision.

Furthermore, many employees may be unaware of this exception since employers have not made it clear that this provision exists nor incorporated it into their contracts. It is unclear how much is required or what employers must include for their employees to get this protection.[78] It is unclear whether citing the immunity provision is sufficient to get the protection or whether an employer must reproduce the immunity provisions in their entirety.[79] Therefore, there has been little guidance on how the whistleblower provision should provide notice.

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[71] Pooley, *supra* note 4, at 1076.

[72] *See id.* at 1076.

[73] *See* Defend Trade Secrets Act of 2016, § 7(b)(3)(A), 130 Stat. 376, 385 (2016) (an employer must include the immunity provisions in "any contract or agreement with an employee that governs the use of a trade secret or other confidential information."); *see also* Bruns, *supra* note 9, at 489.

[74] *See* Cohen, *supra* note 29, at 7. For example, in *Xoran Holdings LLC v. Luick*, No. 16-13703, 2017 WL 4039178 at *7 (E.D. Mich. 2017), an employer did not give notice to his employee of the whistleblower immunity provision in the employment agreement. Therefore, the employer recovers any exemplary damages or attorney's fees on their DTSA claim.

[75] *See* Bruns, *supra* note 9, at 490.

[76] Unum Group v. Loftus, 220 F.Supp.3d 143 (D. Mass. 2016).

[77] *See generally id.* at 146.

[78] *See* Dhanani, *supra* note 25, at 2.

[79] *See id.*

D. Concerns about the Defend Trade Secrets Act of 2016

With the passing of the DTSA, there have been a variety of concerns about the DTSA's implication and the effect the DTSA has had on trade secret litigation and protection. Initially, Congress received an opposition letter to the DTSA from forty-two law professors who were wary of the dangers of the DTSA, including the ex parte seizure remedy abuse, increased costs of litigation, and uncertainty.[80] They claimed that the ex parte seizure was vague, expensive, and favoring the plaintiff.[81] Further, the costs and lengths of litigation would rise since plaintiffs must prove their trade secret falls under the Commerce Clause and meets the jurisdictional requirements.[82] The professors were concerned with the uncertainty of how judges would interpret the DTSA and how an additional act (the DTSA) would decrease the already predictable and well established trade secret law.[83]

More critics argue that the act results in increased internal business costs as well as length of litigation for trade secret misappropriation.[84] Further, those who have small businesses are impacted more than larger companies since they do not have the resources to increase their costs or take on litigation.[85] For example, employers need to add in an immunity provision for whistleblowing, and have all of their employees re-sign or approve of the additions to their contract. This increases the internal costs to reproduce and redraft documents which may be easier for a large company with a large legal team rather than a small business with a couple of attorneys. Other critics believe that by passing the DTSA, the incidence of trade secret trolls will increase and cause problems for trade secret owners.[86] Because the DTSA does not preempt law, critics assert that bringing trade secret claims under state and federal law fail to promote the uniformity it seeks to achieve and enables forum-shopping.[87]

II. THE DTA'S PURPORTED GOALS HAVE NOT BEEN MET

Over three years, the courts have used and interpreted the DTSA in relation to federal trade secret cases. Since the DTSA is relatively new, there has been little guidance for the courts to interpret the DTSA aside from the plain language of the text. Courts also have struggled with interpreting the provisions under state or federal law since there has been

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[80] Eric Goldman et al., *Professors' Letter in Opposition to the Defend Trade Secrets Act of 2015 (S. 1890, H.R. 3326)*, STAN. L. SCH. CTR. FOR INTERNET AND SOC'Y (Nov. 17, 2015), https://cyberlaw.stanford.edu/files/blogs/2015%20Professors%20Letter%20in%20Opposition%20to%20DTSA%20FINAL.pdf.

[81] *See id.* at 2.

[82] *See id.* at 3.

[83] *See id.* at 7.

[84] *See* Beauchamp, *supra* note 7, at 1068.

[85] *See, e.g.*, Goldman et al., *supra* note 80, at 5.

[86] *See, e.g.*, Pooley, *supra* note 4, at 1061.

[87] *See, e.g.*, Bruns, *supra* note 9, at 494.

some ambiguity. As such, some courts have used the UTSA due to its similarity and proximity to the DTSA's language and purpose, and have therefore used related cases to examine DTSA claims.[88] Therefore, some critics have argued that DTSA case analyses and decisions are put together like a patchwork of federal and conflicting state laws.[89]

Looking at how the DTSA has been applied and the results of court interpretations, early scholarship has suggested that the DTSA has failed to meet its goals. The DTSA has not increased the uniformity of trade secret law as much as it has hoped to do. By failing to provide guidelines for the courts and a lack of precedent to follow, courts have reached different conclusions in similar cases. Federal courts may use state trade secret law or even cases from other states to interpret the DTSA.[90] In addition, in looking to precedent, those cases which have both federal and state claims will most likely look to state law for answers, which may vary from state to state.[91]

The DTSA has also failed to provide clear rules for creating predictable results. Some of the aspects of the definitions are not explained, such as what constitutes misappropriation as well as what trade secrets are covered.[92] Furthermore, some of the provisions do not have clear instructions for what is required to satisfy a certain obligation, such as what the employers must include for the whistleblower immunity provision to cover their employees.[93] Due to the lack of clarity, courts are free to interpret the definitions and provisions how they wish and therefore may not be consistent across the board. Therefore, the goal for clear rules and predictability have not been met.

The third goal of creating quick and efficient trade secret litigation has also not been achieved by the DTSA. By allowing plaintiffs to bring cases under both state and federal law, this has increased litigation costs and time in preparing material for both parties.[94] Therefore, the parties would have not only to prove that the trade secret in question falls under the jurisdictional requirement, but anticipate the law that will be applicable under both state and federal law.[95] Further, the scope of discovery permitted under the Federal Rules of Civil Procedure will broaden, with costs at stake from $250,000 to $1 million in discovery.[96] Thus, the increased internal costs for businesses fail to accomplish a fast and efficient litigation process. Furthermore, since there are uncertainties in DTSA interpretations, courts must sort through reasoning and precedent and thus take longer to arrive at decisions for their cases.

The fourth goal of the DTSA could be construed as going either way. It has in some respects properly narrowed a federal civil cause of action. There are requirements that trade secrets must meet in order to

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[88] *See generally* Kang, *supra* note 17, at 3.
[89] Winston & Khagi, *supra* note 57, at 2.
[90] *Id.*
[91] *See* Kang, *supra* note 17, at 3.
[92] *See id.*
[93] *See* Dhanani & Khagi, *supra* note 25, at 2.
[94] *See* Goldman et al., *supra* note 80, at 7-8.
[95] *See id.* at 5-6.
[96] *See id.*

operate under a federal cause of action. Further, plaintiffs must satisfy aspects of the provisions in order to receive them. On the other hand, since state and federal claims are commonly brought together and courts may look at state laws to interpret the DTSA, this prevents an appropriate narrowing of a federal civil cause of action. In addition, some of these requirements are also unclear as to what they require and cannot be appropriately narrowed until it is clear what they include.

A. Proposed Solution: Preempting State Law

Several scholars have argued that the solution to the pitfalls of the DTSA is preemption of state trade secret law.[97] They argue that if the DTSA preempted state law, many of the concerns about uniformity and ambiguity will be solved and the interests of Congress will be served better.[98] By strictly using federal law to handle trade secret issues, trade secret law will be better off. By allowing plaintiffs to file federal and trade secret claims, there is the possibility for confusion, conflict, and uncertainty which runs contrary to DTSA's goal of uniformity.[99] Although the DTSA provides a set of rules and requirements, plaintiffs have often opted to bring claims under both federal and state law instead of picking one over the other.[100] Without preemption, they argue that business and litigation costs will increase and this will most likely lead to a "chilling effect" on company innovation and trade secrets that might grow the economy.[101] Furthermore, plaintiffs will seek out jurisdictions that better favor their side of the case, which will increase forum shopping.[102] Defendants have no say whether the case is handled under federal or state law either, and thus may have difficulty anticipating where the direction of litigation may go.[103] Lastly, they argue that the lack of preemption undercuts state policies.[104] Therefore, scholars suggest that the DTSA should preempt state law to serve better the interests of Congress to provide strong, uniform trade secret protection.[105]

B. Preemption's Supposed Remedies

These critics argue that preempting state law supposedly resolves many of the issues created by the DTSA and better helps the Act reach its goals. With no more state trade secret laws, there would be little

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[97] *See, e.g.,* Beauchamp, *supra* note 7, at 1069; *see also* Bruns, *supra* note 9, at 491.

[98] *See generally* Bruns, *supra* note 9, at 491.

[99] *See* Beauchamp, *supra* note 7, at 1073.

[100] *See* Winston & Khagi, *supra* note 57, at 1 (bringing claims under both federal and state law allow for defendants to reap the benefits of the respective laws and cast a wider net for recovery. Should they fail to meet the requirements of the DTSA, they still have an opportunity to recover under state law).

[101] Goldman et al.,, *supra* note 80, at 4.

[102] *See, e.g.,* Winston & Khagi, *supra* note 57, at 3.

[103] *See* Bruns, *supra* note 9, at 494.

[104] *See, e.g.,* Beauchamp, *supra* note 7, at 1074.

[105] *See, e.g.,* Bruns, *supra* note 9, at 491.

argument over the appropriate choice of law for a trade secret action.[106] Plaintiffs would no longer have the option to pick one form of action over the other, or bring both types of claims in court. By taking away options, there would be a decrease in forum shopping since every jurisdiction would have the same rules.[107] Defendants, who may wish to advocate for a more forgiving state law, would no longer need to worry about which jurisdiction might be beneficial or harmful for their case.[108] By preempting state law, everyone is placed on the same playing field.

Further, the uncertainty around whether state or federal rules are going to be applied as well as what employment opportunities are allowed for employees who wish to work for competitors, scholars assert, would no longer be an issue with preemption.[109] By failing to preempt state law, they argue that the DTSA has failed to provide strong trade secret protections and encourage employee mobility and competition.[110] Preempting state law would allow for the "federal courts [to have] power over all cases where trade secrets are used in, or intended to be used in, interstate commerce."[111] Employees would better be able to know what they can and cannot do in regards to trade secrets at their company or business.[112] Many states have different ways of handling employees who may have had access to trade secrets. Without state trade secret law, there is no mystery as to what the restrictions are and companies would be allowed to educate their employees of certain consequences.

Preempting state law, they argue, will also stop the DTSA from undermining state policies. Only state laws with broader trade secret protection than federal law allow states to achieve their policy goals.[113] State policies that include policy goals other than just protecting trade secrets are undercut with the greater protection given by the DTSA.[114] If a plaintiff figures that he or she can avoid a state requirement by bringing a claim under the DTSA, he or she can circumvent that state policy by picking the federal route.[115] Further, if the DTSA has a requirement and a state does not, a plaintiff might bring that claim under state law instead.[116] Preempting state law might eliminate this issue altogether, since plaintiffs would be unable to pick and choose what kind of law they wish to use.

III. THE DEFEND TRADE SECRETS ACT SHOULD NOT PREEMPT STATE LAW

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[106] *See id.* at 499.

[107] *See id.* at 494.

[108] *See id.*

[109] *See id.* at 500.

[110] *See id.* at 470.

[111] Beauchamp, *supra* note 7, at 1069.

[112] *See* Bruns, *supra* note 9, at 499.

[113] *See id.* at 497 (explaining that trade secret law is like trademark law, in that state laws which have greater protection than federal law will have an effect on the case).

[114] *Id.*

[115] *See id.* at 498.

[116] *Id.*

The DTSA has failed to meet its goals of uniformity, prevention of disruption to business, and provision of clear requirements and guidelines; however, the DTSA preempting state law is not the answer. Despite the fact that preemption would provide some solutions to the problems created by the DTSA, it would create other issues that would undermine the balance of federal and state powers. The DTSA should not preempt law because: (1) state law provides an avenue of suit for all trade secrets that do not meet the requirements of the DTSA, (2) state laws better serve the interests of the state and its citizens, (3) victims of trade secret misappropriation should have more avenues of recovery, (4) it would overburden the federal courts, and (5) it does not help the DTSA achieve clarity. Instead, Congress should amend the DTSA in order to provide clearer guidelines and better meet its goals.

A. *Preemption Would Leave Some Trade Secrets Without Relief*

Letting the DTSA preempt trade secret law would take away an alternative route for obtaining relief. Furthermore, it would prevent all trade secrets from being covered, especially those that potentially might not be covered by the DTSA.[117] In order to bring a claim under the DTSA, a trade secret owner must prove that his or her trade secret meets the jurisdictional requirements under the Act. A trade secret under the DTSA must be "related to a product or service used in, or intended for use in, interstate or foreign commerce."[118] Therefore, a trade secret must be (1) in actual use in commerce and (2) must be related to a service or product. The nexus requirement requires for the product or service to actually flow or intend to flow across state lines.[119] The relationship requirement has generally been construed narrowly and must be directly connected to an item or service.[120] These limiting requirements indicate that a civil remedy is only available for certain trade secrets that are related to a product or service.[121] If a plaintiff fails to allege a sufficient connection between the trade secret and interstate commerce, then courts may dismiss his or her motions or claims.[122]

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[117] *See* Brook K. Baker et. al., *Professors' Letter in Opposition to the "Defend Trade Secrets Act of 2014" (S. 2267) and the "Trade Secrets Protection Act of 2014" (H.R. 5233)*, STAN. L. SCH. CTR. FOR INTERNET & SOC'Y (Aug. 26, 2014), http://cyberlaw.stanford.edu/files/blogs/FINAL%20Professors%27%20Letter%20Opposing%20Trade%20Secret%20Legislation.pdf. ("While the precise meaning of this clause is unclear and unsettled, it obviously does not (and cannot) describe all US trade secret information, as not all trade secrets are necessarily 'related to a product or service used in ... commerce,' like many customer lists"). *Id.* at 3.

[118] 18 U.S.C. § 1836(b)(1) (2016).

[119] *See* Tucker, *supra* note 10, at 26.

[120] *Id.* at 33.

[121] *Id.*

[122] *See, e.g.,* Hydrogen Master Rights, Ltd. v. Weston, 228 F. Supp. 3d 320, 337-38 (D. Del. 2017) (district court dismissed the DTSA claim because the complaint

For example, in *Search Partners, Inc. v. MyAlerts, Inc.*, a Minnesota federal district court dismissed plaintiff's DTSA claims because their trade secret of the identity of an individual on an executive recruiting list did not constitute a product or service used for interstate or foreign commerce.[123] Therefore, the plaintiffs did not prove that their trade secret was one that the DTSA could protect. This case emphasized that not all trade secrets are covered by the DTSA, and thus the DTSA cannot provide an avenue for every trade secret brought under federal law.

It is unclear what types of trade secrets are included under the DTSA. A trade secret that is only used for in-state business may not fall into "interstate or foreign commerce."[124] Further, if a business's customer list is only used in-state, but the business may envision marketing its products in other states in the future, it is unclear whether that falls within the types of trade secrets the DTSA protects.[125] Unlike technical trade secrets such as formulae and manufacturing processes, general business secrets like customer information, finances, and strategies that do not go outside of a state are a type of trade secret that may be beyond the scope of the DTSA.[126] This is because general business secrets are not sufficiently related to products or services, but instead to the internal aspects of the business itself.[127] These kinds of trade secrets arise under contractual agreements not to disclose information.[128] These kinds of agreements are normally interpreted under state law, not federal law. To allow these types of trade secrets under the DTSA would encroach into state fiduciary duties and contract law.[129]

On top of the nexus and relationship requirements, a trade secret must also meet the timing requirement. The DTSA extends a federal civil cause of action to all acts of misappropriation that happen on or after the date that the DTSA was enacted.[130] Although, if the appropriation happened before the DTSA was enacted but continued to be misappropriated after that date, then that trade secret also meets the timing requirement.[131] Therefore, the DTSA's timing requirement casts a broad scope to encompass most trade secrets; however, that does not mean all trade secrets are covered. Those trade secrets that do not meet the timing requirement and fall outside of the parameters may still find a

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did not allege any connection between interstate or foreign commerce and the trade secrets in question); *see also* Gov't Emp. Ins. Co. v. Nealey, 262 F. Supp. 3d 153, 173 (E.D. Pa. 2017) (plaintiff did not establish that the court had subject matter jurisdiction since they failed to allege any nexus between the trade secrets and interstate or foreign commerce).

[123] Search Partners, Inc. v. MyAlerts, Inc., No. 17-1034, 2017 U.S. Dist. Westlaw 2838126 *1, *2 (D. Minn. June 30, 2017).

[124] 18 U.S.C. § 1836(b)(1)(2016).

[125] Winston & Khagi, *supra* note 57, at 2.

[126] *See* Tucker, *supra* note 10, at 36.

[127] *See id.*

[128] *Id.*

[129] *Id.* at 35.

[130] *See* Defend Trade Secrets Act of 2016, Pub. L. 114-153, §2(e), 130 Stat. 376, 381-82 (2016).

[131] *See Brand Energy & Infrastructure Servs., Inc.*, 2017 WL 1105648, at *1.

recourse under state law. To preempt state law would be to take an additional remedy away for all trade secrets, especially those that do not meet the requirements.

If a plaintiff fails to establish the jurisdictional or timing element under the DTSA, then he or she cannot find a remedy under federal law; however, a trade secret owner can still pursue a course of action under state law.[132] If a trade secret is misappropriated in a single jurisdiction, state law would most likely have an adequate remedy since it is not used in commerce or across state lines.[133] Further, if a trade secret is misappropriated in multiple jurisdictions, it makes sense for a trade secret owner to find a sufficient remedy under federal law since the trade secret misappropriation affected more than one state.[134] As the DTSA is framed now, if the DTSA preempts state law, it is very likely that multiple trade secrets will be without a remedy to stop their misappropriation. Trade secrets that were not sufficiently used in interstate commerce, those that were not related enough to a product or service, those that were misappropriated not within the time the DTSA permits, or those that were business information included in contracts and protected by state law would not have a way of recovering from their losses or stopping an alleged misappropriator from exposing or continuing to use the trade secret information should the DTSA preempt state law. Further, federal law would then need to take on contractual non-disclosure agreement litigation that it would have preempted.[135] Therefore, if the DTSA preempted state law, it may cause more harm than good and may not provide protection for all trade secrets.

B. *Preemption Would Fail to Protect State Interests*

Originally, trade secrets were protected by common and state law.[136] These protections have existed for hundreds of years and have developed to meet better the needs of each state. Protecting state interests is of great concern to Congress and the Constitution.[137] Furthermore, states have their own citizens' best interests at heart, and have developed laws that better fit their system and rules. States have worked to create well-developed laws that better suit the rules of the state.[138] Through decades of courts interpreting state laws in each of their

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[132] *See* Dhanani, *supra* note 25, at 3.

[133] *Id.* at 4.

[134] *See id.*

[135] *See* Tucker, *supra* note 10, at 35-36 ("Federal courts… may end up preempting state fiduciary and contract law regarding the duty of confidentiality. An expansive definition of the Relationship Requirement would put federal courts into the business of interpreting and implying fiduciary duties owed by directors or executives…").

[136] Pooley, *supra* note 4, at 1048.

[137] The U.S. Constitution preserves the rights of the states and protects their interests. For example, Amendment X recognizes their rights: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[138] *See* Seaman, *supra* note 15, at 325.

respective states, state trade secrets laws have created legal certainty and precedent to follow.[139] States have been allowed to become "laboratories of legislative innovation" to find the right version of trade secret law for themselves and reflect their policy goals.[140] These precedents have been reaffirmed case after case and the states have reflected their preferences into their laws.

For example, in Alabama, the Alabama Trade Secrets Act was construed to be consistent with the common law of trade secrets and sets out clear requirements unlike the UTSA. The Act does not follow the UTSA, on which many other states base their trade secrets laws and provisions.[141] Alabama instead selects to uphold common law and follow the laws it has spent time and effort into forming.[142] Alabama defines trade secret as information that:

> a. Is used or intended for use in a trade or business; b. Is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process; c. Is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret; d. Cannot be readily ascertained or derived from publicly available information; e. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and f. Has significant economic value Alabama actively chooses to follow common law rather than provisions set out in the UTSA as they better fit what Alabamans desire to see in a trade secrets laws.[143]

This definition of trade secret clearly lists the requirements to receive protection. Further, the Alabama legislature intends to exclude those persons who may have innocently acquired knowledge of a trade secret, which is different from the UTSA.[144] Therefore, Alabama casts a more restrictive view of trade secrets and intentionally sets itself apart by intending not to be uniform with the other states that have adopted the UTSA.

Additionally, the Arkansas Trade Secrets Act[145] allows plaintiffs to invoke the inevitable disclosure doctrine for injunctive relief where a plaintiff may show that a defendant's new employment will result in use of a plaintiff's trade secrets.[146] The Arkansas courts have let individuals have this remedy in trade secret cases, contrary to many states that do not allow the inevitable disclosure doctrine. Furthermore, Arkansas's definition of trade secret is based on the *Restatement of Torts*:

> (1) the extent to which the information is known outside the business; (2) the extent to which the information is known by

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[139] *See id.*

[140] Bruns, *supra* note 9, at 490.

[141] ALA. CODE §§ 8-27-1 to 8-27-6 (2015).

[142] *See* Sid Leach, *Anything but Uniform: A State-by-State Comparison of the Key Differences of the Uniform Trade Secret Act,* SNELL & WILMER L.L.P., 52 (2015).

[143] ALA. CODE § 8-27-2(1) (2015).

[144] *Id.*

[145] ARK. CODE ANN. § 4-75-601 (2015).

[146] *See* Leach, *supra* note 142, at 76.

> employees and others involved in the business; (3) the extent of measures taken by the company to guard the secrecy of the information; (4) the value of the information to the company and to its competitors; (5) the amount of effort or money expended by the appellee in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[147]

Therefore, Arkansas and some other states use the *Restatement of Torts* to determine if something is a trade secret while states like Alabama have their own definitions of trade secrets that are different. These distinctions in states' trade secret laws emphasize the uniqueness of their provisions and active action to separate themselves from other states.

While the states have had many years and decades to develop their trade secret laws and preferences in their jurisdictions, federal trade secrets law has been freshly created. Federal trade secrets law has only been around for three years, which has given the courts little time to create interpretive precedent. To allow the DTSA to preempt state law now or in the near future is still not enough time for the federal trade secrets law to mature fully. Further, some definitions and provisions under the DTSA are unclear and ambiguous. To preempt state law with the DTSA would muddle trade secrets law further. More years are needed in order to develop precedent of claims under the DTSA. Courts have used precedent of the UTSA to help interpret the DTSA since they have similar language[148], but the UTSA and DTSA do not have all of the same provisions and therefore do not have the same effect or result. Thus, the UTSA does not give the proper insight or understanding we need for the DTSA and its functions.

By preempting state law, federal law would eradicate the intricacies of state trade secrets law and dismiss the time and effort put into creating the right law for trade secrets specific to their state. Each state has its own policy goal in creating its trade secrets laws and having the DTSA speak for all trade secrets policy considerations will not adequately achieve the specific goals of the states. States like Alabama and Arkansas developed their trade secrets laws as an interpretation of how their jurisdictions define trade secrets and handle violations. Leaving state trade secrets law as it is would respect the state laws that have been set and allow for the relevant policies for trade secrets of the states to stay in place.

Critics have argued that the DTSA, by failing to preempt state law, undermines state policies and allows victims of trade secret misappropriation to select jurisdictions that favor them.[149] In reality, many plaintiffs end up bringing claims in court cases under both state and federal law.[150] Plaintiffs do this in order to seek out remedies offered under both of kinds of laws. In addition, plaintiffs are bound to the jurisdictions where their trade secrets have been used in commerce and thus have those jurisdictions as options for places where they can bring a suit. Therefore, they cannot pick a random jurisdiction to which they

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[147] *Id.* at 73-74.

[148] *See, e.g.*, Kang, *supra* note 17, at 2.

[149] *See, e.g.,* Beauchamp, *supra* note 7, at 1074.

[150] Cohen, *supra* note 29, at 2.

have no connection. Since his or her trade secret should be connected to a product or service, a plaintiff may bring a suit in another state that is not his or her primary place of residence as long as the product or service containing the trade secret was used in the other state. Therefore, concerns of plaintiffs forum shopping and selecting the jurisdiction that best benefits them is not a problem in reality, since plaintiffs choose to bring claims under both forms of action. Therefore, state policies are not actually affected or undermined, and are left intact.

C. *Preemption Would Provide Less Protection for Victims of Trade Secret Misappropriation*

To let the DTSA preempt state law would take an additional avenue of recovery from victims of trade secret misappropriation crimes. Trade secrets constitute one of a corporation's most important resources with thousands of dollars invested into these pieces of information.[151] With technology advancement, the way in which trade secrets have existed has been altered and has become more at risk of dissemination or loss.[152] Therefore, corporations and companies have needed stronger protections to guard their trade secrets. By passing the DTSA, Congress wanted "to provide more options for trade secret owners to protect their trade secrets."[153]

Critics worry for the supposedly unfair balance of power in favor of the trade secret owner. Since the trade secret owner is the one who was harmed, he or she is able to bring a claim under a certain state's law or under federal law of his or her choosing. A defendant who is sued under a certain law has no choice in which jurisdiction he or she will be sued, whether it be state or federal law or both.[154] A defendant thus cannot anticipate the direction of potential litigation.[155] This concern, however, is contrary to the purpose of creating the DTSA. The DTSA was enacted in order to better protect trade secrets and the public, not those who steal a trade secret or cause the harm.[156] Taking away an extra protection does not increase the protection that victims of trade secret misappropriation will receive. Further, this is not just a trade secrets law issue. In other cases, with multiple jurisdictions, defendants do not a have a choice in where plaintiffs can bring suits anyway. For example, in trademark law, if a trademark owner sues a defendant who has been misusing the trademark, a defendant also does not get to decide whether they are going to be sued in federal or state court. Allowing the DTSA to preempt state law would also put into question these other laws that permit this. Thus, plaintiffs are permitted to sue in a court with appropriate jurisdiction, and defendants must work with the law of that jurisdiction or state.

Additionally, this imbalance of power is not necessarily uneven.

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[151] Cardillo, *supra* note 3, at 578-79.
[152] *See* Pooley, *supra* note 4, at 1066-67.
[153] Bruns, *supra* note 9, at 491.
[154] *See id.* at 494.
[155] *See id.*
[156] *See* Pooley, *supra* note 4, at 1072.

Defendants may not be able to argue for a more forgiving law, but they do have the power to remove the case to federal court when a state law may favor the plaintiff.[157] The DTSA itself has pro-employee sentiment with its lack of inevitable disclosure, since it does not stop an employee from being able to take a job with a competitor.[158] A state law may favor the employer in one instance but in no way does it grossly weigh the favor in the direction of the plaintiff. In fact, if there was only federal law, then there is a real danger of the provisions under the DTSA favoring defendants more than plaintiffs. Therefore, the DTSA preempting state law would remove an additional remedy for trade secrets owners and put trade secrets law at risk of favoring the misappropriator.

D. *Preemption Would Cause Trade Secret Law to Overburden the Federal Courts*

If the DTSA were to preempt state law, then federal courts would suddenly have to take on over 800 trade secret cases every year that would normally have gone to the state courts.[159] State courts, although lacking some of the resources for understanding complex disputes, have had sufficient resources to handle over 800 trade secret cases per year in addition to their other cases. In 2017, district courts experienced an increase in filings by 6%, while courts of appeals saw a rise in filings by 10%.[160] As these cases increase, the federal courts have failed also to increase the amount of judges handling these workloads.[161] With fewer judges to handle more cases, plaintiffs and defendants spend a longer time in litigation before their case is reached.

If the DTSA preempts state law, then federal courts will be overrun with all trade secret claims. The already overwhelmed federal courts and judges would suddenly have to take on hundreds of trade secret cases. Without hiring more judges, court processes would slow down and trade secret owners and misappropriators would have to wait longer for their cases to be decided. Preempting state trade secrets law would put the DTSA even farther from its goal of providing fast and efficient litigation. Further, trade secret owners would have less time to spend on improving their trade secrets or creating new valuable information and thus would inhibit novelty. Therefore, the DTSA should not preempt state law since it is likely to overburden the federal courts and because it does not help the DTSA achieve its goals of clarity and promoting innovation.

E. *Preemption Does Not Increase the Clarity of Trade Secret*

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[157] *See* Cohen, *supra* note 29, at 2.

[158] *See* David Bohrer, *Threatened Misappropriation of Trade Secrets: Making a Federal (DTSA) Case Out of It*, 33 SANTA CLARA HIGH TECH. LAW J. 505, 527 (2017).

[159] Rachel Bailey, *Trade Secret Litigation Report*, LEX MACHINA, 3–4 (July 2018), https://www.gordonrees.com/Templates/media/files/pdf/Trade_Secret_Litigation_Report_2018.pdf.

[160] Federal Judicial Caseload Statistics 2017, UNITED STATES COURTS (2017), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017.

[161] *As Workloads Rise in Federal Courts, Judge Counts Remain Flat*, TRAC REPORTS (2014), https://trac.syr.edu/tracreports/judge/364.

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Proponents of preemption argue that trade secrets law will become clearer if the DTSA preempts state law. However, the problem is not state trade secrets law, but the DTSA itself. Without state law, there would certainly be one less version of the law to be concerned about. However, preemption does not solve the DTSA's problems nor make the statute itself clearer. The DTSA's provisions and definitions fail to offer clear and unambiguous explanations of what is required under the DTSA. Definitions such as "trade secret" or "misappropriation" contain ambiguity in the ways that they have been worded. While it is vague what trade secrets can be covered under the DTSA, it is also unclear what exactly constitutes misappropriation.[162] Further, it is not explained what is included in "other lawful means of acquisition" in terms of the "improper means" definition.[163] Preempting state trade secrets law does not increase the clarity of the DTSA, and therefore, the DTSA should not preempt it.

Although preempting state law would solve some of the problems created by the DTSA, this preemption would do more harm than good for trade secrets laws. The DTSA has specific jurisdictional requirements that not every trade secret may meet, thus leaving a trade secret owner without an avenue for recovery. Preempting state law also runs contrary to state interests and discounts the effort placed into developing laws tailored to meet the needs of a state's citizens. Taking away state law and its remedies takes away an additional cause of action in a time when trade secrets are more at risk than ever before. Further, leaving state law untouched maintains the balance of fairness between the plaintiff and defendant.

IV. RECOMMENDATIONS

The DTSA should not preempt state law, but that does not mean that the DTSA does not need to be improved. In order to better protect trade secrets, state trade secrets law should stay intact and continue to provide relief for trade secret owners. Adding the additional amount of previously-stated trade secret cases to federal courts would be burdensome and counterproductive to fast goals of quick litigation. In order for the DTSA to serve as a strong protection for trade secrets law, federal jurisprudence and statutory interpretation must develop through more cases. Through each case, the precedent for the DTSA will start to form and definitions and provisions will have more certain interpretations and understandings.

Most importantly, to better meet its goals, the DTSA needs to clarify its language in regard to definitions and requirements. This will better promote uniformity and uncertainty about rules or unclear wording. For example, the whistleblower immunity provision provides an immunity for employees who assist with revealing trade secret

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[162] Winston, *supra* note 57, at 2.

[163] *Id.*

misappropriation.[164] However, employees may be unaware of the provision or employees may be unsure what they should include in their contracts in order for their employees to qualify.[165] To better clear up the uncertainties in this provision, the DTSA should require employers to update their agreements to include a standard notification clause in their contracts with employees.[166] This should sufficiently avoid challenges to the whistleblower immunity provision in the document.

Furthermore, the DTSA should clarify what kinds of information are considered to be trade secrets to be protected under federal law. It is also important to explain what trade secrets were in mind for a trade secret "used in, or intended for use in, interstate or foreign commerce."[167] These types of trade secrets may be revealed over time through statutory interpretation, but some trade secrets may not be able to be litigated if their trade secrets may not qualify. It may also be beneficial to explain what "related to a product or service" means and how trade secrets must be related in order to be covered by the DTSA.[168] For the "improper means" definition, I would recommend providing examples for what "other lawful means of acquisition" means so that it is clear what the DTSA is trying to protect.[169] These uncertainties contribute to the lack of clarity that the DTSA creates, and clarifying them will allow the DTSA to better achieve its goals.

If the DTSA should ever preempt state law in the future, the DTSA must explicitly expand its scope so that it may cover all trade secrets.[170] As the DTSA is right now, with its inability to meet some of its goals, the DTSA should not preempt state law.

V. CONCLUSION

The Defend Trade Secrets Act of 2016 is an important advancement in trade secrets law that has helped provide an important protection for trade secrets in federal court. The DTSA has given trade secret owners new remedies and actions in order to recover for any losses they may incur should their trade secret be stolen or misappropriated. It has also acted as a way to ensure the safety of the investment and time put into creating these sources of information. State trade secrets law protects all of the trade secrets that the DTSA cannot and provides remedies and provisions that better meet the policy goals of that state.

In many ways, the DTSA has failed to meet some of its intended effects, such as providing uniformity and clarity to trade secrets law, promoting innovation, increasing the efficiency of litigation, and

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[164] *See* Dhanani, *supra* note 25, at 2.

[165] *See id.*

[166] Dhanani, *supra* note 25, at 2–3.

[167] Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, §2(b)(1), 130 Stat. 376 (2016).

[168] *Id.*

[169] *Id.*, §2(b)(6)(B).

[170] Therefore, Congress under the DTSA must exercise the full powers of the commerce clause in order to cover all trade secrets. This, however, may open up other issues such as unconstitutionality and overstepping the limits of the powers of the Congress and the commerce clause. U.S. CONST. art. I, §8.

narrowly drawing a federal civil cause of action. Some argue that to help the DTSA meet its goals, the DTSA should preempt state law. However, the DTSA should not preempt state law because: (1) the DTSA jurisdictional requirements will not cover all trade secrets and would not provide recovery for all trade secret victims, (2) the DTSA should respect states' interests and preserve their individual policies, (3) the DTSA was enacted to provide an additional remedy to trade secret victims, not take one away, (4) taking on all of the state trade secret cases would overwhelm the federal courts, and (5) preemption does not clarify the DTSA and its requirements.

The solution to improving trade secret law is not to preempt state law, but to make changes to the DTSA, its provisions, and its definitions with state law intact. The DTSA should include examples and explain the meaning of certain definitions as well as provide guidelines for what employers should do to put their employees on notice of the whistleblower exemption. The DTSA has provided the right foundation of protection that ensures that the Act itself is on the right track to providing a strong, fair protection for trade secrets.