

Trade secret litigation in the 21st century

By Randall E. Kay

The 21st century has seen a marked increase in trade secret disputes. The trend likely will continue in the years ahead. **Why so?**

Digitalization of data, proliferation of data, and theft of data. That leads to trade secret lawsuits. So does increasingly intense rivalry for market share between competitors. Add corporate greed and industrial espionage to the mix, and even more trade secret disputes arise. Between state court, federal court, arbitration and the International Trade Commission, plaintiffs have more places to bring trade secret claims than ever before. The stakes are high, shown by the increasing values of settlements and the size of recent verdicts in trade secret cases.

This article examines some of the reasons for the growing volume of trade secret lawsuits in the United States.

The Digital Revolution

While the digital revolution began in the 1950s, only more recently have we seen digital storage outright replace hard copy data. Digitalization has made it easier than ever before for employees to steal large amounts of data. It has also improved detection of improper taking of trade secrets. The combination of those phenomena results in more trade secret lawsuits.

Enactment of the Defend Trade Secrets Act

Bipartisan congressional support led to passage of the first federal civil trade secret protection law in 2016. The DTSA gained favor on the widely held belief that it would aid American businesses in protecting their trade secrets in the global marketplace. More than 40 American companies and industry organizations wrote and spoke to Congress supporting the DTSA. The Senate and the House of Representatives overwhelmingly

approved the new law, voting 87-0 and 410-2, respectively. President Barack Obama signed the DTSA into law on May 11, 2016. The DTSA has led to a spike in trade secret filings in federal district courts.

Presidential Attention

The executive branch has raised awareness of the need for strong trade secret protection. President Obama acknowledged the need to protect U.S. trade secrets in his 2015 State of the Union address, stating that no foreign nation or hacker should be able to steal trade secrets. In remarks made in August 2017, President Donald Trump talked about the safeguarding of trade secrets being vital to our nation's security and prosperity. On World Intellectual Property Day in April 2018, President Trump reiterated the importance of trade secret protection, noting that the U.S. "will no longer turn a blind eye to the theft of American jobs, wealth, and intellectual property through the unfair and unscrupulous economic practices of some foreign actors." The Trump administration's February 2019 Annual Intellectual Property Report to Congress emphasized the need to protect American trade secrets both domestically and abroad. Trade secret protection has become part of the national discussion.

Government Enforcement Against Misappropriation

The Trump administration has acted on its commitment to protect American business from misappropriation abroad. The Department of Justice charged 11 cases under the Economic Espionage Act in its FY2018. Ten of those matters involved theft of trade secrets and almost all of the matters related to activity in China. In October 2018, the Commerce Department announced placement of export controls on a Chinese state-owned entity accused of theft of trade secrets from an American semiconductor company. In November 2018, the Justice Department announced the unsealing of both a criminal indictment and civil complaint for injunctive

relief against that Chinese entity — Fujian Jinhua Integrated Circuit Co., Ltd. — and Taiwanese co-defendants.

Alice

The U.S. Supreme Court's 2014 Alice decision limiting patent eligible subject matter for certain computer-implemented inventions has curtailed patent protection for some software-based inventions. *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014). Combined with prior decisions on patent eligibility by the Supreme Court such as *Bilski v. Kappos*, 561 U.S. 593 (2010), the decision in Alice has led some companies to favor trade secret protection in lieu of the patent system for protection of software-related technology.

The Economy

"It's the economy!" We are in a growing economy with low unemployment. That leads to job openings which, in turn, leads to employee movement. With that, trade secret claims follow. Combined with the explosion of digitally stored information, an increasing volume of trade secret cases is here to stay.

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