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INSIGHT: Trade Secrets 2019 Litigation Roundup and 2020 Trends

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Gibson Dunn & Crutcher LLP attorneys, in Part 1 of a two-part series, highlight 2019 developments in trade secret litigation and say 2020 will see similar trends. Courts will continue to construe the Defend Trade Secrets Act and attorneys can expect to see more cases alleging misappropriation of emerging technologies.

2019 marked another exciting year for trade secret litigation. Approximately 1,400 new cases were filed in federal courts, holding fairly steady with the number filed in 2018. Successful federal plaintiffs were awarded more than $45 million total for their trade secret claims, with an average award of about $1.1 million.

We expect 2020 to be equally eventful for trade secret litigation.

Overall in 2019, courts continued to clarify the Defend Trade Secrets Act, highly anticipated cases went to trial, and the U.S. Supreme Court protected confidential information from Freedom of Information Act requests.

In 2020, appellate courts will have more opportunities to construe the DTSA as lawsuits brought under the statute during its first few years advance through the courts. As the DTSA and state trade secret misappropriation laws continue to provide an oftentimes more direct route for companies to protect their confidential technological information, we should continue to see a rise in trade secret claims in addition to, or instead of, patent and other intellectual property claims.

In a similar vein, we should see more trade secret cases alleging violations in connection with emerging technologies. And we expect courts to continue to require plaintiffs to allege those trade secrets with particularity in California and elsewhere—a lesson litigants should continue to take to heart.

Defend Trade Secrets Act

Since DTSA was enacted in 2016, we've seen a roughly 24% increase in trade secret litigation, while patent litigation has held steady and copyright and trademark litigation have slightly declined.

In 2019, courts continued to solidify trends that emerged after the act's enactment, providing further guidance for practitioners and litigants.

For instance, several courts continued to hold that the statute of limitations begins to run once an injured party is put on inquiry notice of potential misappropriation, or at the time a reasonable person would investigate.

The Eighth Circuit affirmed that a plaintiff was put on inquiry notice when it sent a letter to a former employee—who had joined the defendant company—warning him that disclosing the plaintiff's trade secrets would be a crime.

The Northern District of California also held that a plaintiff was put on inquiry notice of potential misappropriation at the time the defendant failed to return the plaintiff's confidential information, as the parties' nondisclosure agreements required the

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defendant to do when the parties stopped discussing business opportunities.

Courts also clarified what constitutes "reasonable" efforts to maintain the secrecy of information under the DTSA—of course, more safeguards are better.

The Southern District of Florida found, for example, that a plaintiff's practices were not "reasonable" where it had granted the defendants temporary access to password-protected information but had not required them to sign a confidentiality agreement.

By contrast, the Northern District of California granted a preliminary injunction where the plaintiff restricted offsite access to its source code, encrypted the code, and required employees to sign a confidentiality agreement.

And in a continuing lesson for trade secret plaintiffs, particularly in federal courts in California, plaintiffs' cases were dismissed for failure to plead their trade secrets with sufficient specificity. For example, in *Zoom Imaging Solutions Inc. v. Roe*, the Eastern District of California dismissed a DTSA claim because the plaintiff did not identify which of the items on a list in the complaint constituted its trade secrets.

Courts also continued to require a greater level of particularity in pleadings for technological trade secrets. In *AlterG Inc. v. Boost Treadmills LLC*, for example, the Northern District of California explained that "technical matters . . . are more complex to begin with and therefore warrant greater specificity."

Notable Trials

Several trade secrets cases went to trial in 2019—some with surprising outcomes.

In a highly anticipated trial in Texas, Huawei Technologies Co. brought trade secret and contract claims against a former employee and his new startup, and the startup pursued cross-claims against Huawei for misappropriation of its own trade secrets.

The jury found that Huawei misappropriated the defendant's trade secrets and that the former employee was not liable for trade secret theft—though the employee had breached a patent agreement. No damages were awarded to either party.

In another Texas trial, after the judge concluded on summary judgment that a former employee breached a non-solicitation agreement, the jury awarded the plaintiff $287,000 for that breach but found that the employee's new company did not misappropriate the plaintiff's trade secrets.

FOIA Requests

The U.S. Supreme Court also clarified last year that FOIA provides real protections for companies providing sensitive information to government agencies.

In *Food Marketing Institute v. Argus Leader Media*, a newspaper had issued a FOIA request to the Department of Agriculture seeking information about stores that participate in the national food-stamp program. In refusing to disclose some of the information requested, the USDA invoked FOIA's Exemption 4, which "shields from disclosure 'trade secrets and commercial or financial information obtained from a person and privileged or confidential.'"

The Supreme Court reversed the Eighth Circuit, which had required "substantial competitive harm" in order to invoke Exemption 4, holding instead that, "where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."

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