Expect Claims to Keep Rising

Several strong trends are driving companies to protect trade secrets more aggressively

Federal trade secrets litigation has heated up in the past few years. Since passage of the Defend Trade Secrets Act (DTSA) in 2016, yearly claims brought under the act have more than doubled from 2016's 476 to 1,008 in 2020—an annualized growth rate of 21 percent. DTSA cases accounted for 73 percent of all trade secrets cases filed in 2020.

Astor Heaven, a Crowell & Moring Litigation Group partner focusing on trade secrets cases, expects this trend to continue. "A powerful mix of ingredients is pushing businesses to defend their trade secrets more forcefully by filing DTSA cases," he says. "More employees are changing companies due to the pandemic, more companies are using trade secret classification to protect their intellectual property, and courts have emphasized the importance of the statute of limitations."

A Strong Case for More Cases

A closer look at Heaven's key drivers underscores his belief that DTSA filings will keep rising.

Employee mobility. The pandemic has prompted employees to switch jobs and companies at historically high rates. Fueled by burnout and other factors, workers feel less employer loyalty and have a greater willingness to publicize business practices they don't agree with. Add to this the ease of access to confidential information at many companies and a legislative backlash against noncompete agreements and you have a recipe for theft of trade secrets. Look no further than the recent revelations about Facebook to see what can happen.

Trade secret classification. The competitive stakes are rising in many industries, prompting companies to rethink what their trade secrets actually are. They realize that trade secret classification can be an effective way to protect and defend their intellectual property, as well as their business's viability—hence their growing efforts to protect things like customer lists, proprietary manufacturing methods, and algorithms that they believe have economic value if kept secret.

Another tack is to protect intellectual property by using trade secrets instead of, for instance, patents. Note in this context that while U.S. patents typically are enforceable for 20 years after original filing, the enforceability of trade secrets is perpetual.

Statute of limitations. As parties opt to protect their most important technology through trade secrets, the statute of limitations is becoming increasingly important and should serve as a marker for potential litigants. This period under DTSA is three years, as it is in most states.

Courts have ruled that the statute of limitations in various jurisdictions begins to run when the filing party knows (or should have known) about the basis of its claims. This means that if a company believes that its trade secrets have been misappropriated, it must act to protect those secrets or else potentially forfeit trade secret protection. Such statute-of-limitations pressure—exemplified by *Zirvi et al. v. Flatley et al.*, a 2019 Federal Circuit ruling—could incentivize parties to initiate litigation.

Heaven is confident that the only direction for DTSA filings is up: "I don't see that trend changing or reversing course. The reasons for bringing more claims are just too strong," he says.

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—Astor Heaven