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Trade Secret Litigation Report

Carla Rydholm, Rachel Bailey, and Mark Klapow discuss the highlights of Lex Machina's latest Trade Secret Litigation Report.

Lex Machina gathers legal data from Federal Trade Secret litigation, analyzes the underlying documents, and then uses a unique technology to turn this data into valuable insights.

Specific areas that were covered in this webcast:

- District Court Filings
- Injunctive Relief
- Case Findings and Resolutions
- Top Trade Secret Law Firms
- Damages Awarded
- DTSA Trade Secret Damages

Speakers:

Carla Rydholm
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Lex Machina

Mark Klapow
Partner
Crowell & Moring

Carla Rydholm (00:02):

Good day, everyone. My name is Carla Rydholm and I lead product development at Lex Machina.

Carla Rydholm (00:08):

First off, I want to thank you all for taking time to join us today for this webcast covering Lex Machina's Trade Secret Litigation Report. Trade secrets play an important role in business success across industries and for companies of every size. Some trade secret disputes make headlines like in [HMO 00:00:25] versus Uber, but many other cases are filed without as much press that also involve the familiar center areas of intense competition and employee mobility or perhaps a soured licensing agreement between one 10 business partners.

Carla Rydholm (00:38):

Today we're going to hear about trends in trade secret litigation in federal court looking at the past 10 years of data and with a focus on 2019. We've got some compelling and exciting content to share. First I'll cover a couple of quick housekeeping items. The first item is that there will be a Q&A following the presentation and you are invited to enter questions along the way. The second item is that you can resize your window larger. See the lower right corner of the window.

Carla Rydholm (01:08):

As we are doing data from the trade secret litigation report, I encourage the audience to know that everything presented today comes from Lex Machina. We write and present these analytics reports, give you an appreciation of the data that can be gathered directly from Lex Machina with only a couple clicks. All of the data in the report comes from our online real analytics tool. If you are a subscriber, then you have access to these analytics in second. Lex Machina is the leader in legal analytics and analytics is really about one thing, helping you win. We enable you to make data driven decisions to help you win new clients and win cases. Our subscribers include 75% of the [AMA 00:01:57] 100 and also range from some of the biggest companies in the world to many [petite 00:02:04] law firms.

Carla Rydholm (02:06):

If you like what you see in our report, we'd like to give you a demo of the Lex Machina product so that you can learn more. What I'll do now is go ahead introductions of our two presenters and turn it over to them. First I'll introduce Rachel Bailey from Lex Machina. Rachel is a legal data expert and the author of the 2020 trade secret litigation report. Rachel is admitted to practice in California and Louisiana and is based in New Orleans.

Carla Rydholm (02:36):

Second, I would like to introduce Mark Klapow from Crowell and Moring. Mark is a partner and co-chair of the firm's litigation group. Mark represents clients from across the breath of industries including technology, media and telecommunications, financial institution, chemicals, and automotive and trucking. Mark's litigation experience includes both sides of trade secret dispute. So enforcing trade secret and defeating allegations of trade secret misappropriation. Mark has admitted to practice in New York, Connecticut, and the district of Columbia and is based in Washington DC. I'm going to go ahead now and turn it over to Rachel. But before I do, I will highlight that everything we're about to see comes directly from Lex Machina. [inaudible 00:03:20] and all of the data. Rachel.

Rachel Bailey (03:25):

Great. Thank you Carla. Very excited to bring you our trade secret report. This is one of our most anticipated reports at Lex Machina and it's just an exciting area of the law. So we have some really interesting data trends to talk about today. We're going to cover case filings, injunctive relief, talk districts, law firm, plaintiffs, we're going to talk about findings, and lastly we will talk about damages. So just jumping right in. Here is the filing charts for the last decade of trade secret litigation. And we can see the distinct jump between 2015 and 2017 there. Just to talk a little bit big picture. The way that we find trade secret cases is that we use the pacer system and so these are all trade secret case filings in federal district court. And then we crawl the comprehensive civil district cases in pacer and we use both the cause of action code for trade secrets that is in pacer and then we also find cases through text-based searching, our natural language processing, and then some attorney review as well.

Rachel Bailey (04:50):

And so I do day to day looking at the filings. There's no doubt that this jump was caused by the passage of the Defend Trade Secrets Act, the DTSA. But what's interesting is that we thought maybe cases would continue to increase after 2017, but they've stayed level between 2017 and 2019. There's only five cases different there. Looking at cases with DTSA claims in them, they've increased since 2016, no surprise there. And about 72% of cases have DTSA claims in federal court. So the rest of those cases are going to be common law or state only. I'd love to talk to Mark now. If you could tell us a little bit about why litigants are pleading both DTSA and state law claims.

Mark Klapow (05:47):

Yeah. Thanks Rachel and thank you also to Lex Machina for the reports and the analytics around trade secret litigation. Lex Machina really, in my view, has no equal in the marketplace right now in terms of tracking trade secret data and I use it in every case that I'm involved in. Litigants are pleading both as you correctly point out DTSA and state law claims typically under the uniform trade secrets act that's applicable in the jurisdiction. Plaintiffs are pleading DTSA claims principally to get into federal court. That was a concern at the time of the DTSA was passed. The nationwide subpoena power of federal courts [inaudible 00:06:37]. Federal judges tend to be more facile with technology issues given their exclusive jurisdiction over patent cases. And so it is viewed as attractive for many litigants to have their case heard in federal court and the DTSA is the easiest way to do that.

Mark Klapow (06:59):

DTSA plaintiffs are still pleading uniform trade secrets act claims and other state law claims in their federal pleadings for the most part because there's no downside. There is no preemptive effect of the DTSA over uniform trade secrets act claims. There are some very narrow categories of cases where there would be liability under one, but not the other and then what state you're in. And there may be different damages available also in a relatively narrow set of circumstances. But the real reason litigants are pleading and continuing to plead state law claims is because there is no downside and the state law claims are typically backed by 20, 30, 40 years of case law precedent that litigants can point to. Whereas because the DTSA is relatively new, while you can always analogize to UTSA cases, there just isn't that much or isn't nearly as much case law to point to as you litigate the case.

Rachel Bailey (08:11):

That makes sense. Yeah. One thing that you told me when we had our prep call was that one of the first things that you look at is injunctive relief. And so we know injunctions are incredibly important in trade secret cases. I do a lot of the day to day reading of trade secret cases along with a couple other practice areas and we don't

see anything like this in another practice area. Trade secrets, the amount of claims for TROs and preliminary injunctions is just so much more percentage wise in trade secrets. And so looking now we have the temporary restraining order grant deny rate and so there's a few consent judgements.

Rachel Bailey (09:02):

But in the last decade courts have looked at over 1,000 cases on the merit for TROs. The numbers are similar for preliminary injunctions. Those are in the report. And then looking at permanent injunctions, the courts are seeing just so many content judgements. And so the judgments on their just kind of go down there. And so I'm wondering if you could talk a little bit about how you use this information in your practice.

Mark Klapow (09:35):

Absolutely. And this is probably the single most critical piece of information for me when I advise my clients on what jurisdiction to file in, if there are options and on how to proceed after a judge is assigned. As you say, the vast majority of trade secret cases involve a request for preliminary injunctive relief either in the form of a TRO or a PI. In fact, in many cases that's the whole case. The case is effectively over or will be over soon after that decision is rendered. And that range is the full gamut of trade secret litigation from run of the mill employee non-compete cases through to complex technology trade secret cases. Although the standard for injunctive relief is fairly similar across jurisdictions, sometimes stated somewhat differently depending on what circuit you're in. In fact, the grant denial rates are dramatically different across jurisdictions and as to particular judges.

Mark Klapow (10:43):

So I think it's very important and I always use it for my clients in any case I'm involved in. When you're thinking about where to file to start with Lex Machina data on grant deny rates for TRO and PIs in the jurisdiction you're looking at. In a jurisdiction with a small number of judges, that information is particularly helpful. In a jurisdiction with a larger number of judges it may not be as helpful because you don't know what judge you'll be assigned when you first file. But there are differences and just to cite one example. If you look at the data for the Eastern district of Virginia on grant rates, you'll see that it's quite a bit lower. And the reason we think is because that court and whoever the judges is assigned are so used to hearing matters of national security that there's some skepticism built in that in a civil case, a TRO or PI is warranted absent the most extreme and extenuating circumstances.

Mark Klapow (11:48):

Other courts you'll find have much more forgiving grant denial rates. In terms of when the individual judge is assigned, again, you'll see fairly significant differences. Just to point to one metric that I think shows up in the space quite often and that should inform your decision about whether to move for a TRO, whether to seek expedited discovery, whether to move for a preliminary injunction, and what to expect. TROs and PIs are generally more common in state courts. And so when you have a judge who is perhaps recently been elevated from a state court system, that in our experience has often reflected a better opportunity to seek a TRO PI. Nobody wants to start their case with a loss though. So if you're thinking about filing for a TRO and PI and you get your judge assigned, the first thing you have to do is look at Lex Machina data to determine if that continues to be the right strategy.

Rachel Bailey (12:57):

Great. Yeah. That's one of our most popular use cases. And just to kind of follow up on that. So we have the report and we're making the report available and that has these big picture trends and so we have these

injunctions for the whole decade. But as Mark said, our software a lot of times you can look at two of the metrics that we're looking at today, sort of cross analyzing them and so right now we're looking at injunctions and then we can look by district and so just to kind of give people some background of how the report fits into the Lex Machina platform.

Rachel Bailey (13:42):

Now we're looking at the districts with the most trade secret case filings. And on the left we're looking at 2010 to 2019 and then on the right is the 2019 only chart. And so central district of California remains in the lead, but there is a smaller percentage of cases. This doesn't near patent law where we're seeing people rush to various districts. Instead it's very spread out. Could you talk a little bit about considerations of what you think about when you decide where to file?

Mark Klapow (14:24):

Absolutely. To oversimplify, I think of a trade secret litigation in two big buckets. There are employee cases that may involve non-competes, non-solicitation agreements, trade secret maybe in a customer list or pricing document or a business strategy document. And then at the other end of the spectrum, I think about what I call technology trade secret cases, which may be about a chemical formula or a manufacturing process and may look, the technology at least, may look very much like what you would expect to see in a patent case and those tend to be the more complicated cases and also the cases with bigger damages and that get more press. But it's still true and it probably always will be that employment cases as a percentage of the number of total trade secret cases are a plurality of the trade secret filings. So what you see, as you said Rachel, sort of very different from in patent litigations that trade secret cases are filed everywhere because employees are everywhere.

Mark Klapow (15:34):

And even if where you have a contract with a forum selection clause, it's typically tied to the location of the employer or the employee, which could be anywhere. So even taking the top five jurisdictions, it doesn't even add up to 25% of the cases, which is very different from in a patent context. I think the reason you see districts like the Northern District of California, the Central District of California, New York, Chicago, rising a little bit to the top of this list is because as you would expect on the far other end of the spectrum, the technology driven trade secret cases, those are filed more frequently in locations where technology is a critical part of the economic infrastructure and where those companies are headquartered. The one surprise to me, particularly given some changes in the venue rules for corporations, a venue maybe proper, is to not see the District of Delaware in the 2019 numbers.

Mark Klapow (16:44):

I suspect that if we look at this in 2020 or going forward that we're going to see Delaware also rise to the top of this list. And like I said before, while you can't be guaranteed any particular judge when you file in a jurisdiction the trends in any individual jurisdiction, even if you don't know who the judge is yet, do matter, they matter in terms of the availability of injunctive relief, they matter in terms of time to summary judgment, and time to trial and they matter ultimately in terms of summary judgment grant and deny rates and the damages available and that have typically been granted by that jury pool. And when I look at some of those other statistics, I start with the trade secret litigation numbers but I don't end there. I think it's important to look at the other related areas of intellectual property and how those cases play out in those jurisdictions as well.

Rachel Bailey (17:48):

That makes sense. We had our patent report was our previous report that came out and we did see that the District of Delaware just rose to the top in this past year. So we'll see if trade secret follows along with that trend.

Rachel Bailey (18:05):

This is everyone's favorite slide, most active law firms. And so looking at plaintiff's law firms, we've got Littler Mendelson, Ogletree Deakins, Seyfarth Shaw at the top for the decade. A lot of the same firms show up on the 2019 list, but Fisher and Phillips was top in 2019. And what we see here is a lot of these firms have well known employment practices. It makes sense that when you're an employer and your employee leaves and takes something with them, something of value, usually it's a hard drive, then you call up your employment counsel.

Rachel Bailey (18:48):

And this goes along with what we've talked about and what you said Mark, about how a lot of these cases are employee cases, but then we have this subset of technology cases that are sort of the big numbers cases, but aren't necessarily showing up in the filings. And so I'm wondering if there's something strategically that you think about particularly seeing the types of law firms that are filing these cases.

Mark Klapow (19:23):

Right. No surprise, as you said, to see employment law firms and firms, general practice firms with large employment practices towards the top of this list because it remains true and probably always will be true that more than 50% of the cases are employee driven. I think probably the next frontier for Lex Machina is to allow us through searching to distinguish between those cases and again it's not a bright line we all know.

Mark Klapow (19:52):

But the cases that involve joint venture partners or a NDA has gone bad or cyber hacking that get most of the press attention and that are front page news are generally towards the technology side of the spectrum and being able to differentiate between those types of cases is important. Of course in any case that I do, and I suspect that most of you do, you look at opposing counsel once they're identified and you try to get a sense of if they've played in this space before. I think in the technology driven trade secret space we sort of have lawyers from the employment space who sometimes try to play there and we also have lawyers from patent space who also try to do technology-driven trade secret cases. You need to know who you're up against and you need to know what their frame of reference and experience is to maximize your result and this is one metric that I think is very important in that regard.

Rachel Bailey (21:07):

That makes sense. And I did change over, now we're looking at the most active defendants law firms, which as we said, you have litigated on both sides and I find that interesting about most intellectual property practice areas. A lot of them as lawyers get a chance to see both plaintiffs and defendants. It's not sort of one sided as it is in other practice areas.

Mark Klapow (21:33):

Right.

Rachel Bailey (21:35):

Looking at most active plaintiff, I'm going to kind of go through this one quickly, but we decided to not have most active defendants in the report because there wasn't really a trend and you can see these numbers are pretty small. For the whole decade Allstate is number one with only 51 cases. This shows that the main repeats, as we've talked about, are these employment cases. As we're seeing, the banking and the insurance companies.

Rachel Bailey (22:07):

So their franchising agreements where someone didn't return their materials and like you said, once they get the TRO or some sort of injunctive relief, a lot of times those cases are over. 2019 discover org data went up to the top, which I find interesting. And that company actually is a business database. So they have been suing people for alleging that they have unauthorized access to the database. And so they're a big filer. But when we traditionally think of trade secrets, we're talking about sort of these one off cases. And so this practice areas, again, is not quite like patent where we see large numbers of people suing technology companies with these massive defendants. We didn't see a trend in defendants. And so there was nothing to put in the report for that, quite honestly.

Rachel Bailey (23:05):

This is my favorite slide. I'm excited to talk about this. I'm going to show two slides with some very specific information on them. These are our findings. And so the first slide here has ownership findings and the second slide is misappropriation findings. And so this is something that I do a lot of the day to day work on is we look at cases and we annotate where in the case the court made a finding and we go as specifically as failure to identify trade secret. That was the most popular ownership finding in the last decade. Where the court just simply says, "We can't go on with this case because we don't have enough information," which I think is incredibly important. And so Mark, could you talk a little bit about the two stages and how you use this information?

Mark Klapow (24:04):

Sure. Well to over simplify a trade secret case on liability has two primary aspects that the plaintiff needs to prove out. One that they're trade secrets and two that there's been misappropriation. What the numbers bear out is that the defendants, most likely successful resolution in court is going to be at the summary judgment stage. And you see them in the bucket of ownership, or whether or not you have a trade secret, that three areas stand out, maintaining secrecy, which I think, any discussion of trade secrets will focus on whether or not there've been adequate efforts to maintain secrecy and the related concept of whether or not the information is generally known or readily ascertainable such that it's not a trade secret. And then the third area that I think is growing in its appeal to defendants, which is to argue that the plaintiff has not adequately identified their trade secrets such that the case can move forward.

Mark Klapow (25:14):

And as we all know, unlike with patents, the trade secret is not identified before a case starts and there's a big debate about, in the trade secret community, when the identification should take place. But I think everybody agrees by the time of summary judgment, the defendant should know what the plaintiff is asserting as a trade secret and was misappropriated. And you see the stats bearing out increasingly that can be a fruitful argument for defendants. Now of course you've got on summary judgment that maybe even earlier. You've got to drill down in your particular district and with your particular judge to what extent those arguments are resonating. Likewise with misappropriation, the defendant often argues on summary judgment that they didn't, the acts

that they committed do not constitute misappropriation. Maybe they'll argue they were not improper or they don't qualify otherwise under the statute.

Mark Klapow (26:14):

And you see that that argument can have some purchase and the data bears out both of the summary judgment stage and sometimes earlier. I think from a plaintiff's perspective, the key is to understand as early as you can, what is the defendant arguing, what are the defenses to liability? You may start out a case and in the case of a sort of general denial type answer where the defendant is putting everything in issue. But more often than not as the case develops, the defendant will be forced to key in on one or more of these arguments. And it's important to know how your judge in your case has looked at these issues before and these steps from Lex Machina really help you drill down and make an argument that's tailored to your judge.

Rachel Bailey (27:05):

Exactly. And now we're looking at the misappropriation findings. And so we have also lumped in here, willfulness and malicious behavior, which can affect your argument. Whether or not your judge has found that before and at what stage. It's all very strategic. All right. Now we're looking at damages. This is in the report. So these are the damages for it's the number of cases and then the total damages award for trade secret damages, excluding fees and interest. And so what we found in this practice area, there's very little correlation to the number of cases to the size. And the other thing that's in the report that I just kind of want to touch on is that untangling these damages is very difficult. And so as someone who looks at these awards very often we see and we've talked about judges, some of them think of this as another intellectual property and they want to relate it to a patent case.

Rachel Bailey (28:22):

Other judges lump it in with the rest of some common law toward which I find very interesting now that we have a federal statute, should we be differentiating those damages [inaudible 00:28:37] different behavior? And then some judges are saying, "Well this is just another part of a contract. It's just protected under the contract and so we want to lump in the damages with that." And so you're having the damages data is something that I find strategically very important for negotiating and settling and things like that. I don't know, Mark, if you have more to add as far as what you look at specifically.

Mark Klapow (29:09):

Yeah. Thanks Rachel. There are a couple of things I take away from this. That first thing I think to observe is that these are really, really big numbers. You have roughly 20 cases going to trial each year and frequently over $100 million a year in damages. So in some instances these numbers are impacted by one very, very big case. Like in 2011 that $1.2 billion number is of course impacted by the $900 million DuPont Kolon Award, the case that my firm worked on. But in general you see very big numbers. And so I think you're right to say Rachel, that there's still a lot of room for creativity in trade secret cases with how to arrive at the right damages metric and there's sometimes analogs to patent law and there's sometimes analogs to just regular tort damages and having a good expert and a good theory are critical and we generally engage on the plaintiff's side an expert very early on in the process for that reason.

Mark Klapow (30:23):

The other thing I'll say is I think it, at least from my vantage point, looking at the awards in the district you're in just for trade secret damages is interesting, but I don't think it's the primary use case for these metrics. If I were looking at district wide damages figures to try to get a sense of the jury pool, I think I would expand the

metrics beyond just trade secret cases. But I think the more interesting part is to really zero in on particular types of cases, regardless of where in the country they're proceeding, but cases that are in a similar industry or have a common fact pattern. I think if you look at the damages figures and particularly the willfulness determination or any enhanced damages, that will tell you something about how a jury received that type of information and then how the case was tried that may be relevant to your ultimate trial, but also your negotiation and settlement position.

Rachel Bailey (31:35):

Well this has been a lot of information for folks. We want to be cognizant of time. We've reached the 30 minute mark. If you all want to stay on, we will continue answering questions, but just quickly, we're making a report available to those of you on the call and we'll get to questions. Carla, I don't know if you have anything else to sort of wrap up before we have a Q&A.

Carla Rydholm (32:05):

Yeah, that was outstanding. Terrific insights. I do just the one housekeeping item, a number of questions and terrific observations have come in. A few folks have asked about how to get a copy of reports. Everyone will be getting an email to request a copy. One small ask is if that you are not a Lex Machina customer we'll ask for 15 minutes of your time to show you Lex Machina live.

Carla Rydholm (32:31):

You can view with us your cases and your data so that we can show you the value that data delivers. You can get access sooner if you are a subscriber. The report will be today in our website in the help center today. And there have been a lot of questions and observations come in so we'll make sure to follow up with everyone. But for now I will turn to a few of the questions that came in. One question is how can a general counsel make use of your report. Rachel or Mark, do you have thoughts on that?

Mark Klapow (33:12):

I do, and I think the use case for Lex Machina generally and for this report and the suite of services in particular is actually very strong, equally strong for general counsel as it is for outside counsel. Of course general counsel can use the information in the report in all the same ways that outside counsel use it, but the very first way in which general counsel can use the data analytics is to validate their own choice of counsel. As I said, we have employment lawyers who are expert on employment matters and who sometimes stray into the space of technology driven trade secret litigation and we have traditional patent lawyers who given the downturn in patent litigation may be looking to broaden their horizon and they can look into the technology driven trade secrets space as well as a place to do that.

Mark Klapow (34:12):

But for my money, you want somebody who's been there before and who really understands how to work these cases efficiently, effectively towards a desired outcome. Oftentimes that's not money or money is secondary in the injunctive relief is really primary. And so general counsel can look at the counsel who they've contacted who's available to them and really validate that they've been playing in this space, they know the area, they know the law, and they know the strategy and that they've gotten good results.

Carla Rydholm (34:49):

Right. And Rachel, there have been a number of specific questions about data on the slides that I think we will make sure to answer the specifics about what the data was. And with that just thank you both, Rachel and

Mark, for sharing your thoughts and the data of course and thank all of the attendees. I hope that you found this conversation about legal analytics for trade secret litigation valuable. Both the presentation and the report will be available through Lex Machina. You can always go to our website to learn more and look for resources there or contact our customer facing teams, the public facing team sales at LexMachina.com and we'll wish everyone a terrific day out there. Thanks so much.

Rachel Bailey (35:45):

Thank you.