# Lex Machina's 2023 Trade Secret Litigation Report

Join Jeremy Elman (Partner at Duane Morris), Kim Cauthorn (Willis Towers Watson's Intellectual Property Leader), Dawn Mertineit (Partner at Seyfarth Shaw), and Elaine Chow (Lex Machina's Legal Data Expert in Trade Secret Litigation), hosted by Aria Nejad (Lex Machina's In-House Counsel), as they discuss trade secret litigation trends over the last three years and offer insights on judges, venues, parties, law firms, case filings, timing, case resolutions, findings, damages, and more.

The webcast will also include a look at emerging trends in connection with federal appellate trade secret litigation.

## Speakers:



Jeremy Elman
Partner
Duane Morris

Kim Cauthorn
Intellectual Property Leader
Willis Towers Watson

Dawn Mertineit
Partner
Seyfarth Shaw

Elain Chow
Legal Data Expert
Lex Machina

Aria Nejad
In-House Counsel
Lex Machina

Aria Nejad ([00:00](#)):

And welcome everyone to today's webcast, where we'll be introducing Lex Machina's newly released 2023 Trade Secret Litigation Report. My name's Aria Nejad. I'm in-house counsel here at Lex Machina, and I'm moderating today's webinar. I'll introduce our guests here shortly, who will discuss trade secret litigation trends over the last three years, and they'll offer insights on judges, venues, parties, law firms, and more. A couple of quick housekeeping notes up top before we get started. This will be a 25 minute presentation, followed by answers to any questions submitted by attendees, for up to 30 minutes total. Please share your questions at any time, and we'll review them together at the end. At the end of the presentation, we do have a short survey we would appreciate your feedback on for today's webcast. It takes less than a minute, and it helps us improve our future webcasts. So please take that time to share your thoughts with us.

([00:48](#)):

A little bit about Lex Machina, well, Lex Machina is legal analytics. It's our focus. Lex Machina provides legal analytics to companies and law firms, enabling them to craft successful strategies, win cases, and close business. We currently count over three quarters of the Amlaw 100 as clients, in addition to companies and law firms of all sizes, from Fortune 50 companies to small businesses and even solo practitioners. I'm joined today by my colleague Elaine Chow, Lex Machina's legal data expert in trade secret litigation. Before joining Lex Machina, Elaine practiced patent litigation at an IP litigation boutique and at an Amlaw 100 firm, representing multinational technology companies as well as startups. She's a registered patent attorney. Welcome, Elaine. We're also excited to have a stacked lineup of guest speakers joining our panel today. From Seyfarth Shaw, we have partner, Dawn Mertineit, with us. For more than a decade, Dawn has represented corporations and their directors and officers in a number of industries in complex commercial litigation, with a special emphasis on non-compete and trade secret litigation.

([01:51](#)):

She also has experience prosecuting and defending against claims related to misappropriation of trade secrets. Welcome, Dawn. We're also fortunate to have Kimberly Cauthorn with us today. Kim is head of the IP practice within Willis Towers Watson's risk and broking segment and is responsible for overseeing and growing the IP team's risk consulting and insurance brokerage capabilities. Welcome, Kim. From Duane Morris, we have partner, Jeremy Elman, with us. Jeremy is a trial lawyer and strategist with over 20 years of experience at the intersection of law and technology. Jeremy regularly leads teams of attorneys in defending the IP of innovators at every stage of a company's lifecycle. He's tried cases around the country in nearly 100 technology related disputes and has advised dozens of startups and entrepreneurs as a trusted advisor. Welcome, Jeremy. So at this point, I'm going to turn the presentation over to you, Elaine. Elaine, go ahead and begin the presentation when you're ready.

Elaine Chow ([02:47](#)):

Great, thanks, Aria. Hi everyone, and welcome. Today, we'll be discussing some brief insights from our most recent Trade Secret Litigation Report, which focuses on trade secret misappropriation cases filed in the federal district courts, as well as cases appealed to the federal circuit courts in the five-year period from 2018 to 2022. And at the end of this presentation, we'll tell you how to get a copy of this complete report if you're interested. Now, before we dive in, I just wanted to give a quick overview of the data in the Trade Secret Litigation Report. Lex Machina defines a trade secret case as a case with one or more claims for trade secret misappropriation under state law or the Federal Defend Trade Secrets Act. This report encompasses the more than 12,000 trade secret cases that were filed in the US District Courts

from 2013 to 2022, as well as the more than 1400 trade secret cases that were appealed to the federal circuit courts from 2013 to 2022.

([03:43](#)):

Now, this data is filtered to focus on general trade secret cases, Defend Trade Secret Act cases, and federal appellate trade secret cases from the past five years. And today, we'll look at some data on filings, courts, judges, timing, resolutions, and damages. And in the full report, we'll also have data on parties and law firms. So we'll begin. So this shows trade secret cases filed from 2013 to 2022. It looks relatively flat, although it has been declining since 2019. I'm not sure if that's... That might be a reflection of the pandemic. And Dawn and Kim, I wanted to know what your thoughts were on this long-term trend for trade secret cases filed in federal court.

Dawn Mertineit ([04:33](#)):

Yeah, I was going to say, I'm not surprised to see a little bit of a dip in 2020 and even in 2021. I think you're right, Elaine, with the pandemic. On a personal level, I noticed I had clients in March of 2020, who were gearing up for litigation, and then, when things shut down, everyone was worried about, "Do we have the money to sue?" Litigation is expensive. Trade secret litigation in particular is expensive. I am a little surprised to see that the downward trend continued into 2022. So I don't know if that's just a continuation of financial concerns or if companies got better at detecting trade secret misappropriation, if employees got better at hiding trade secret misappropriation. But I'm interested to see what happens in 2023 and beyond.

Kim Cauthorn ([05:21](#)):

Yeah, one thing that was interesting for us, so some of the ways in which we've been using the Lex Machina data is to build an underwriting model for a new insurance product we just launched, to protect intangible assets, primarily non-public proprietary, such as trade secret protected corporate confidential information. And so, we were looking at a subset of the trade secret cases, so those dealing with employees or former employees. And we saw a similar trend, except what was interesting to us is, from 2021 to 2022, we actually saw the opposite. So we saw about a 2% increase in filings, as opposed to a 2% or so decrease in filings, which I thought was kind of interesting. And is that because now there's more sensitivity, you've had a lot of tech layoffs, so maybe there's more disgruntled employees and they walk out the door with trade secrets, and now that companies are on firmer financial footing, they feel like it's worth bringing the litigation? Not sure, but it was interesting to us that we saw a little bit of an opposite trend when you looked at that subset of cases.

Elaine Chow ([06:43](#)):

Great. So next, we'll look at the number of case filings from 2018 to 2022, excluding the Defend Trade Secret Act cases. And here, we see pretty steady decline actually in the number of trade secret filings that don't include a DTSA claim. Jeremy, I was curious if you had any thoughts about the decline.

Jeremy Elman ([07:08](#)):

Yeah, we've definitely seen that almost everybody is doing DTSA now when they're asserting claims and complaints. And since the DTSA has harmonized most of the state laws, judges and parties are pretty much ignoring the state claims and going for the DTSA claims. So we are definitely seeing an absence of any litigation over specific states uniformed trade secrets acts claims, and that's really what the intent of the DTSA was. So this trend line is definitely in line with what was intended and what we're seeing in the courts.

Elaine Chow ([07:45](07:45)):

Kim, do you have any thoughts?

Kim Cauthorn ([07:47](07:47)):

No, I would say that that makes perfect sense to me. I think that folks are, they want to be in federal court most of the time, so then, bringing that DTSA claim enables them to be able to do that and...

Kim Cauthorn ([08:03](08:03)):

... that bringing that DTSA claim enables them to be able to do that and not have to rely on other forms of jurisdiction to get in the federal court. So, yep, makes sense to me.

Elaine Chow ([08:10](08:10)):

So the next two slides show some interesting trends here. So while the percentage of cases filed that have DTS claims has steadily increased over the past five years, which reflects your comments on the previous slide. So it's up to 80% in 2022. Oops, sorry. Compared to just 70% two years ago. Dawn, do you see this reflected in your practice?

Dawn Mertineit ([08:49](08:49)):

Yeah, to reiterate what someone just said a minute ago, I think generally speaking for these sorts of cases you want to be in federal court. Not always, but I find that sometimes at the state level you might have more of a mix of judges, so you'd rather be in federal court where perhaps you feel more comfortable with the judges there. So I'm not surprised to see this trend going up and I think it will go up even higher. If you're going to be in federal court anyway, why wouldn't you have a DTSA claim, is my take.

Elaine Chow ([09:20](09:20)):

Great. So our next slide shows the most active district by filed trade secret cases filed the past five years. It's relatively even, this is not like in patents where Western District of Texas is overwhelmingly on top. Here it's Central District of California is slightly ahead of the Southern District of New York and some other courts as well. And I was just curious why these filings actually seem relatively evenly distributed even though the Central District does have a very slight lead?

Dawn Mertineit ([10:02](10:02)):

So I think oftentimes in these cases you're really focused on where the parties are, where the trade secrets are. So that might explain a little bit better why it's more evenly distributed. But I do note that California Central District and Northern District account for 10%, 11% maybe of the total filings, which doesn't surprise me because, as many people know, non-competes are generally unenforceable in California. So as a result we see a corresponding increase in trade secret litigation because you don't have non-compete litigation. So I think that's part of the driver there.

Jeremy Elman ([10:43](10:43)):
And Elaine-

Kim Cauthorn ([10:44](10:44)):
I think-

Jeremy Elman ([10:45](#)):

... I'm sorry.

Kim Cauthorn ([10:45](#)):

... Oh, go ahead, Jeremy.

Jeremy Elman ([10:46](#)):

If I could just jump in. Being in California, we do see a lot of trade secret cases and we see courts being very active early on in the case. So unlike patent cases you see with trade secret cases, you don't see the distribution of people picking the jurisdiction for time to trial. You see a more general distribution here. So I think that reflects. In the trade secret cases, you have a lot of action up front to the case and you're not as worried about the time to trial and discovery issues. So here you you'd see a more non IP distribution here, but we definitely see a lot of litigation like this by involving trade secrets claims in California.

Kim Cauthorn ([11:22](#)):

The other thing I thought was interesting is so Southern District of Texas is one of the more active districts, and I think a lot of that honestly has to do with the energy sector. Because like you were saying before, you're going to file where you are and there are a lot of energy companies, obviously in Houston where the Southern District is, and Beaumont some of those areas that are included within the Southern District. And especially with oil field services, there is a fair amount of trade secret litigation. Those trade secrets are as important to a lot of those companies as the patents. So that one didn't surprise me.

Elaine Chow ([12:04](#)):

Following up on Dawn's comment about the CD Cal and the ND Cal being about 10% of cases. It also reflects the courts of appeal, federal courts of appeal by cases docketed. And not surprisingly, Ninth Circuit is number one with 16.2% of cases appealed from an underlying trade secret district court case. I don't know if you have any further comments, Jeremy or Dawn, about how these numbers stack up? And fed circuit because often patent and trade secret go hand in hand in a lawsuit.

Jeremy Elman ([12:47](#)):

Yeah, what I was going to mention, Elaine, about federal circuit is that that's really a large body of law that's coming to play in trade secret cases that people don't think about a lot because there's jurisdiction if there's any patent claim related, even for trade secret cases. So the federal circuit number three on this list probably has a disproportionate amount of case law that's applicable to folks.

Elaine Chow ([13:10](#)):

So now we have the most active judges by trade secret cases filed in the past five years. Texas is five out of the 10 judges listed here. Surprising, Judge Albright doesn't make an appearance on this list. But this might reflect what you were saying, Kim, about the energy sector, there's two Southern District of Texas judges on the list. And this also might reflect with patent and trade secret going hand in hand and there are changes in how cases are filed now in the Western District, or how they're assigned, but this might reflect the prevalence of patent and trade secret cases together.

Kim Cauthorn ([13:53](#)):

Yeah, I think that's exactly it. I think the Southern District, that just reflects, again, energy sector. And then Eastern District and Western District both popular for patent cases. So if you teased out and looked at those cases, there probably were patent claims involved in a lot of them. So that would I think, explain a lot of that.

Elaine Chow ([14:17](#)):

So now we're going to look at some timing data. So this is the time to certain milestones in trade secret cases. And here you'll see that medium time to summary judgment is well over a year, 674 days. Time to trial is well over two years, 922 days. And just general termination events. So that can also include settlement, motions to dismiss is a little under a year. And I was just curious, among our panelists, do these numbers seem high to you? How do they feel compared to other litigation you might handle?

Dawn Mertineit ([15:04](#)):

I mean I'll weigh in on the general termination. That number compared to other source of litigation might seem pretty low. The mean time to termination, 292 days, less than a year. But for this practice area, I think it makes perfect sense. I mean typically in these cases, if you're the plaintiff, you're going to be looking for an injunction, whether a temporary restraining order or preliminary injunction. And oftentimes what I have found is whether you get the injunction or not, the parties often settle shortly thereafter because if you get the injunction, the defendant doesn't want to keep going and spend a lot of money just to be found liable at the end of the case. If you lose the injunction as the plaintiff, same thing, you don't want to spend a lot of money. The whole point was really getting an injunction, so it doesn't surprise me that number is fairly quick.

Kim Cauthorn ([15:54](#)):

Yeah, I know, again, when we were looking, because duration was very important for us because there's a component of our insurance that covers-

Kim Cauthorn ([16:03](#)):

Because there's a component of our insurance that covers legal costs to pursue alleged appropriators. And so the insurers want to know how long are they going to be on the hook to cover those fees, so duration's important. And we looked at duration across the board, no matter how the case was resolved, whether it was settlement, trial, summary judgment, whatever. And we also, again, were looking at a subset because we were looking specifically at the employee cases, and the median was even a little lower. So even taking into account those cases that go to trial, our median was around 241 days, and the average length of suit was just over a year, 368 days. And again, that didn't really surprise me. It's less than an average duration of a patent case, which is typically around 15 months. But just for the points that Dawn made, those numbers made sense to us.

Elaine Chow ([17:05](#)):

Okay. Now we're going to look at, speaking of injunctions, let's see here. So injunctions by judgment events for cases terminated. Interestingly, temporary restraining orders and permanent injunctions have a higher grant rate than a preliminary injunction. And I was curious what your thoughts were on why that is and how that affects how you advise clients in a case, in a trade secret case.

Jeremy Elman ([17:52](#)):

Elaine, so I'd say to that, you need to act quick on both sides. If you're a plaintiff bringing a case, and you've got the strong facts here that there needs to be an injunction, you're going to get that relief from the court. Similarly, if you're a defendant, you need to get your ducks in a row, you need to line up your facts because that relief can come quickly. We see really high numbers here. And TROs, 67% on the merits. And then, like you mentioned, done permanent injunctions. So this is one area of the law where judges really jump in quickly within a couple of weeks and will give relief if people are saying that they need a TRO, could be ex parte. So as opposed to a lot of other types, especially IP cases, this is one where injunctive relief is still really a main driver. So both parties need to act right away because the fact it can be explosive and need to take the product off the market or prevent it from being launched.

Dawn Mertineit ([18:44](#)):

And I think the slight dip between the TRO stage and the preliminary injunction stage makes sense because oftentimes at the TRO stage, the judge has a limited record and the plaintiff is coming into court to say, you need to preserve the status quo or everything's going to be on fire if you don't do that. So okay, on this limited record, I'm more likely to grant a TRO. But then the preliminary injunction, typically you have a more complete record. Maybe you have deposition transcripts, maybe you have witnesses at the hearing. And the judge might be less inclined once they hear the fuller story from the defendant to grant a more long-term injunction that's going to last for the pendency of the case.

Elaine Chow ([19:29](#)):

Oops, sorry. Okay, so this is our Lex Machine donut, what we call the donut. And this shows case resolutions for cases that were terminated in the past five years. And so the colors represent different types of outcomes. Green is likely settlement. We see about two thirds of trade secret cases settle out. That seems about average. And then interestingly, claimants win by a five to one margin over claim defendants. Mostly if you see the red box on consent judgment. And then if the claim defendant does prevail, it's primarily either at summary judgment or judgment on the pleadings. And just curious, Dawn, if you had any thoughts on, are you surprised by these numbers?

Dawn Mertineit ([20:42](#)):

So the settlement number, I generally think nowadays most cases settle. But again, particularly in this context, as I mentioned earlier, whether you get an injunction or you don't get an injunction, I think more often than not, the parties say, "We don't need to continue to litigate this. Let's find a resolution." So that 67% number, if anything, I feel like that's a little low. So that doesn't surprise me. The consent judgment, I suspect that's also a bit of a settlement. "Okay, we're going to resolve this." The defendant agrees for whatever reason, that there will be an injunction on the record and that the court will enter a judgment. But that's a way to avoid spending a ton of money. You look at the summary judgment that's still only 2% of the cases. And as we all know, just to get to summary judgment, let alone trial, that's very expensive.

Elaine Chow ([21:51](#)):

This actually shows just the reversal rate and affirments rate for appeals cases that originate from a trade secret case. So just to be clear, it's not necessarily a trade secret issue was raised on appeal, but the underlying case did have trade secret allegations, and so the reversal rate is 39%. But I'm curious if, Jeremy, does this dovetail with what you see in your practice?

Jeremy Elman ([22:26](#)):

Yeah, I mean, it is a pretty high reversal rate, but yeah, in practice you do see trade secret cases are messy once they get to the appellate level. There's often multiple issues like you mentioned, as between trade secrets and other claims. And there's not really a definitive case body of case law in the appellate courts that they turn to. We showed that a bunch of different appellate courts deal with trade secret laws. So there's not like Supreme Court or federal circuit weighing in and it's always the same every time. So we do see a lot of reversals on trade secret claims. We do see a lot of arguments at the appellate level because there isn't a single answer. And trade secret law is still really evolving.

Elaine Chow ([23:08](#)):

So I know the DTSA was supposed to implement consistency in case law, but that doesn't seem to have happened, not only at the district court level, but also at the circuit court level. Is that a fair statement? I mean, I think the end goal was to have a consistent body of case law, but I've seen recent cases where the second circuit is doing something different than other circuits, for example, on certain issues.

Jeremy Elman ([23:47](#)):

Yeah, I think that's right. I think there's no generally accepted case for what's readily ascertainable or independent economic value. So the terms that are in the DTSA still haven't been run through the courts with a sufficient number of years, that there's definite answers to these questions.

Jeremy Elman ([24:03](#)):

... a sufficient number of years that there's definite answers to these questions like there are in other areas of law.

Kim Cauthorn ([24:06](#)):

Yeah, because if you take into account the high settlement rate, you just don't have that many cases going up on appeal. And, in the big scheme of things we haven't had the DTSA in place for that many years. So it's just the wheels of the law grind slowly.

Elaine Chow ([24:27](#)):

This is trade secret findings in cases that were terminated in the past five years. So the rows on the right are the types of trade secret findings that Lex Machina tracks. The top columns or the types of judgment events where these findings would occur. Any judgment event doesn't necessarily equal the sum of all the other columns because you can have multiple findings in a particular case.

([24:54](#)):

But I did find it interesting that, which it's consistent with some of our earlier data, that no trade secret misappropriation, whether it's on the DTSA level or the state law level, is typically found at some sort of judgment on the pleadings or at summary judgment, versus finding misappropriation is either default judgment, consent judgment, or trial.

Dawn Mertineit ([25:32](#)):

Yeah, I was going to say the same thing. You look at the last four columns... Or the last four rows rather, and finding that there is misappropriation, whether it's DTSA or state law, that's much more likely to happen early on, versus no trade secret misappropriation for the defendants, that's more likely to come

later on. So again, another reason why it's important, especially for defendants, to mount a good factual defense early on to try to pump those numbers up.

Elaine Chow ([26:06](#)):

So this is damages that have been awarded in trade secret cases in the past five years. And just by way of background, how they're categorized. So actual damages/lost profits, it's like compensatory damages, unjust enrichment, lost profit. So it's damages based on the claimant's the real loss or injury. Reasonable royalty, it's based on fees the claimant would've received to license the trade secret. And then obviously punitive and willfulness damages, it's like troubling or enhanced damages. And then the top is just the total sum of the four columns to the right. So default judgment, consent judgment, a jury verdict, merits is like... This can be from a judge, summary judgment, bench trial, stuff like that. I was just curious among our panelists, what your reaction is to these numbers?

Kim Cauthorn ([27:14](#)):

And remind us too, this is trade secret specific though, so if there are other claims, do these numbers reflect damages from a patent infringement claim as well or not?

Elaine Chow ([27:25](#)):

So the other mixed damages types is where that'll be-

Kim Cauthorn ([27:29](#)):

Oh, here we go. Yeah, that's right. I see.

Elaine Chow ([27:31](#)):

So, that might include, it's either the judge wasn't necessarily splitting it clearly or it is combined with there's other damages, whether it's contract or patent.

Kim Cauthorn ([27:40](#)):

Gotcha.

Jeremy Elman ([27:43](#)):

So Elaine, I'd like to say that for punitive and willfulness damages you see huge numbers, half the number of cases but the awards are much higher than actual damages and lost profits. So we see this can be a real punitive remedy for plaintiffs. If they get in front of a jury and are able to show that there's misappropriation they could get really high awards. So I think that's here. And also that reasonable royalty, unlike patent, is rare.

Elaine Chow ([28:08](#)):

Yeah.

Kim Cauthorn ([28:10](#)):

Yeah, it's kind of the flip. Yep.

Elaine Chow ([28:13](#)):

And I think we are almost out of time. So Aria, do we have any questions?

Aria Nejad ([28:20](#)):

Yeah, thanks for the presentation. That was great. Great stuff from everyone. So we probably have time for one of these questions. This is the one I thought was interesting. So this is open to any of our guest speakers or all of them. So the question is, do you have any predictions for the next few years in trade secret litigation, any major shifts or movements?

Dawn Mertineit ([28:41](#)):

So I think, again, I was surprised to see the downward trend for 2022. My prediction is that that number will go up a little unless we have a huge financial crisis and then maybe it'll go back down again. So that's one of my predictions.

Aria Nejad ([28:59](#)):

Interesting, thanks Dawn. Anyone else wanted to add to that?

Jeremy Elman ([29:03](#)):

I also think that with the rise of remote work, you're going to see more cases. There's just more mobility of information, mobility of employees.

Kim Cauthorn ([29:12](#)):

Yes. I would say we looked at some studies of what company's greatest concerns were for their protection of their intangible assets. And the number one threat that they saw to their intangible assets was insider risk, their employees.

Aria Nejad ([29:33](#)):

Very interesting. Oh, go ahead. Sorry.

Dawn Mertineit ([29:35](#)):

I was going to say the one other thing I was thinking, we see more and more laws aimed at non-compete and other restrictive covenants. I think that will also probably drive up the trade secret misappropriation cases a little bit as we start to see that filter out.

Aria Nejad ([29:52](#)):

Makes sense. Very insightful. Well, thank you so much. I want to thank everyone for joining us today, we're at time now.

([29:58](#)):

Really quickly, if you are already Lex Machina customer, then you can log in and find the Trade Secret Litigation Report in the help center right now. So you can go up to your name in the upper right-hand corner and the help center is in that menu and you can download the report. If you're not a customer, you'll receive an email with follow up information as well. And if you're not a customer, we do ask that you spend about 15 minutes with one of our experts before receiving the report.

([30:21](#)):

I want to thank Elaine and Jeremy and Dawn and Kim for all your expertise. Thank you so much. And to all of our attendees, thank you for joining us. If you have any questions, reach out to us directly via the Lex Machina website. Enjoy the rest of your day everyone.