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Is It, or Is It Not?

It's a familiar debate in trade secrets cases: Is the information at issue actually a trade secret, or is it not? Many times that debate focuses on the nature of the information itself, but a recent case by the Second Circuit serves as a reminder that **how the information is handled** may be the determinative question.

In *Turret Labs USA, Inc. v. CargoSprint, LLC,* the Second Circuit rejected Turret Labs' efforts to protect its claimed trade secrets because it had not taken actual and reasonable precautions to protect the information at issue, a software program it had developed.

The software was designed to facilitate both the handoff of air cargo arriving in the United States to ground transporters and the payment of storage and handling fees associated with that cargo. Turret alleged that the software, called Dock EnRoll, was a first-to-market product that took two years to create. Turret had licensed the software exclusively to Lufthansa Cargo Americas for use by freight forwarders that coordinated the shipping and storage of cargo delivered by Lufthansa. Allegedly, CargoSprint, one of those third parties, reverse-engineered the software after improperly accessing technical information and algorithms. CargoSprint responded by filing a motion to dismiss, arguing that Turret could not show a protectable trade secret as a matter of law. *The court agreed.*

The Second Circuit was not persuaded by Turret Labs' pro forma allegations that it took reasonable measures to keep its information secret. It noted that the claimed trade secret consisted "primarily, if not entirely" of the software's functionality, which was made apparent to all users of the program. Thus, the court found that the analysis of whether reasonable efforts were made to protect the trade secret had to focus on "who is given access, under what contractual arrangements, and with what attendant disclosures and representations." The Second Circuit held that without confidentiality or nondisclosure agreements, "it is not apparent from the [second amended complaint] that any user could not simply replicate the software after using it."

Finding that Turret "delegated total control over the sharing of Dock EnRoll to Lufthansa" without requiring Lufthansa to contract with the third parties to keep Turret's proprietary information confidential, the court concluded that Turret could not show an enforceable trade secret.

This case reminds us that the precautions that are (or are not) taken to protect a company's trade secrets are critical. Certainly, where a company licenses its trade secrets to another entity, it must require the use of appropriate nondisclosure agreements where those secrets are subsequently shared with third parties.

High-Stakes Litigation

It can sometimes be difficult to put a price tag on the harm caused by the theft of trade secrets, but a jury in Virginia did in one recent case, and it was a big one. That panel awarded more than $2 billion to Appian Corp in its trade secret case against Pegasystems, Inc. and an individual defendant.

The two entities are software companies that provide, among other things, low-code development platforms that allow companies to create apps quickly and easily using a graphical user interface. Appian presented evidence that

Pegasystems hired an employee of a government contractor to provide it with access to Appian's software as a part of an effort to learn how to better compete against Appian. In hiring the contractor, Pegasystems instructed its third-party contracting service to recruit someone who was not "loyal" to Appian. Appian provided evidence that the contractor, a developer working with the Appian software under a government contract, violated his employer's code of conduct and its agreement with Appian by providing access to an Appian competitor.

Appian claimed that the contractor subsequently helped Pegasystems create dozens of video recordings of the Appian development platform. These videos allegedly contained various Appian trade secrets, which Appian claimed Pegasystems employees used to improve the company's development platform and to train its sales force. Appian also alleged that Pegasystems employees later gained access to free Appian product trials by using false identities and false companies to sign up for them.

Plaintiffs in trade secret cases may be entitled to one of three measures of damages: unjust enrichment, lost profits, or reasonable royalties. In this case, Appian pursued the unjust enrichment theory, arguing that the proper measure of its unjust enrichment damages was the amount of Pegasystems' net profits attributable to the platform improvements it made using Appian's trade secrets. This argument resonated with the jury, which rendered the $2,036,860,045 verdict after a seven-week trial. It also found that Pegasystems engaged in willful and malicious conduct.

While a verdict of this amount is certainly not commonplace, it is a reminder that showing unjust enrichment by the theft of trade secrets is a valuable alternative when a company cannot pinpoint lost sales or other more traditional types of losses.

DOJ Hits Snag in Campaign Against No-Poach Agreements

For the past several years, the Department of Justice has been on a quest to find cases to attack and invalidate no-poach agreements, which are agreements made between competitors to restrict the companies' ability to hire certain categories of each other's employees. The DOJ has been pursuing an aggressive strategy and criminal penalties in these cases. But a Colorado jury recently handed the DOJ a big blow with a not-guilty verdict. Dialysis giant DaVita Inc. and its former CEO were charged with entering into and engaging in three separate conspiracies with other health care companies to suppress competition for the services of certain employees. The jury rejected all charges.

The verdict was paved with a court ruling that could make these prosecutions harder to win in the future. The court ruled that it was not enough for the DOJ to simply show a no-poach or non-solicitation agreement was in place. Rather, it instructed the jury that the DOJ had to prove beyond a reasonable doubt that the agreement was put in place expressly for the purpose of allocating the market for the identified employees. In fact, the court made it clear to the jury that the DOJ had to show the defendants intended to end meaningful competition in the labor market. This stands in stark contrast to the standard in more traditional antitrust cases alleging deals to fix prices or carve up a market. In those cases, the agreement itself is judged to be illegal per se.

This requirement that the government had to show a purpose behind the deals proved to create too large of a gap for the DOJ to overcome. Attorneys involved in the case speculated that the court's ruling was based on the judge's discomfort with applying such a rigid standard to these types of cases, which had been challenged civilly in the past but had never before been prosecuted criminally.

With this type of rule, defendants can try to justify their conduct, such as by arguing that the benefits outweigh any anti-competitive consequences. In no-poach cases, that often means companies need deals restricting worker mobility to protect the expense of training staff, that the agreements are part of legitimate business dealings, or that employees have more employment options than with the companies involved with the agreements. In the DaVita case, the judge recognized that the labor market is distinct from customer product allocation issues involved in more traditional price-fixing cases. If more judges embrace the Colorado court's ruling and rationale, the DOJ's agenda might be derailed.

FOR MORE INFORMATION

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