

Intellectual Property & Technology Law Journal

Edited by the Technology and Proprietary Rights Group of Weil, Gotshal & Manges LLP

VOLUME 32 • NUMBER 6 • JUNE 2020

Protecting Trade Secrets Without Breaking the Bank (or Even Negatively Affecting Profits)

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As a result of the COVID-19 crisis, and the effective shut down of most of the U.S. economy, many companies are hemorrhaging cash, others may be temporarily illiquid, and even more are facing pressure from stakeholders to minimize costs (and maximize profits) in order to navigate and weather the current and impending financial storm. But this is no time to be penny wise and pound foolish, particularly when a company's trade secrets are at risk and the misappropriation of those trade secrets could destroy the company.

MISAPPROPRIATION RISK

Indeed, with millions of employees being laid off, many more now required to work remotely, and the ubiquitous use of new technologies that are not necessarily secure (or permitting less secure methods of communication and data transfer), the ground is particularly fertile for misappropriation unless companies take appropriate steps to protect their trade secrets.

Trade secret litigation can be very expensive, not only in terms of attorneys' fees but also expert

fees and other costs. Although these costs pale in comparison to the cost of losing sensitive and competitive business information, and potentially everything a company has worked toward, companies simply may not have the cash, the institutional will, or the necessary foresight to expend what is required to protect their trade secrets in the current environment.

While we continue to stress the need to seek injunctive relief where appropriate, even while many courts are limiting access only to specific emergency matters (although some are now easing those requirements) the prospect of hefty damages awards remains both a good deterrent and ultimately a valuable remedy that can make a company whole for any losses it suffers as a result of trade secret misappropriation. But what if the company is cash-starved, illiquid, or cannot convince stakeholders of the long term benefits of incurring short term litigation costs? There is another option: litigation finance.

THIRD-PARTY FUNDERS

Litigation finance involves third-party funders who provide non-recourse financing of litigation costs, including attorneys' and expert fees, in exchange for a percentage of any settlement or judgment in respect of a claim. To comply with

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applicable ethical and certain state rules, the funder typically has no say in the direction or outcome of the litigation. Rather, the client and the attorney control the litigation and make all decisions regarding strategy, trial, and/or settlement without input from the funder. Hence, and since the funds are non-recourse, the funder has no recourse if the client decides to forgo its claim and/or settle on terms that are not ideal to the funder.

Litigation finance started in Australia in 2001, was adopted by the United Kingdom shortly thereafter, and established a toe hold in the United States in 2011. Large law firms, however, did not spend much time on it until 2015. The first large law firms' use of litigation finance was fairly limited in the beginning and, as such, there were only a few primary litigation funders in the United States until around 2017. Since 2017, however, litigation finance has become more accepted and, not surprisingly, the number of funders has grown substantially.

These litigation funders, who operate like hedge funds and private equity, including by soliciting outside investors, come in all shapes and sizes, with some funds of \$5 to \$10 million, and others with funds of \$1 billion. Industry data¹ shows that these funders have a total combined assets under management of at least \$9.5 billion. Yet, only \$2.3 billion is currently deployed to finance litigation.

In other words, \$7.2 billion is waiting to be invested.

Trade secret litigation is an area of law that is particularly ripe for third-party funding.

Not surprisingly, litigation funders believe that the current economic climate is the right time to start deploying the outstanding \$7.2 billion in capital. And firms are now considering litigation finance to pursue meritorious commercial claims on behalf of corporate clients, including trade secret misappropriation, other types of intellectual property infringement, antitrust violations, breach of contract, fraud, and the like.

TRADE SECRET LITIGATION

Trade secret litigation is an area of law that is particularly ripe for third-party funding, both in normal circumstances, and also (and especially) in an

economic downturn. Startup companies, companies in nascent industries, and companies with products that have yet to be commercialized are often cash-strapped or illiquid. Typically, trade secrets may be the most valuable (if not only) assets of these companies. Trade secrets may also be highly valuable assets of more established and larger companies, especially those that are associated with products still in the development (and pre-patent) phase. Whether emerging or established, for all companies operating in a time of economic uncertainty, funding a large litigation may be unfeasible.

Nonetheless, trade secrets are often the lifeblood of a company. Thus, if an employee, business partner, vendor, or other bad actor misappropriates those trade secrets, both the harm to the company and a potential damages award can be substantial. And both the Defend Trade Secrets Act and most states' versions of the Uniform Trade Secrets Act provide for recovery of exemplary damages and/or attorneys' fees where willful and malicious misappropriation and/or bad faith is proven.

Thus, trade secret misappropriation cases can be a good bet for litigation funders. The funders, along with the company and outside litigation counsel, will need to perform substantial due diligence, which will include, among other things, an analysis of the facts and relevant law, the potential recovery (including not only baseline damages, but the availability of exemplary damages and attorneys' fees and costs as well), the likelihood of a quick settlement, how fast cases in the relevant jurisdiction typically get to summary judgment or trial (time is money after all), the putative defendant's ability to pay any settlement or judgment, and the cost of pursuing a case through trial (both in terms of attorneys' fees as well as expert fees and other costs).

CONCLUSION

If the facts, law, timing, and potential recovery warrant it, there are opportunities (and an appetite by funders) to fund these types of cases. And with that funding, companies can not only protect their interests and recover large damages awards, but simply by pursuing litigation, companies can show the market that, even in the most tenuous of economic times, they will not stand by while their trade secrets are being misappropriated, which could have the added benefit of potentially deterring other misappropriators in the future.

So, do not assume that just because your company is cash-strapped or facing pushback from stakeholders that it cannot protect its trade secrets. Litigation finance is an option for this type of complex commercial case, and companies should strongly consider it under both the current situation and in more normal times.

Note

1. https://assets.website-files.com/5d3219df242257de8146924c/5dd813e3cd97761c9b70e0a0_Westfleet%20Buyers%20Guide%202019-11-17.pdf.

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Number 6, pages 8–9, with permission from Wolters Kluwer, New York, NY,
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