STOUT

Trends in Trade Secret Litigation Report

VOLUME 3

Table of Contents


ONLY
ONLY
ONLY

Introduction

Whether developed and maintained to protect firms' algorithms, manufacturing processes, or proprietary methods for optimizing logistics, trade secrets are crucial to many business operations. Companies large and small know the pitfalls of key secrets being exposed and have long looked to the state and federal court system as one forum in which to safeguard and defend their trade secrets.

The development, protection, and enforcement of trade secrets has always been a vital part of the toolkit available to companies whose success is tied to their intellectual assets. In recent years – as competition intensifies, firms increasingly digitize their data, and evolving patent law has both limited certain historical remedies available to firms and introduced new risks to patent assertion – trade secrets have arguably become more important than ever.

It is against that backdrop that we have provided this update, which focuses on the period since the issuance of Stout's last Trends in Trade Secrets Report in 2020. This report analyzes recent developments in trade secret litigation and considers whether those trends are likely to persist.

From 2015 to 2018, likely spurred on in part by the passage of the Defend Trade Secret Act of 2016 (DTSA), trade secret litigation rose approximately 28%. In the years since, however, trade secret litigation filings have leveled off and are perhaps showing early signs of decreasing. Whether such decrease is simply a blip in a longer-run trend of growth, or whether it portends further reductions, will depend on several factors. Some of these are:

1 | Macroeconomic Factors: What had previously been a gradual evolution in the nature of labor accelerated considerably with the onset of the COVID-19 pandemic, which began to impact the U.S. economy in 2020. Future years will bring increasing clarity on which of the drastic changes seen in the last four years are here to stay. To the extent that workforce mobility, the utilization of contract workers, and the acceptance of non-traditional work structures continue to expand, certain causes of action in labor and employment litigation that often include a trade secret component may also grow.

2 | Statutory Factors: The enactment of the Defend Trade Secrets Act of 2016 (DTSA) appeared to drive an initial spike in trade secret filings, which extended approximately three years after its passage. That growth has since halted and perhaps even reversed. However, the DTSA remains relatively new, and firms and their legal counsel continue to adjust to its impact on the trade secret landscape. Whether new or modified law surrounding trade secrets is passed – and whether firms develop new legal strategies within the context of the DTSA – may have significant impact on the growth curve in trade secret filings in the coming years.

3 | Courtroom Factors: Statute alone will not determine the legal and practical considerations facing companies as they consider how to best defend their trade secrets. Both legal precedent stemming from the courts' interpretation of the DTSA and the prevalence of large damages awards will impact the cost/benefit analysis of filing a trade secret case and seeing it through to trial. The mean trade secret judgment has increased to $8.2 million in recent years, though this growth is largely attributable to a handful of very large decisions rather than a clear and sustained increase in the median award. In fact, most awards are still at or below $1 million. Given the expense associated with litigation, an increase in the median award, either due to evolving precedent around trade secret damages or some other combination of factors, could be one accelerant to future filings.

4 | Shifting Trade-offs: Trade secret strategy is not only a relevant consideration at the point of litigation, but far earlier, at the point of innovation. For those innovations that may be eligible for protection through either the maintenance of a trade secret or the issuance of a patent, the traditional tradeoffs are well-understood. Patents require public disclosure and have an expiration date, but they protect from competitive use for 20 years regardless of independent competitive discovery and are protected by more well-established law around damages. However, the increase in successful invalidity challenges against asserted patents has the potential to change this calculus; filing a patent litigation now carries the risk of losing protections entirely and leaving a firm with a patent that has been declared invalid and has been publicly disclosed. If firms become more hesitant to seek patents in the first place and instead bolster their trade secret protections, one downstream result could be a long-term substitution of trade secret filings for patent filings.

As a result of these factors, attorneys and industry experts must continue to be mindful of the nuances impacting where a trade secret case is filed, the damage remedies available in that venue, and emerging precedents available to practitioners for determining damages.

This report presents Stout's comprehensive research on trade secret litigation, spanning three decades. It details our observations and analyses on the types of trade secrets at issue, certain case-specific matters, and a discussion of trends since our last report issued in 2020.

The insight we have gathered into certain trends paints a clear picture of the far-ranging effects, changing patterns in patent litigation, and the labor and employment landscape will have on trade secret litigation going forward.

REPORT BACKGROUND

Stout initially conducted an independent analysis of federal trade secret cases decided over the 27-year period from 1990 through the summer of 2017, studying the historical impact of these matters. This report, originally published in 2017, has been updated to include federal trade secret cases decided through 2022. Stout's research methodology is detailed in Appendix I to this report.

We have observed numerous trends in trade secret litigation via continual research, monitoring, and marketplace exposure. We discuss our findings throughout this report, and our research and results have been summarized to highlight notable observations.

Key Findings

Our research uncovered a number of interesting findings in trade secret litigation between 1990 and 2022.

OBSERVED TRENDS (2017-2022)

- Trade secret litigation filings have decreased back to pre-DTSA levels.
- 42% of trade secret cases included multiple types of trade secrets.
- Over 80% of trade secret cases also include contract claims.
- The majority of the top ten trade secret damages awarded were appealed.
- While the average trade secret damages awards have been increasing over recent years, the median damages award has remained at approximately $1 million.

What constitutes a trade secret and what constitutes confidential information can vary between organizations. All trade secrets are confidential information, but not all confidential information is a trade secret.

EMPLOYEE MOBILITY

While trade secret filings slightly decreased in 2022 in the aggregate, trade secret cases related to employee turnover have increased. This can be attributed in part to increased labor market turnover resulting from the Great Recession and accelerated by the COVID-19 pandemic and its after-effects. These shifts in the labor market – alongside other factors, including an increasingly service-based economy, strategic recruiting by competitors, and the ease of misappropriating digitized information – have increased the frequency with which employee departures drive trade secret litigation. Based on an in-depth analysis of a representative sample of 327 trade secret cases from 2017-2022, 82% included contract claims (largely comprised of employment-related contract breaches), 36% included breaches of fiduciary duty, and many included additional causes of action associated with misappropriation by a current or prior employee.

CONFIDENTIAL INFORMATION

There has also been a significant influx of cases involving trade secrets and/or confidential information related to:

- Computer technology, programing methods, and source code
- Customer lists
- Proprietary pricing
- Supplier relationships
- Designs/blueprints

Our analysis considered data relating to thousands of trade secret cases filed in recent years. However, for purposes of better understanding some relevant trends, we performed a more detailed analysis of a representative sample of 327 trade secret misappropriation cases filed since 2017. Of this sample, 143 (or 43%) of the cases alleged misappropriation of trade secrets related to business relationships such as customer/client information, vendor information, employee information, supplier information, subscriber information, and reseller lists.

However, what constitutes a trade secret and what constitutes confidential information can vary between organizations. All trade secrets are confidential information, but not all confidential information is a trade secret. Often, the categories of financial information and business relationships overlap, resulting in matters in which customer lists, proprietary pricing, and other marketing and financial records are at issue. The complexity of distinguishing trade secrets from other, similar information is likely responsible for at least some non-willful trade secret misappropriation and may also be responsible for some filings that ultimately prove unsuccessful.

CASE RESOLUTIONS

Plaintiffs received favorable judgments in 81% of cases in our sample which ultimately resulted in a judgment. Defendants/counterclaimants received favorable rulings in the remaining minority of cases. While this could incentivize further filings, it may also be more indicative of the confidence necessary for plaintiffs to proceed all the way to trial and incur the associated costs. At the increment, increased filings might be less meritorious on average and reduce this measure. At this point, however, trade secret plaintiffs' success at trial appears fairly stable, with amounts varying by only a few percentage points from year to year.

Federal cases that went to trial:

78%
awarded damages

10

Ten largest awards each
$100+M

DAMAGES

Our sample included over 9,600 federal cases with trade secret claims whose most recent docket activity occurred since the beginning of 2017. Of these, 271 include a trial verdict in district court. In 228 of these cases (84%), a trial judgment was entered in favor of the claimant, while the finding was for the defendant in the remaining 43 (16%). Damages were awarded in 212 of the 228 cases in which judgment was entered for the claimant, or 78% of all federal cases with trade secret claims that went to trial during the sample period.

Of the 212 cases[1] with an asserted trade secret claim in which damages were awarded, 50 included damages numbers explicitly tied to trade secret claim[2], with contract damages, damages associated with other classes of intellectual property, and various other claims comprising the remaining awards (either in lieu of or in addition to trade secret damages). In addition to these 50, the sample includes four additional cases with publicly available records of trade secret-specific awards. Three of these are cases that have not yet been terminated and, thus, are not coded as having a "Case Resolution" in the data source used to assemble our dataset. The fourth additional public trade secret award resulted from a default judgment.

The resulting sample of 54 trade secret-specific awards provides several interesting insights into the present state of trade secret damages at the federal level. The trade secret components of these awards ranged from six awards of less than $100,000 on the low end to three awards in excess of $100 million on the high end. Ten of the 54 awards exceeded $100 million in aggregate (i.e., when aggregating associated claims along with the trade secret claims).

Total damages across the sample of 54 cases reached nearly $2.5 billion, of which $970 million can be tied

1 We note that certain of these cases had appeals pending as of the time of our data analysis. We have included the results of initial verdicts in the data cited in this section to provide an instructive sample of trial results in district courts.

2 This number may understate the economic impact of the trade secret claim(s), as certain verdicts included damages measures that would have considered multiple or overlapping claims.

directly to trade secret claims. The mean trade secret award across the 54-case sample is thus approximately $18 million, though the largest awards cause that average to skew significantly higher than the median award of approximately $1.3 million. Aside from the amounts tied directly to trade secret damages, the 54 cases included enhanced damages – comprised of punitive damages, prejudgment interest, and attorneys' fees and other costs of the action – of an additional $923 million (or a mean of approximately $17 million per case). While we have not identified these additional damages as entirely due to trade secret claims, the strong likelihood is that the majority – and perhaps overwhelming majority – of these damages do relate to trade secret awards.

We have also analyzed certain publicly available verdict forms and post-trial orders to estimate the composition of the various trade secret damages awards. Of the $970 million in trade secret damages aggregated across the 54 judgments in our study, over two-thirds (approximately $669 million) were awards of unjust enrichment. Trade secret lost profits and reasonable royalty awards made up the balance, contributing approximately $147 million and $153 million, respectively. An interesting observation is that, while the aggregate amount of lost profits and reasonable royalties awarded in these cases were very similar, the frequency with which they were awarded differed significantly. $147 million in trade secret lost profits damages resulted from 41 separate awards that included lost profits. Only four cases in the sample of 54 included damages specifically identified as arising from a reasonable royalty approach, but these awards were significantly larger on average. When awarded, both unjust enrichment and reasonable royalty damages for cases in the sample were approximately $40 million per judgment, on average.

We note a correlation between the number of cases adjudicated in a particular jurisdiction and the average size of damages awards. Whether that correlation indicates causality, and in which direction any such causality goes (i.e., whether plaintiffs take cases to trial more frequently in jurisdictions where they know awards are higher or whether judges and juries in larger trade secret dockets rule more favorably for plaintiffs) is a potentially interesting question for further study.

FORUM PREFERENCES

Many factors affect plaintiffs' decisions regarding the jurisdiction in which to file a case. These include, but are not necessarily limited to, speed-to-trial rates, the court's experience with the type of litigation at issue, and the perceived likelihood of positive outcomes (and large awards). Prior to the advent of the DTSA, plaintiffs commonly filed trade secret suits in such jurisdictions as the Eastern District of Texas, the Northern District of Illinois, and the District of Colorado. Since the introduction of the DTSA, this has shifted slightly, with the Central District of California, the Southern District of New York, and the Northern District of California joining the Northern District of Illinois as the most popular districts. For example:

- Over half of the cases in our research were in just four federal circuits from 1990 to 2016. Since 2017, the spread of federal trade secret cases were more evenly distributed throughout multiple districts, with fewer than 20% of cases filed in the top four federal circuits.
- Federal district courts in Texas were responsible for nearly 20% of trade secret case decisions in our last report but represent fewer than 6% since 2018.
- The Central District of California, the Southern District of New York, and the Northern District of Illinois each had approximately a 5% share of the filed trade secret cases.

Post-DTSA Growth in Trade Secret Filings Has Tapered

Historically, trade secret assets have been protected at both the federal and state court levels, yet the definition of "trade secret" has varied. For several decades, litigators have looked to the Uniform Trade Secrets Act (UTSA) as a framework for trade secret proceedings. The introduction of the DTSA broadened the definition of a trade secret, and the 2017 edition of this report observed an increase in trade secret filings in the first year following its enactment. However, that increase quickly leveled out, and trade secret filings have begun to show signs of potential decline.

How the UTSA Defines Trade Secrets

The Uniform Trade Secrets Act, published by the Uniform Law Commission in 1979 and amended in 1985, was promulgated in an effort to provide a legal framework to better protect trade secrets for U.S. companies operating in multiple states. The UTSA aimed to codify and harmonize standards and remedies regarding misappropriation of trade secrets that had emerged in common law on a state-to-state basis.[3]

Under UTSA § 1.4, "a 'trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[4]

3 Uniform Trade Secrets Act with 1985 Amendments, Section 1.4.

4 *Ibid.*

How the DTSA Defines Trade Secrets

The Defend Trade Secrets Act of 2016, which was signed into law on May 11, 2016, by President Barack Obama, amended the earlier-enacted Economic Espionage Act of 1996, which designated trade secret misappropriation as a federal crime.

The DTSA – the first U.S. law to create a federal civil cause of action for the misappropriation of trade secrets – allows businesses to choose to sue for theft of trade secrets and seek remedies in either federal or state court.[5]

While one intention of the DTSA was to align federal statute with the UTSA, the two laws differ in certain respects. The DTSA's definition of trade secrets is broad, allowing a wide range of proprietary information to fall within the purview of trade secret protection under the statute. The DTSA defines trade secrets as: "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information."[6]

Trade secret actions filed pursuant to the DTSA can originate in federal district courts. However, the DTSA does not conflict with, replace, or preempt state laws. Rather, it works alongside state laws, providing victims of trade secret misappropriation easier access to federal courts, which are better equipped to handle cross-state and international cases, as well as complex technological issues.

For example, a federal court may still enjoin an employee under relevant state law, and a company may still elect, as a strategic matter, to file suits in state court and use the DTSA for the same alleged misappropriation.

For more information on how the DTSA compares with the UTSA, see **Appendix II**.

TRADE SECRET LITIGATION FILINGS POST-DTSA

Several trends emerged in the years following enactment of the DTSA. First, the geographic mix of trade secret lawsuits began to shift. California and Texas each accounted for over 5% of total national filings in the first year. Aggregate filings also initially grew. An uptick in the late spring of 2016 gave way to some seasonality for the remainder of that year before a significant spike in filings materialized in March 2017.[7] Specifically, an average of 1,400 federal trade secret lawsuits were filed from 2017 through 2019, compared to approximately 1,100 per year in the six full years (2010-2015) preceding the passage of the DTSA.

5 Tony Dutra, "New Trade Secret Law: More to Consider in Patent Trade-Off;" *Bloomberg BNA*, May 31, 2016.

6 Bret A. Cohen, Michael T. Renaud, and Nicholas W. Armington, "Explaining the Defend Trade Secrets Act," American Bar Association: *Business Law Today*, September 2016.

7 David L. Newman and Christina O. Alabi, "The Federal Gates Are Open: Defense of Trade Secrets Act 2016," Gould & Ratner, LLP, May 2016.

The first jury verdict under the DTSA was returned by a federal jury in Pennsylvania on February 27, 2017. The jury in *Dalmatia Import Group, Inc. v. FoodMatch, Inc. et al.*, 16-cv-02767 (E.D. Pa. Feb. 24, 2017) found for the plaintiff (the owner of a proprietary fig spread), awarded damages of $500,000 for its trade secret misappropriation claim, and issued an injunction preventing future use of the trade secrets. While the facts and outcome of this matter are fairly ordinary, the timeline is notable: the verdict came less than a year after the DTSA became law with the intention to allow trade secret cases to "move quickly to federal court, with certainty of the rules, standards, and practices to stop trade secrets from winding up being disseminated and losing their value."[8]

Waymo v. Uber[9] was one of the first DTSA cases to make national headlines. Waymo (a subsidiary of Google's parent, Alphabet) filed a trade secret misappropriation claim alleging theft of over 14,000 files by former Waymo employee and then-Uber employee Anthony Levandowski, as well as improper solicitation of Google employees by Uber. In May 2017, the Northern District of California awarded a preliminary injunction against Uber, including a bar on Levandowski further working on the technology at issue in the case, ultimately leading to Levandowski's firing by Uber. Five days into the trial, the parties reached a settlement under which Uber compensated Waymo in shares of its stock, valued at $245 million.[10]

In another notable case, *BladeRoom v. Emerson Electric*, a California jury found that Emerson misappropriated trade secrets from BladeRoom in order to win a bid for a $200 million Facebook data center. BladeRoom trade secrets at issue in the matter consisted of a method for manufacturing and installing prefabricated data centers. BladeRoom had previously described the method to both Emerson and Facebook in pitches and claimed that the two larger companies had secretly worked together to steal BladeRoom's proprietary techniques for the project. In 2019, a jury found in favor of BladeRoom and awarded $30 million in damages. A California federal judge enhanced the award, adding prejudgment interest, attorneys fees, and $30 million in exemplary damages.[11]

The DTSA [allows] trade secret cases to "move quickly to federal court, with certainty of the rules, standards, and practices to stop trade secrets from winding up being disseminated and losing their value."

The 2017 spike in trade secret filings was not the beginning of an extended period of growth. It did, however, result in a higher "plateau' of trade secret filings. In subsequent years, filings initially remained relatively consistent and, even though annual filings began to decline in 2020, filings still exceeded the 1,101 cases filed in the last full pre-DTSA year in each individual year from 2016 through 2022 (i.e., in every year considered in this study).

Whether this decline is an indication of things to come, or simply a temporary blip in either an upward trend or a sustainably higher plateau, remains to be seen.

Numbers aside, the change in incentives stemming from the DTSA provides reason to expect at least modest growth, as business owners leverage stronger, more consistent rules of procedure, protections, and enhanced remedies against unwarranted exposure of their trade secret information.

We also anticipate that federal case law from other IP areas will increasingly influence the determination of

8 David Opderbeck, "DTSA Statistics," *The Cybersecurity Lawyer,* May 10, 2017.

9 Thomas A. Muccifori and Daniel DeFiglio, "Jam Recipe Yields 1st DTSA Verdict," *Law360,* March 28, 2017.

10 *Waymo, LLC v. Uber Technologies, Inc., et al.,* United States District Court for the Northern District of California, 3:17-cv-00939.

11 Josh Rychlinski, "Waymo v. Uber: An Update on the Ongoing Trade Secret Dispute," *Trade Secrets Trends,* May 22, 2017; Dennis Crouch, "Waymo and Uber at the Federal Circuit – Round 2," *Patently-O,* June 7, 2017.

trade secret damages under the DTSA. By consolidating cases to federal courts, the DTSA may, over time, provide trade secret litigators with a more established and broader set of precedents with which to work in evaluating damages.

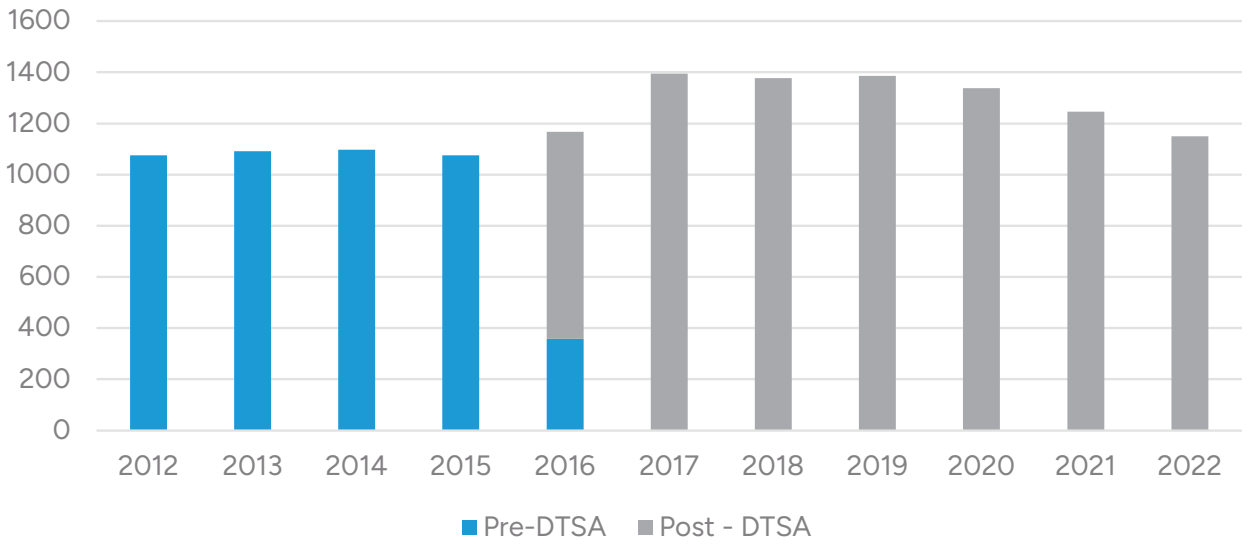
Similarly, a correlation exists between the steady increase in trade secret claims in both state and federal courts in recent years – rather than cannibalizing state court filings, the DTSA appears to have emboldened owners to believe that this is an asset class capable of being defended (and monetized) in the courtroom.

Perhaps the biggest impact the DTSA will have is the creation of a uniform body of federal law on trade secret litigation, in the same vein as trademark or patent law. Federal courts may provide a more efficient litigation process and more consistent decisions compared with state courts.

This may fundamentally alter the risk/reward calculus of filing litigation in favor of trade secret owners and, as these owners and their outside counsel gain a better understanding of the new terrain and associated rules of engagement, drive filings to sustainably higher levels.

FIGURE 1:

Trade Secret Filings from 2012 to 2022



Trade Secrets in Employment Litigation

Labor and employment litigation filings have significantly increased during the past several decades. Firms are increasingly proactive in pursuing a variety of claims following an employee's departure or termination, and trade secret enforcement is not exempt from this trend. Companies frequently seek a temporary restraining order immediately upon discovering that a former employee has taken confidential information. These cases often resolve quickly, with the employee returning the information and agreeing to cease and desist use. For those that are not resolved so simply, litigation is the likely next step.

An observable increase in litigation related to alleged breaches of confidentiality agreements and restrictive covenants, including noncompete and non-solicitation agreements, has also occurred since the prior edition of this report. Legal strategy sometimes dictates that underlying claims related to the alleged misappropriation of trade secrets in these cases are plead separately.

INCREASE OF CLAIMS OF MISAPPROPRIATION OF TRADE SECRETS IN LABOR AND EMPLOYMENT LITIGATION

Several factors are likely responsible for the increasing frequency of trade secret claims as components of broader labor and employment litigation. These factors include the rapid pace and advent of new technologies, greater workforce mobility, growing consistency and awareness of trade secret law, and increased risk to companies of international exposure.

One of the most significant factors affecting trade secret litigation is the diversity and speed to market of new technologies, which simplify the misappropriation of information intended to be kept as a trade secret. As companies become more reliant on digital media for the storage and creation of information, barriers to stealing protected information are lowered. Instead of key locks and safes, companies use firewalls and encryption to keep out the public – but not always their employees.

The focus on reducing external theft can, at times, leave companies more exposed to internal theft from employees with sufficient access to otherwise-secure systems. Once an employee gains access to protected trade secrets, copying, preserving, and disseminating that information is far easier in the modern digital world of social media, ubiquitous smartphones and tablets, and growing technological literacy. By the same token, these technological shifts reduce a trade secret owner's ability to identify and mitigate the theft until it is too late. This ease of theft and preservation has lead to an increase in the filing of trade secret claims within labor and employment litigation.

In addition to new technologies, the emergence of a more highly mobile U.S. workforce, in part linked to the Great Recession and the COVID-19 pandemic, has direct implication on the theft of trade secrets within an employment environment.

As job mobility increases, and remote work requires new types of access to be granted to employees, the opportunity for individuals to misappropriate trade secrets also rises.

PROTECTABLE TRADE SECRETS COMPARED WITH CONFIDENTIAL INFORMATION

When firms bring action against former employees for allegedly breaching noncompete and non-solicitation agreements, one common goal is to prevent the defendant from using the trade secrets, or other confidential information, in a manner that could compete with or otherwise harm the plaintiff. When paired with a claim of trade secret theft, plaintiffs are required to specify the confidential information embodying an asserted secret.

One potential challenge for parties and courts to navigate, however, is that defining the metes and bounds of a particular trade secret in the context of a litigation is not always straightforward. Companies may attempt to pre-empt this issue long before the point of litigation by defining specific trade secrets within employees' restrictive covenant agreements (e.g., confidentiality, nondisclosure, and noncompete agreements) alongside explicit protections for other IP classes, such as patents, trademarks, and copyrights. If this has been done, then employment litigation centering around the breach of these agreements may allow plaintiffs to assert trade secrets that, at least in their minds, have already been defined and agreed to by and among the parties to the litigation.

Labor and employment litigators must appreciate the legal distinction between what constitutes a trade secret and what constitutes confidential information. As previously discussed, while all trade secrets are confidential information, not all confidential information constitutes a trade secret. Confidential information represents a much broader category, including virtually any information about the business that is not generally known to the public.

As a simple example, a given company may consider that it possesses certain trade secrets relating to its manufacturing know-how, processes, formulae, customer lists, and pricing information. That company may further define these business assets as trade secrets in an employee's confidentiality agreement. However, that confidentiality agreement is likely to be far broader and to cover not only those trade secrets but also any information the company deems to be confidential, nonpublic information. In this example, confidential information could include the company's financial position, its business plan, volumes purchased by customers, and key suppliers.

It is important, therefore, to recognize that an alleged theft of trade secrets may also involve the theft of separate confidential information. There are significant legal issues to address in determining whether to pursue litigation pertaining to theft of trade secrets and/or confidential information, such as the specificity

> ***The diversity and speed to market of new technologies are making the misappropriation of trade secret information easier.***

in employment agreements, arbitration provisions, whether to pursue a claim against the new employer of the former employee via trade secrets, jurisdiction and case law, and other considerations. The answers to these questions may have consequences that impact recoverable damages, the likelihood of injunctive relief, and other key case outcomes.

ADDITIONAL OBERSERVATIONS PERTAINING TO TRADE SECRETS AND LABOR AND EMPLOYMENT LITIGATION

One subset of labor and employment litigation in which trade secret claims are relatively common surrounds the departure or termination of sales personnel. Because these employees are responsible for revenue generation and have often spent years if not decades cultivating, maintaining, and growing customer relationships, their movement between firms is a frequent antecedent of trade secret litigation.

In particular, when sales personnel join a competitor of their prior employer, the potential for companies to suffer damages due to the theft of trade secrets significantly increases. Customer and contact lists, pricing data, and supplier information are just a few categories of information whose acquisition by a competitor can potentially drive loss of accounts, price erosion, and other potential forms of loss. As a result, companies have become increasingly proactive in the pursuit of claims when they perceive a risk to their market share, customer base, and competitive advantage, both to recover for any harm and to disincentivize their remaining employees to act similarly.

Noncompete law is also evolving. Though largely outside the purview of this report, the limitation of situations in which noncompetes are enforceable leaves plaintiffs to consider whether, absent a signed document on which to build their case, they are likely to clear the hurdles placed before trade secret plaintiffs.

Illinois and New York have passed litigation meant to reduce the enforceability of noncompete clauses for lower-level employees.[12] Other states have enacted legislation to limit the restrictiveness of noncompetes, particularly related to geographical and time-duration limitations.[13] At the extreme end of the spectrum, California, North Dakota, and Oklahoma generally prohibit all forms of noncompetes.[14]

Furthermore, certain industries have been the target of similar noncompete legislation. Hawaii enacted a law in 2015 that banned most noncompetes in

technology positions, while Rhode Island enacted a law in 2016 that prevents restrictions of any kind related to the ability of a physician to practice medicine.[15] In 2018, several states passed laws which limit noncompete agreements. Illinois, Maine, Maryland, New Hampshire, Rhode Island, and Washington have all enacted laws which ban noncompetes for workers who do not meet income requirements.[16]

The status of noncompete agreements continues to be challenged through courts and federal rule making bodies. In 2021, a Hawaii court struct down a real estate company's noncompete agreement, stating that protection from competition is not a legitimate purpose for the noncompete.[17] In January 2023, the FTC released a proposed rule banning noncompete clauses, stating that they suppress wages, hamper innovation, and block entrepreneurs from starting new businesses.[18] After an extended public comment period, the FTC received around 27,000 public comments and will consider changes to the rule based on those comments.

On April 23, 2024, the FTC announced its ban on non-compete clauses for employment contracts. The new rule forbids employers from entering into new non-compete agreements with workers and also requires employers to inform any current and past workers that their non-compete agreements are unenforceable.[19]

The new rule will go into effect 120 days after it is published in the Federal Register. The existing non-compete agreements for certain senior executives making more than $151,164 and who are in policy making positions may remain in effect. According to the FTC, existing noncompetes for senior executives that can remain in force under the new rule make up less than 0.75% of all workers. Also, purchasers of a business can generally still enter and enforce non-compete agreements as part of a sale of a business entity.[20]

Trade secret laws and non-disclosure agreements ("NDAs") may play a larger role for employers impacted by the FTC's ban. Trade secret law and NDAs may allow firms to protect their IP and other investments without having to use, or being able to enforce, non-competes. The FTC was explicit about this in its guidance, stating that "trade secret laws and [NDAs] both provide employers with well-established means to protect proprietary and other sensitive information." The FTC further noted that, "researchers estimate that over 95% of workers with a non-compete already have an NDA."

While the FTC's new rule was scheduled to go into effect prior to the publication of this report, it was set aside in federal court in August 2024 and its future remains uncertain.

12 James Witz and Abiman Rajadurai, "What Employers Should Know About New Ill. Noncompete Law," Littler Mendelson PC, *Law360*, September 2016.

13 David S. Almeling and Tony Beasley, "The Shifting Junction of Trade Secret Law and Noncompetes," O'Melveny & Myers LLP, August 2016.

14 John Skelton, James Yu and Dawn Mertineit, Webinar: "Enforcing Trade Secret and Noncompete Provisions in Franchise Agreements," Seyfarth Shaw LLP, June 2016.

15 David S. Almeling and Tony Beasley, "The Shifting Junction of Trade Secret Law and Noncompetes," O'Melveny & Myers LLP, August 2016; Erik Weibust and Andrew Stark, "Two New England States Pass Legislation Restricting Physician Noncompetes," Seyfarth Shaw LLP, August 2016.

16 Andrew Boling, William Dugan and Colton Long, "The Delicate Nuances In New State Noncompete Laws," Baker McKenzie, *Law360*, December 2019.

17 "Trending Topic: Non-Compete Agreements," Hawaii Employees Counsel. June 2022.

18 https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition

19 Dan Papscun, "FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses," *Bloomberg Law*, May 2023.

20 Defend Trade Secrets Act of 2016.

In-Depth Research and Analysis of Trade Secret Litigation Trends

Given the enactment of the DTSA and the increase in trade secret issues related to labor and employment litigation, we conducted a comprehensive study on trade secret litigation in federal court.

Stout performed substantive in-depth research into 328 federal matters covering the prior 32-year period, from 1990 to 2022. We focused our research on only those trade secret cases that had advanced to a verdict or settlement and had a measurable outcome. The ensuing discussion on the data is a result of this set of cases exclusively. For more information on our research methodology, see **Appendix I.**

In addition, we discuss our insights on certain trends in trade secret litigation during the past few years that we have observed through research, monitoring, and marketplace exposure. These include litigation-related trends, a broad assessment of the types of trade secrets at issue, industry trends, and case-specific matters through 2022.

TYPES OF TRADE SECRETS AT ISSUE

Federal trade secret laws cover any type of information that constitutes a trade secret to a particular business, so long as it meets the requirements of independently derived economic value and reasonable efforts to maintain secrecy. For the purposes of this study, we categorized the information at issue in each case into six classifications of trade secrets:

Business Relationships	Designs
Methods/Processes	Products
Financial Information	Marketing Information

The most commonly asserted categories of trade secrets have varied over time. Trends in recent years are consistent with the increasingly data-driven nature of the U.S. economy.

Cases involving trade secrets relating to software, including source code and methods documented and maintained electronically, are growing quickly relative to other filings. This type of information is readily misappropriated via email, jump drives, data scraping, or other electronic means and is made increasingly possible through improper access to company information maintained on cloud platforms. Algorithms, and programing processes and interrelated connectivity technologies are also being protected as trade secrets more frequently.

Trade secrets related to business relationships such as customer lists, supplier relationships, and proprietary pricing strategies are also typically maintained electronically.

This type of company-specific information is frequently protected as a trade secret, though the increased frequency in employee turnover that began during the Great Recession[21] has led to the theft of trade secrets being more actively pursued through the litigation process. This category of trade secrets has been the most active in federal courts in recent years.

Although claims involving know-how and manufacturing processes as well as designs and blueprints are still being filed, business relationship-based trade secrets, such as those previously cited, have begun to play a more significant role in trade secret litigation. Given the evolution of patent law and other issues discussed throughout in this report, it appears that companies developing and maintaining know-how and manufacturing innovations may opt to protect their information via trade secrets as opposed to, or in conjunction with, patents. This will likely lead to an increase in litigation for these types of trade secrets in the future.

21 The Great Recession officially began in December 2007 and ended in June 2009. The Financial Crisis Inquiry Commission, "Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States," January 2011. The Great Resignation began in March 2021. Bureau of Labor Statistics, "The 'Great Resignation' in perspective," July 2022.

Examples of these trends and the results of our research pertaining to the type of trade secrets are summarized in **Figure 2**.

FIGURE 2:

Case Activity by Type of Trade Secrets at Issue

TYPE OF TRADE SECRETS	NO. OF CASES	% OF TOTAL*	EXAMPLES
Business Relationships	143	44%	Customer Information, Vendor Information, Employee Information, Supplier Information, Suscriber Information, Client Information, Reseller Lists, Policy Holder
Design	97	30%	Designs, Drawings, Products in Development , Engineering , Formulas, Recipe, Instructions, Source Code, Programming, Research and Development, Mold Designs, Plans, Ingredients, Diagrams
Methods and Processes	90	28%	Data Processing, Manufacturing, Development , Training, Policies, Business Practices, Construction Supplies, Company Handbook, Training, Operation Manuals, Technology Information, Techniques, Business Models
Product	92	28%	Software, Hardware, Purchasing Inventories, Equipment, Computer Files, Parts Lists, Tools, Technology
Financial Information	45	14%	Price Lists, Sales , Project Quotes, Business Forecasts, Financial Data, Material Costs, Cost of Goods, Compensation Plans
Marketing Information	37	11%	Strategies, Trends, Industry Trends

42% of the cases studied included multiple types of trade secrets as part of the allegedly misappropriated information

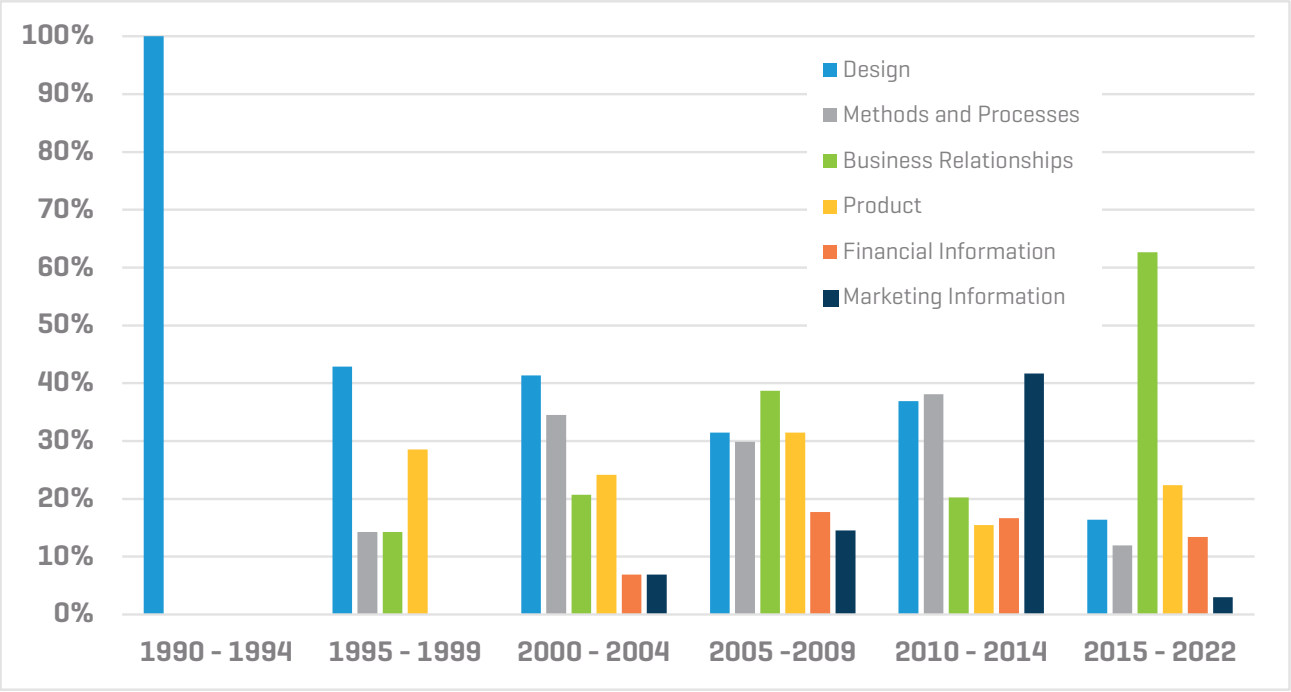
Business relationships represented the largest type of trade secrets at issue, occurring in 44% of all cases studied. These metrics align with our experience in trade secret litigation. Business relationship trade secret cases were followed by those pertaining to designs, methods/processes, and products, all at approximately 30%.

Also of note, in 42% of the cases studied, multiple types of trade secrets were included as part of the allegedly misappropriated information. Often, the categories of financial information and business relationships overlap, resulting in matters in which customer lists, proprietary pricing, and other marketing and financial records are at issue in some combination, and have contributed to the increase in litigation in these categories. Additionally, certain types of trade secret cases are on the rise, partially due to the trend of increasing employee mobility and reliance on technology (**Figure 3**). This distribution over time is consistent with the general assumption that most trade secret owners have historically chosen to protect their technical and clearly definable information through trade secrets. However, the various types of information being protected as trade secrets have significantly expanded during the last decade as companies shifted to greater reliance on electronically stored information.

FIGURE 3:

Portion of Cases by Type of Trade Secrets Over 32-Year Period

(Out of 328 Cases researched)



*Years grouped because of low volume of cases to be comparable with subsequent five-year intervals.

**Nine-year period.

TRENDS IN TRADE SECRET CLAIMS

Among other observations, misappropriation claims increasingly have not been the only claims at issue. Nearly all trade secret misappropriation claims we reviewed were accompanied by other claims, including breach of contract (such as confidentiality agreements and restrictive covenants), tortious interference, conversion, and/or other claims. Frequently, plaintiffs seek a temporary restraining order or preliminary injunction in addition to damages. As shown in **Figure 4**, the accompanying causes of action that most frequently appeared in these cases were contract claims, tortious interference, unfair/deceptive practices, fraud, and claims relating to other classes of IP, such as patents and trademarks.

Trade secret claims are also increasingly brought as companion claims in certain types of litigation beyond those related to breach of contract and/or labor and employment suits. One such area is franchisor/franchisee litigation. As discussed previously, certain states have pursued action or changed laws related to the enforceability of noncompetes for low-level employees, and in many instances franchises were the basis for such actions.[22] However, beyond this specific noncompete issue, when a franchisor terminates its franchisee or when a franchisee decides to leave the franchised system due to nonrenewal or other reasons, the opportunity for theft of trade secrets arises.

There have also been several instances where theft of trade secret claims are brought in conjunction with other IP-related claims, such as patent, trademark, and copyright infringement. The fact that this seems to occur most often in the technology and software industries is unsurprising. With the DTSA now in place, we expect it to occur more frequently in other industries as well.

22 James Witz and Abiman Rajadurai, "What Employers Should Know About New Ill. Noncompete Law," Littler Mendelson PC, *Law360*, September 2016.

FIGURE 4:

Claims Accompanying Trade Secret Misappropriation
(Out of 328 cases researched)

ACCOMPANYING CAUSE OF ACTION	NO. OF CASES	PERCENTAGE OF TOTAL
Contract Claims	237	72.5%
Tortious Interference	163	49.8%
Unfair/Deceptive Practices	119	36.4%
Fraud Claims	104	31.8%
Breach of Responsibility / Fiduciary Duty	104	31.8%
Conversion	70	21.4%
Infringement	77	23.5%
Unjust Enrichment	47	14.4%
Conspiracy	40	12.2%
Defamation/Disparagement	11	3.4%
Trespass	4	1.2%
Emotional/Mental Distress	1	0.3%
Other	93	28.4%

INDUSTRY TRENDS IN TRADE SECRET LITIGATION

Certain industries have experienced a higher degree of litigation pertaining to trade secrets than others. The nature of the companies involved in the lawsuit can illuminate the industries that are generating the largest quantity of trade secret litigation and resulting changes in trends. To assess this aspect of the population of cases, we used the Global Industry Classification Standard (GICS) codification system coupled with our research.

The following is a brief snapshot of trends in different sectors over the period studied.

Medical Device/Pharma Development

Companies developing medical device technology and pharmaceuticals are likewise experiencing an increase in claims of trade secret theft. These are often filed in conjunction with breach of restrictive covenants claims and frequently seek temporary restraining orders, as employees with deep technical knowledge and research are lured away by competitors.

Computer Technology/ Programmers/Developers

The same scenario applies with designers of computer technology platforms, programmers, and the like. Additionally, depending on when the theft of a trade secret is identified, the suit may only commence when it becomes known that the alleged thief has used similar source code in a product available in the marketplace. The suit then may be filed in conjunction with a patent or copyright claim.

Use of Outside Consultants

Additionally, a broader trend affecting multiple industries is the continued increase in matters related to the hiring of outside consultants. These are instances wherein a consultant advises a company on a specific proprietary project, then uses the information and trade secrets garnered from that project to consult with a completely unrelated company, often a direct competitor.

Automotive

In the automotive industry, there has been a significant increase in both trade secrets and breach of contract (for example, nondisclosure, nonuse, and noncompete agreements) litigation involving foreign suppliers to Tier 1 U.S. auto-parts manufacturers. Similarly, foreign-owned suppliers have been establishing U.S. sales and research and development centers that hire away talent (with the individuals' inherent knowledge of protected information and trade secrets) from domestic suppliers.

Professional Services Industries

The largest increase in theft of trade secret claims is among professional services. Often these are companion claims to breach of contract claims related to restrictive covenants dealing with nonsolicitation of customers, suppliers, or employees. Frequently, customer pricing, volume, and other proprietary information is also involved. Within these industries, sales personnel are the most commonly alleged offenders. Other service professions subject to frequent trade secret claims include insurance brokers (involving multiple types of insurance), wealth managers/financial advisors, marketing and advertising professionals, engineers, and architects.

Healthcare

The healthcare industry has experienced many claims relative to sales professionals in the medical equipment and supplies, medical devices, and pharmaceuticals sectors, as well as physicians.

As illustrated in **Figure 5,** 24% of trade secret cases reviewed involved companies in the industrials sector. This is not unexpected, as the GICS codification system includes many diverse industry groups under the industrials sector code, such as aerospace and defense, building products, construction and engineering, machinery, and transportation infrastructure.[23] Other notable industries with high percentages of the overall caseload included the information technology, consumer discretionary, and healthcare sectors.

However, the industrials sector has seen a marked decline over time. Alternatively, the information technology, consumer discretionary, and healthcare sectors experienced steep increases in the number of cases in the 2005-2009 timeframe and have become relatively stable thereafter (see **Figure 6**). In recent years, the lines between sectors have become less distinct as information technology becomes more integrated with other sectors. We expect this reliance on information technology to result in increased federal trade secret litigation in the sector in upcoming years.

FIGURE 5:

Case Activity by Industry Sector

(Out of 328 Cases researched)

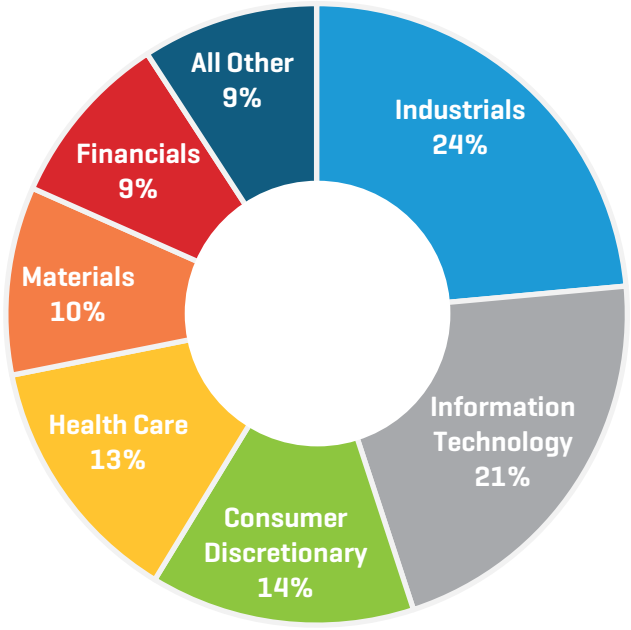
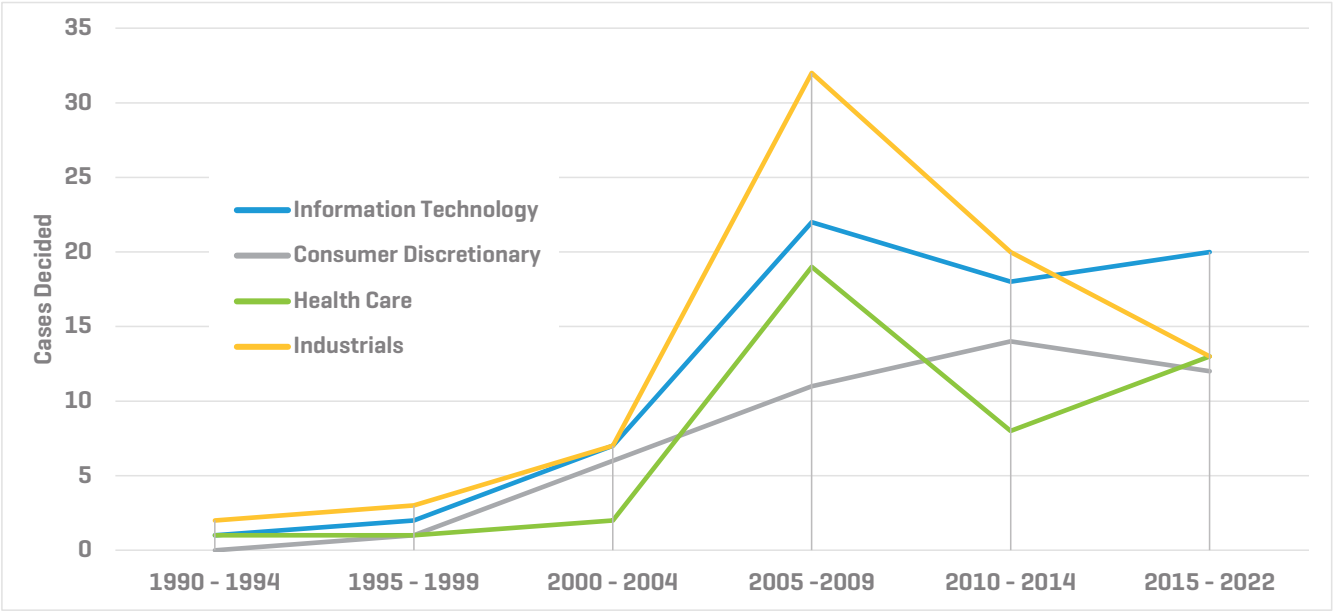


FIGURE 6:

Growth of Selected Industry Sectors Over 25-Year Period

(Out of 328 Cases researched)



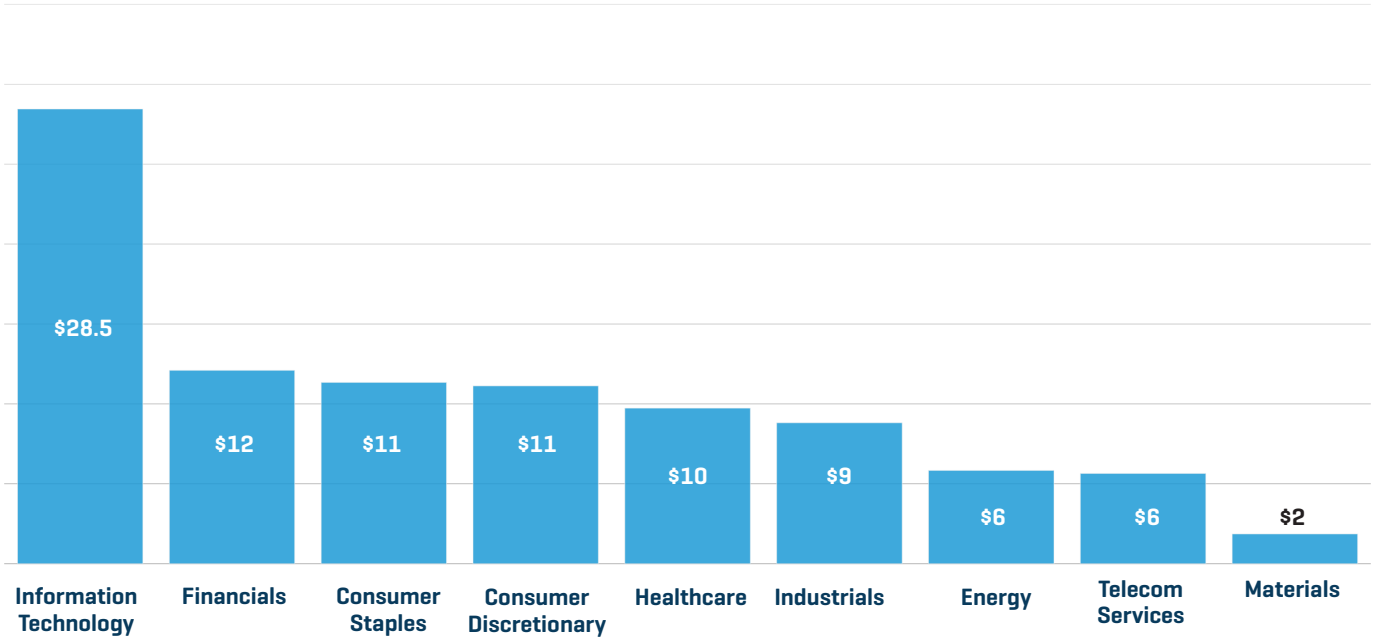
**2016 through 2019 excluded due to limited sample size.*

23 These include capital goods, commercial and professional services, and transportation companies.

FIGURE 7:

Mean Damage Awards by Industry

[$ in millions USD]



*Data range 2018-2022

*These represent the aggregate awards for all causes of action -- rather than solely trade secret misappropriation -- resulting from cases with a trade secret claim.

Other than geographical stratification, we also assessed the damages based on industry sector. As illustrated in **Figure 7**, the sector with the largest mean damages award, at $28.5 million, was information technology, which was also one of the most frequently litigated sectors, as discussed previously (though median awards differ materially in some industries).

Following information technology, a cluster of industries, with average awards between $10 million and $12 million, includes financials, consumer staples, consumer discretionary, and healthcare.

Our examination of the average damages awards by industry aligns with our experience that rapidly growing industries, particularly information technology, have seen increasing damages awards. As this sector has gradually favored trade secret litigation as a means to preserve its private business information over other forms of IP protection, more trade secret lawsuits are filed. Consequently, high-profile, high-stakes cases arise out of the increased filings, leading to higher damages awards.

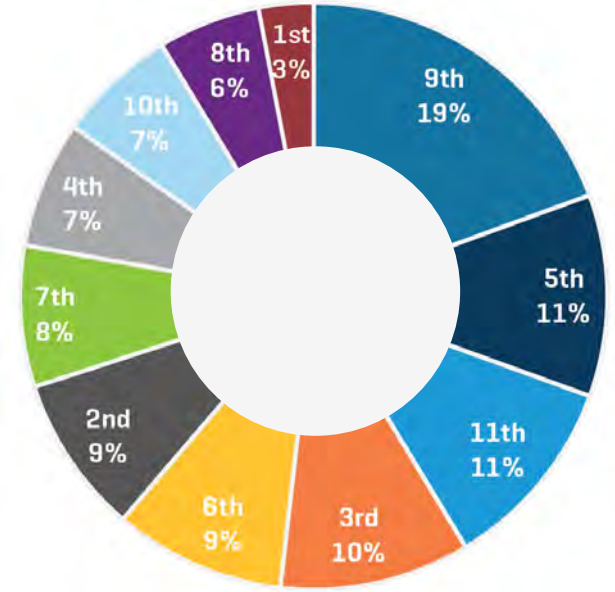
The continued success of companies in this sector to claim sizable trade secret victories, coupled with the more consistent litigation process of the federal court system, may spur further growth in trade secret litigation in the information technology sector in coming year.

TRENDS IN FILING JURISDICTIONS

When examining the jurisdictions of claims, trade secret filings have historically been concentrated in a small number of jurisdictions. For example, over half of the cases in our research came out of just four circuits, the 5th, 9th, 10th, and 11th (see **Figure 8**). This trend remains consistent both before and after the passing of the DTSA.

FIGURE 8:

Case Activity by Court Circuit (Post-DTSA)



GEOGRAPHIC LOCATION OF CIRCUIT COURT

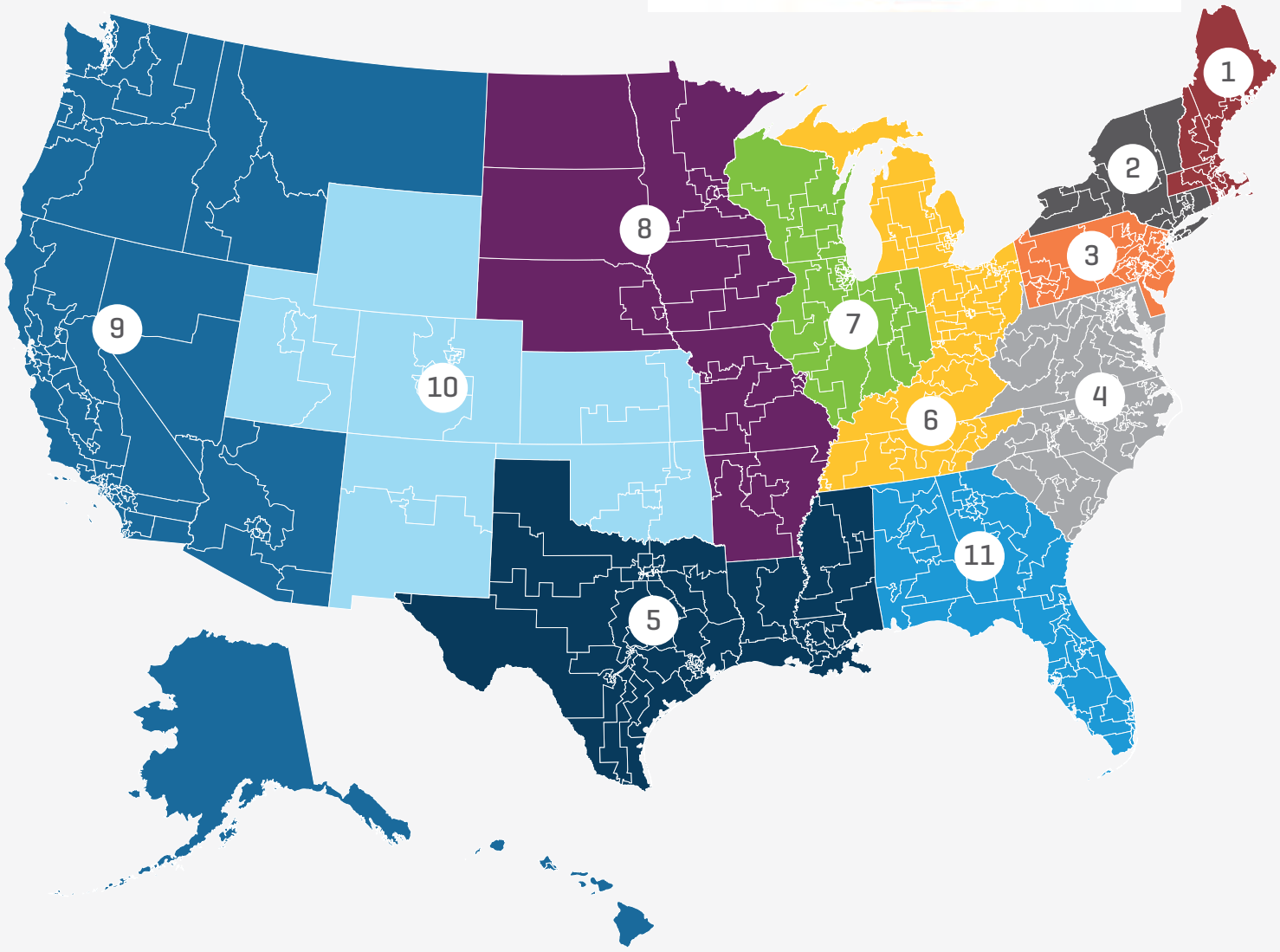


Figure 9 further breaks down jurisdictions into district courts and identifies the top 15 district courts by case filings. The results reinforce the perception that the vast majority of federal trade secret cases are filed in a concentrated group of district courts. For instance, 23% of the cases were handled by just five individual district courts. The state of California alone was responsible for nearly 12% of trade secret case filings (approximately 10% in the Central and Northern Districts, as shown below, and the balance in the Southern District), with Texas, New York, Florida, Illinois, and Pennsylvania rounding out the top 50%, each with between 5% and 9%.

Historically, plaintiffs in federal trade secret cases were perhaps favoring certain jurisdictions, such as the Eastern District of Texas, Northern District of Illinois, and the District of Colorado. This apparent targeting of certain venues is called "forum shopping," which also occurred frequently in other IP-related matters when a plaintiff selects a venue based on factors including speed to trial, the court's experience with the type of litigation, and the perception of probable outcomes.[24] It is possible that forum shopping may have historically occurred in federal trade secret matters. However, based on analysis of cases filed after the DTSA, trade secret case filings are occurring more around large population centers including California, Illinois, and New York.

FIGURE 9:

15 Most Active District Courts (Trade Secret Decisions)

DISTRICT COURT		CIRCUIT	NO. OF CASES PRE-DTSA	NO. OF CASES POST-DTSA	NO. OF CASES TOTAL	% OF TOTAL
Central District of California	●	9th	420	490	910	5.9%
Northern District of Illinois	●	7th	326	424	750	4.9%
Southern District of New York	●	2nd	255	427	682	4.5%
Northern District of California	●	9th	226	376	602	3.9%
District of New Jersey	●	3rd	239	317	556	3.6%
Middle District of Florida	●	11th	226	290	516	3.4%
Eastern District of Pennsylvania	●	3rd	233	270	503	3.3%
Southern District of Texas	●	5th	204	295	499	3.3%
Southern District of Florida	●	11th	203	289	492	3.2%
Northern District of Georgia	●	11th	188	229	417	2.7%
Southern District of Ohio	●	6th	167	240	407	2.7%
Northern District of Texas	●	5th	175	211	386	2.5%
Eastern District of Virginia	●	4th	168	199	367	2.4%
District of Colorado	●	10th	133	234	367	2.4%
District of Massachusetts	●	1st	141	191	332	2.2%
All Other Districts			3,295	4,221	7,516	49.1%
Total Cases			6,599	8,703	15,302	

24 Forum shopping in patent litigation has been diminished due to changes in case law [*TC Heartland LLC v. Kraft Food Brands Group LLC*, Supreme Court of the United States, May 22, 2017, No. 16-341].

TRENDS IN TRADE SECRET DAMAGES

Damages were awarded in 86% of trade secret cases that went to trial, with monetary damages totaling approximately $5.4 billion from 2017 to 2022. The thirteen largest awards for cases that included a trade secret claim were all over $100 million each. Three awards included trade secret-specific damages components in excess of $100 million, while ten cases that included trade secret damages awarded aggregate damages of over $100 million.

We note that these awards do not include any data for state court cases. For example, in *Pegasystems Inc. v. Appian Corporation,* Appain was awarded $2 billion in damages. (Details of this case and other trade secret cases with large damages award can be found in Appendix II.)

We found extensive trade secret damages awarded after the implementation of the DTSA. The $5.4 billion in total damages cited above resulted from just 189 monetary award rulings, with a damange award mean of $28 million.

The states with the largest damages award mean are shown in **Figure 12**. Among the top 15 states, only three states, Illinois, Arkansas, and Texas, had a mean damages award above the national mean post the enactment of the DTSA (Figure 12).

In our last trade secret report issued in 2020, we found that the damages award mean for trade secret cases was $21.4 million. The damages award mean increased to $28 million from 2017 to 2020. Overall, our data suggests that while on average trade secret cases have increased, these means are being driven by a handful of large verdicts. We also recognize that large verdicts, over a $100 million, are becoming more frequent.

Note: median awards differ materially in some states

FIGURE 10:

10 Largest Federal Trade Secret Awards (2017-2022)

Case	Trade Seceret Damages				Additional Causes of Action		Enhanced Damages*	Total Damages
	Unjust Enrichment	Lost Profits	Reasonable Royalty	Total	Copyright Damages	Contract Damages	Total	
Syntel Sterling Best Shores Mauritius Limited v. The Trizetto Group, Inc. et al	$ 284,855,192			$ 284,855,192			$ -	**$ 284,855,192**
Epic Systems Corporation v. Tata Consultancy Services Limited et al	$ 140,000,000			$ 140,000,000			$ 721,646	**$ 140,721,646**
Motorola Solutions, Inc. et al v. Hytera Communications Corporation Ltd. et al	$ 135,800,000			$ 135,800,000	$ 136,300,000		$ 359,647,992	**$ 631,747,992**
Miller UK Ltd. et al v. Caterpillar, Inc.	$ 49,700,000	$ 24,900,000		$ 74,600,000		$ 1,000,000	$ -	**$ 75,600,000**
CardiAQ Valve Technologies, Inc. v. Neovasc Inc. et al			$ 70,000,000	$ 70,000,000		$ 2,950	$ 41,675,154	**$ 111,678,104**
Zest Labs Inc et al v. Wal-Mart Inc			$ 60,000,000	$ 60,000,000		$ 5,000,000	$ 50,000,000	**$ 115,000,000**
Patriot Rail Corp. v. Sierra Railroad Company		$ 22,282,000		$ 22,282,000			$ 30,544,465	**$ 52,826,465**
ResMan, LLC v. Karya Property Management, LLC et al			$ 20,800,000	$ 20,800,000		$ 11,490,000	$ 120,000,000	**$ 152,290,000**
Comet Technologies USA Inc. et al v. XP Power LLC	$ 20,000,000			$ 20,000,000			$ 20,000,000	**$ 40,000,000**
Proofpoint, Inc. et al v. Vade Secure, Incorporated et al	$ 13,495,659			$ 13,495,659		$ 480,000	$ 100,004	**$ 14,075,663**
Total	**$ 643,850,851**	**$ 47,182,000**	**$ 150,800,000**	**$ 841,832,851**	**$ 136,300,000**	**$ 17,972,950**	**$ 622,689,261**	**$ 1,618,795,062**
Share of Total TS Damages by Recovery Type	*76%*	*6%*	*18%*	*100%*				
Share of All Damages by Recovery Type	*40%*	*3%*	*9%*	*52%*	*8%*	*1.1%*	*38%*	*100%*

*Enhanced Damages Includes Attorney Fees, Punitive Damages, Enhancements for Willfulness, and Pre-Judgment Interest

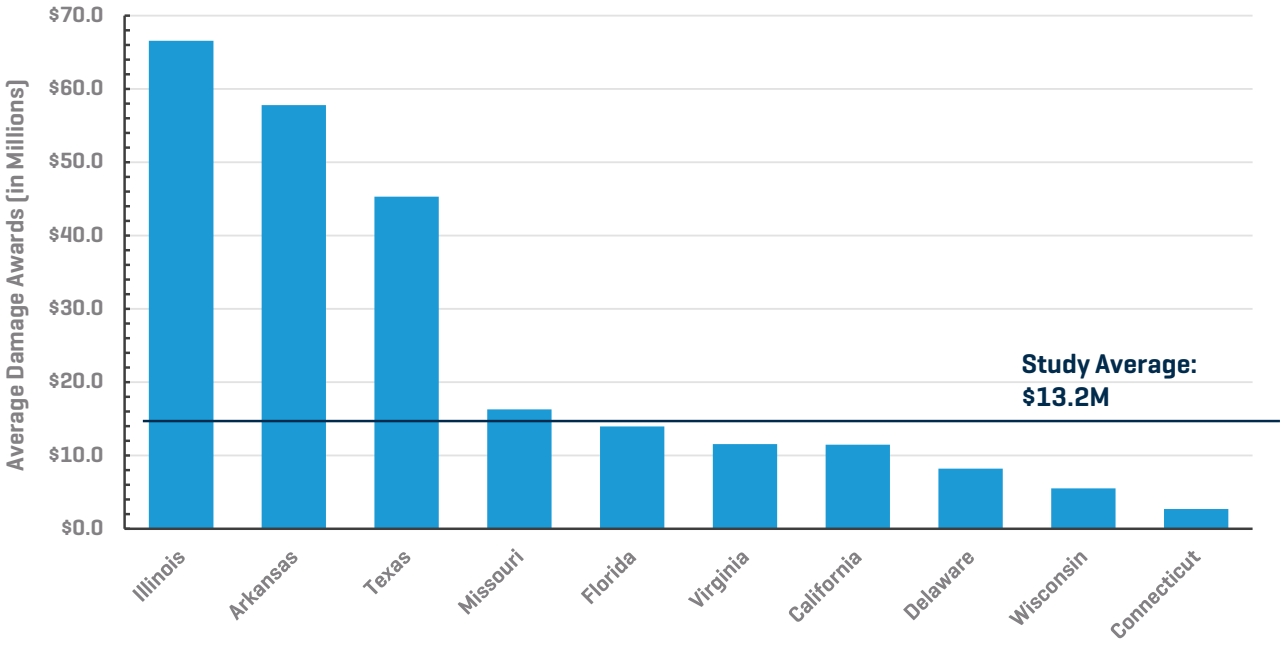
FIGURE 11:

Top 10 Damage Awards (2017-2022) - Cases with Trade Secret Claims

Case	Total Damages Awarded	Trade Secret Damages Awarded	State (Division)
BMC Software, Inc. v. International Business Machines Corporation	$ 1,624,088,184	$ -	Texas (Southern)
Motorola Solutions, Inc. et al v. Hytera Communications Corporation Ltd. et al	$ 631,747,992	$ 135,800,000	Illinois (Northern)
Taxinet, Corp. v. Leon	$ 300,015,000	$ -	Florida (Southern)
Monster Energy Company v. Vital Pharmaceuticals, Inc. et al	$ 293,079,761	$ 3,155,587	California (Central)
Syntel Sterling Best Shores Mauritius Limited v. The Trizetto Group, Inc. et al	$ 284,855,192	$ 284,855,192	New York (Southern)
Zenimax Media Inc et al v. Oculus VR Inc et al	$ 250,000,000	$ -	Texas (Northern)
ResMan, LLC v. Karya Property Management, LLC et al	$ 152,290,000	$ 20,800,000	Texas (Southern)
Epic Systems Corporation v. Tata Consultancy Services Limited et al	$ 140,721,646	$ 140,000,000	Wisconsin (Western)
Steves and Sons, Inc. v. Jeld-Wen, Inc.	$ 135,493,675	$ 1,200,000	Virginia (Eastern)
Quantlab Technologies Ltd. (BVI) et al v. Godlevsky et al	$ 123,240,410	$ 12,200,000	Texas (Southern)

FIGURE 12:

Average Damage Awards by State (Post-DTSA)



TRENDS IN TIME TO RESOLUTION

One area of interest was the mean time to resolution (MTTR) for the cases that resulted in trials (**Figure 13**). Based on the cases studied, the time required to resolve federal trade secret lawsuits averaged 3.6 years from the initial filing of a complaint to the eventual outcome at trial.[25] This MTTR was rather consistent from 2012 through 2018, with the yearly mean varying between three years and three years, seven months. However, since 2018, the mean has spiked, reaching its peak of over four and a half years in 2022. This recent increase in the length of cases may be due to the increasing complexity of the trade secret issues being adjudicated (the effects of the COVID-19 pandemic on court activity may also have played a role in this increase). It is important to note that the MTTR declined slightly toward the average in 2021.

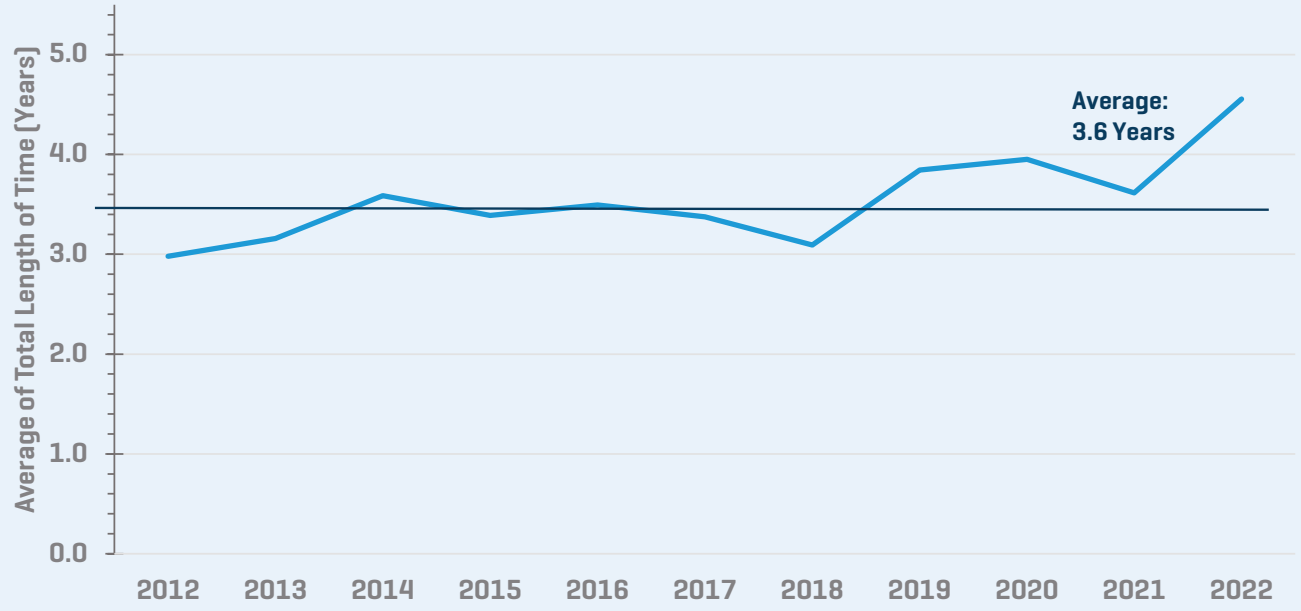
This is an area to watch in the coming years to determine if there will be a return to the three-year, seven-month norm, or if trade secret litigators should expect four or more years to be the new standard. One of the hallmarks of the DTSA is to have readily applicable and consistent federal court decisions, which should theoretically shorten the MTTR of matters, but the data does not reflect this result.

From case to case, the time to resolution varies widely, ranging from one year to over ten years, including appeals. Similar to damage awards, there does not appear to be a clear link between state-wide caseload and MTTR. In our study, many of the states with the largest caseloads had shorter means than the national mean, implying that even when a court handles a disproportionate number of cases, time to trial is not adversely affected. For example, as illustrated in **Figure 14**, trade secret cases tried in Texas were resolved 6% faster, 3.4 years on average, than the national average of 3.6 years. California had an average of 3.3 years, and Florida had an average of about 2.7 years. In fact, of the five most active districts, only New York, at 3.7 years, experienced a longer average than the national mean.

25 This analysis does not incorporate additional time due to appeals.

FIGURE 13:

Average Length of Case by Year Terminated

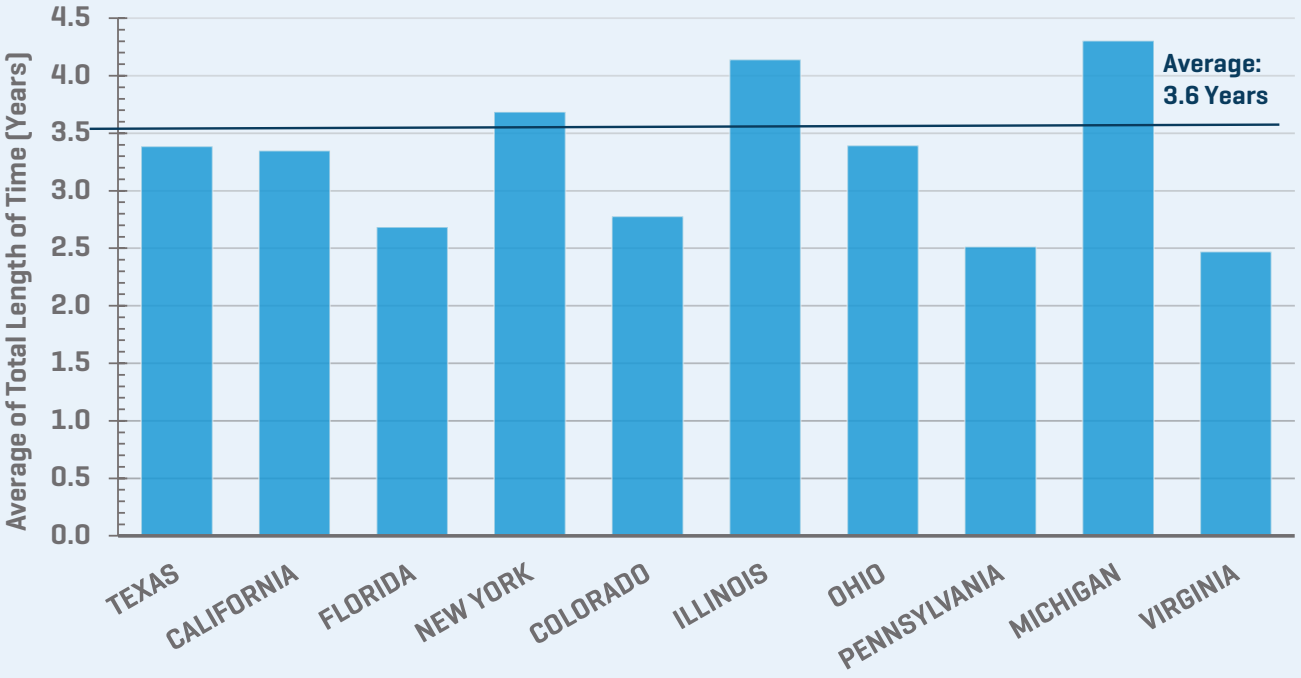


*Only includes cases that resulted in a trial

FIGURE 14:

Average Time to Resolution for Most Active States

(Cases Terminated 2010-2022)



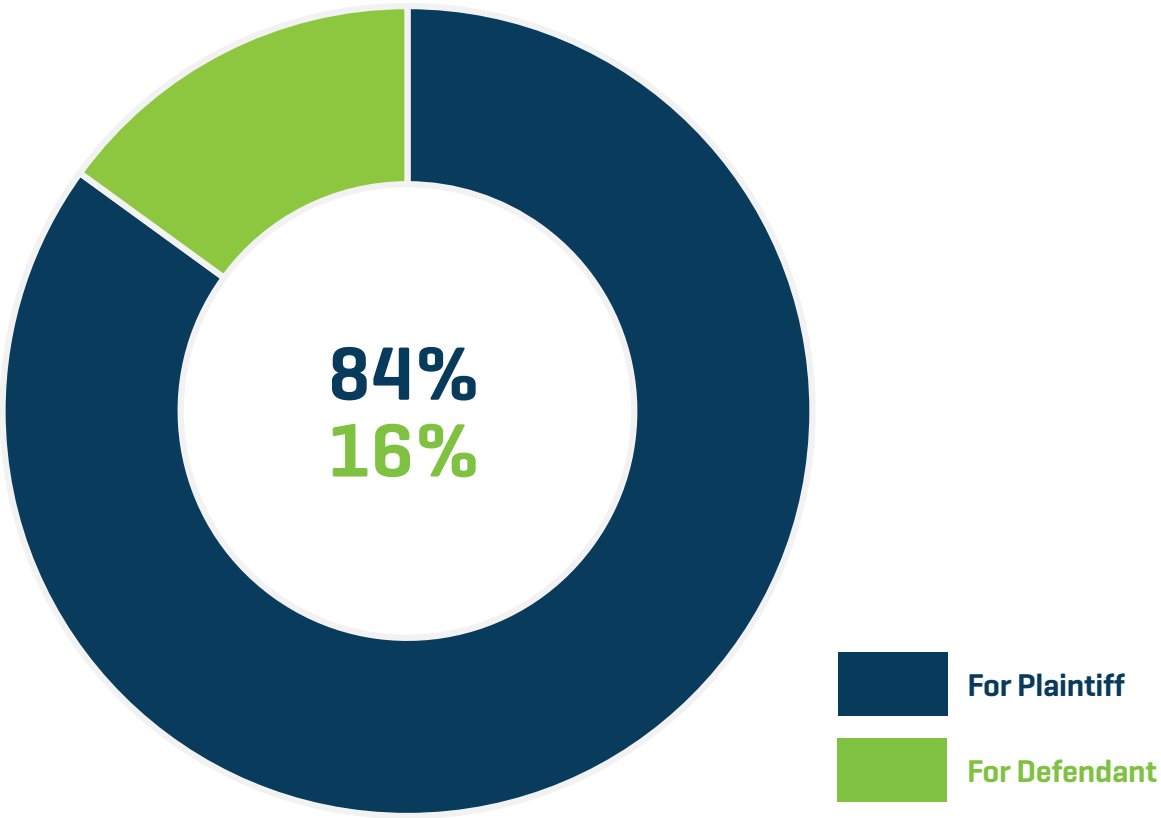
TRENDS IN CASE RESOLUTIONS

One interesting finding to emerge from this study was the proportion of trade secret judgments in favor of the plaintiffs. As portrayed by **Figure 15**, plaintiffs fared well when bringing trade secret claims to trial, earning a judgment in their favor 85% of the time. Defendants received a favorable verdict in only 15% of cases. This ratio has increased since the last time we issued this report in 2020, when our findings showed that 68% of cases were found in favor of the plaintiff.

Furthermore, trade secret cases were judged in favor of the plaintiffs more often than in other IP cases such as patent trials. When looking at patent cases tried over the same period, plaintiffs were successful at trial 73% of the time, much more often than Defendants, but less often than in trade secret trials.

FIGURE 15:

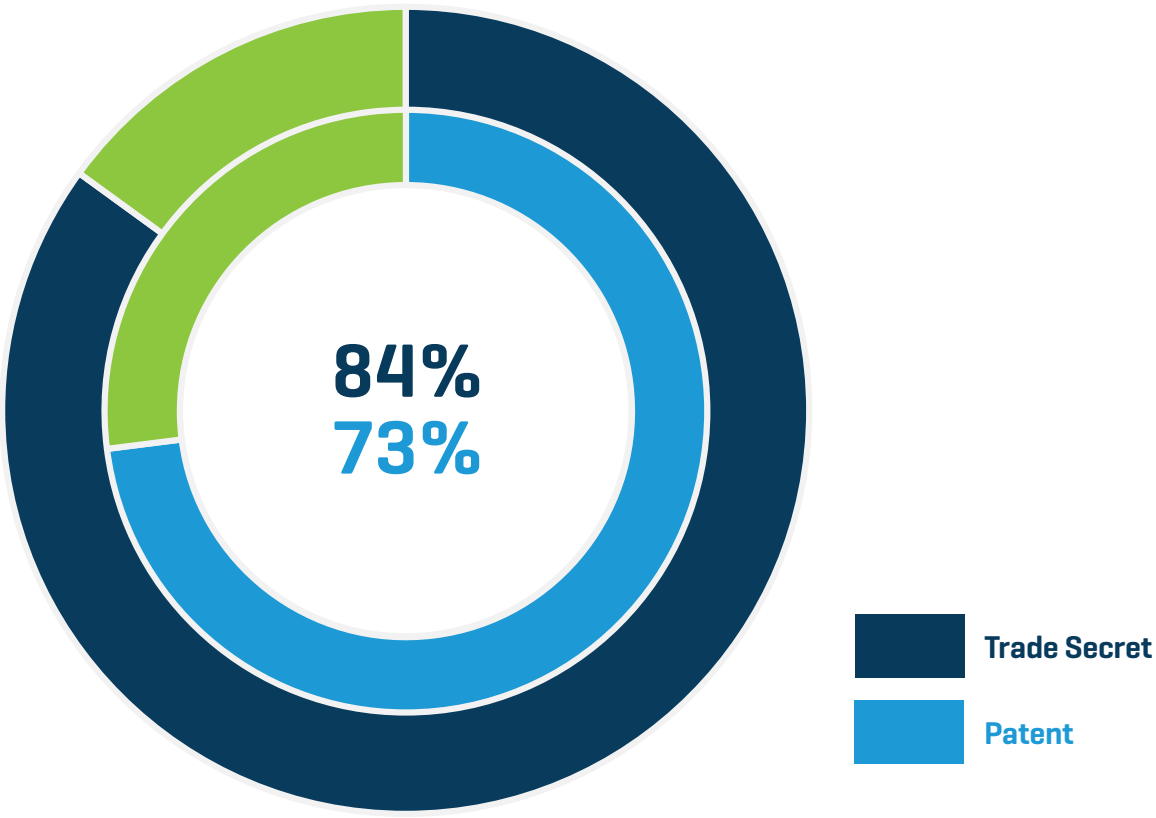
Proportion of Trade Secret Court Rulings by Prevailing Party



*This figure excludes cases resulting in a settlement.

FIGURE 16:

Patent Cases v. Trade Secret Cases - Percent of Trials Won by Plaintiff



APPEALS TRENDS

The decision of the district court is rarely the final stage of a trade secret case. Often, trade secret decisions are appealed. Of the trial cases that resulted in large damages award in the district courts, many were later appealed. In addition, many of the top ten damages award cases were lowered or overturned. Thus, the largest awards may not stand up to the scrutiny of higher courts.

APPENDIX I:

RESEARCH METHODOLOGY AND LIMITATIONS

Stout's analysis for this report includes federal trade secret cases decided during the 1990-2022 period.[26]

For the prior versions of this report, we conducted a search using the Lexis Advance® database for U.S. district court cases identified by Lexis as those pertaining to trade secret claims.[27] This resulted in a population of over 10,800 cases filed in the 29-year period between January 1, 1990, and June 30, 2019. As this population contained cases at every stage of the litigation process from initial complaint filing to final court rulings, we narrowed the study to only those cases that had advanced far enough to have a measurable outcome.

We used Lexis Advance's Jury Verdicts and Settlements database, a comprehensive summary of reported judicial decisions, resulting in 639 cases, and focused on this set of cases to examine. Our analysis was performed on a standardized and comparable basis, demonstrating observable trends and unique findings in federal court trade secret litigation for matters in which a verdict or publicly available settlement information was found over the 29-year period.

In this report, we have expanded our data sets to include cases that went to trial through December 31, 2022, through the use of Lex Machina. Similar to previously collected data, we reviewed corresponding dockets in order to eliminate duplicate cases and those cases that did not truly relate to trade secret claims or counterclaims, resulting in 327 unique trade secret cases in the final study. Removing cases that resulted in a settlement with no publicly disclosed data resulted in a population of 217 cases making up the damages and nonmonetary awards section of our analysis, other than in certain instances where a different sample was considered for a particular reason as previously described.

In addition to the analysis of specific cases, we also used Lex Machina to research trade secret cases filed from 2010 through 2022. This data allows us to analyze certain case characteristics for the over 15,000 cases filed during that period. While we have relied heavily on the accuracy of information as coded by these data providers due to the large volume of cases, we have also analyzed motions, orders, verdict forms, and other qualitative primary sources to provide further insights on certain cases as previously described. Where our interpretation of such cases has deviated from coded information, we have relied upon our own interpretations.

CASE STATISTICS

For each case in the study, we identified and tracked over 45 different characteristics across multiple informational categories of the lawsuit. This includes items such as jurisdictional information, background of the parties, the nature of the trade secret(s) at issue, and related causes of action or counterclaims.

Our research also captured information pertaining to the use of experts, settlements and judgments, damages and other awards, and post-trial results. In this report, our research and results have been summarized to highlight notable observations and augment our ongoing monitoring of the trends in trade secret litigation. In this report, our research and results have been summarized to highlight notable observations and augment our ongoing monitoring of the trends in trade secret litigation, and augment our ongoing monitoring of the trends in trade secret litigation.

26 Although there have historically been some significant trade secret decisions made at the state level, the current condition of the state court databases and availability of complete information varies widely state to state and is not consistent. Our focus on federal court cases allowed for a more uniform and comparable analysis than inclusion of cases on state court dockets.

27 As the dataset is an extract from the third-party LexisNexis databases, the findings herein are limited to any inherent limitations on LexisNexis regarding identifying cases and attributing them as relating to trade secrets.


FINANCE
SOCIAL
Jan Feb Mar Apr May Jne Aug Sep Oct Nov Dec Dec

APPENDIX II:

RECENT LARGE VERDICTS IN TRADE SECRET CASES

The below summarizes various large damages cases in which verdicts were received after the issuance of Stout's previous 2020 trade secret report.

***VERSATA SOFTWARE INC. V. FORD MOTOR CO.,* NO. 2:15-CV-10628 (E.D. MICH. OCT. 26, 2022)**

In 2004, Versata Software, Inc. entered into a 15-year license agreement with Ford Motor Co. in which Versata licensed Ford software to manage the configuration of vehicle components during assembly. In 2014, Ford ended the contract, saying it had developed its own software. In 2015, Versata filed a complaint against Ford, and on October 27, 2022, a federal jury ruled in favor of Versata Software Inc., finding Ford Motor Company guilty of misusing and disclosing confidential information, reverse-engineering the software for its own use, using the software without a license, and misappropriating Versata's trade secrets. The jury awarded Versata $82.3 million for breach of contract and $22.4 million for misappropriation. The case is currently pending appeal.

ZEST LABS, INC. ET AL. V. WAL-MART INC E.D.ARK. 4:18-CV-00500-JM

Zest Labs began developing its "Zest Fresh" solution, a solution for reducing fresh food waste. Over the course of multiple years, ending in 2017, Zest Lab worked with Walmart to demonstrate the Zest Fresh solution. During this time, Zest Labs shared its proprietary information with Walmart. Months after Walmart ended the relationship, it announced a similar system to Zest Fresh. Zest Labos claimed that Walmart misappropriated trade secrets, proprietary information, and know-how related to its Zest Fresh technology for Walmart's own benefit. On August 1, 2018, Zest Labs filed misappropriation of trade secrets and breach of contract claims against Walmart. On April 9, 2021, a federal jury ruled in favor of Zest Labs, ordering Walmart to pay $60 million in reasonable royalties for trade secret misappropriation, $50 million for punitive/willfulness damages, and $5 million for breach of contract.

RESMAN, LLC V. KARYA PROPERTY MANAGEMENT, LLC ET AL. E.D.TEX. 4:19-CV-00402-ALM

ResMan is a property management software company whose customer, Karya Property Management, LLC, in breach of its contractual obligation to ResMan, provided a third-party software consultant, Scarlet InfoTech, Inc. d/b/a Expedien, Inc., unauthorized access to ResMan's proprietary software platform for the purpose of copying ResMan's platform and creating a directly competitive software product. On June 3, 2019, ResMan filed a complaint against Karya and Expedien for breach of contract, tortious interference with contract, violation of the Computer Fraud and Abuse Act (CFAA), and declaratory judgment pursuant to 28 U.S.C. § 2201. On October 1, 2019, ResMan amended the complaint to include violation of the Defend Trade Secrets Act (DTSA) and violation of the Texas Uniform Trade Secrets Act (TUTSA). On March 18, 2021, a federal jury ordered Karya and Expedien each to pay ResMan $45,000 for contract damages, Expedien to pay ResMan $11.4 million and Karya to pay ResMan $9.4 million in lost profits damages, and Expedien to pay ResMan $50 million and Karya to pay ResMan $40 million in punitive/willfulness damages.

PEGASYSTEMS INC. V. APPIAN CORPORATION ET AL. D.MASS. 1:19-CV-11461-PBS

In May 2020, Appian Corp., a cloud computing firm located in McLean, Virginia, filed suit against Pegasystems Inc., a Massachusetts-based software firm, and an individual, Youyong Zou, alleging that beginning in 2012, over the span of eight years, Pegasystems utilized multiple methods to gain access to Appian's trade secrets to better compete against it. Specifically, Appian alleges that Pegasystems paid Zou, an employee of a government contractor using Appian software, for access to the back end of Appian software. Additionally, Appian alleges that Pegasystems employees used false identities to gain access to trial versions of Appian's software and that Pegasystems obtained further access through its partners in India. Appian brought claims under the Virginia Computer Crimes Act and the Virginia Uniform Trade Secrets Act. A Fairfax County jury ruled against Pegasystems for violating both the Virginia Uniform Trade Secrets Act and the Virginia Computer Crimes Act and awarded Appian $2.0 billion in damages. The jury also ruled that Zou owed Appian $5,000 in damages for computer fraud in violation of the Virginia Computer Crimes Act. This is estimated to be the largest amount in Virginia State Court history. Pegasystems appealed the decision to the Court of Appeals of Virginia.

The damages award was overturned on appeal in July 2024, though Appian has indicated that it plans to file its own appeal.

COMET TECHNOLOGIES USA INC. ET AL. V. XP POWER LLC

This case was filed on September 11, 2020, in the U.S. District Court for the Northern District of California. Comet claimed that XP Power had stolen trade secrets related to technology like radio frequency generators and matching networks, technology which Comet sells to customers in the semiconductor industry. The complaint alleged that XP Power began working on similar technology in 2017, hiring away key personnel from Comet who had access to the company's trade secrets. A jury awarded Comet compensatory damages on two of the four trade secrets for a total of $40 million in damages, split evenly between $20 million in compensatory damages and $20 million in punitive damages.

MOTOROLA SOLUTIONS, INC. ET AL. V. HYTERA COMMUNICATIONS CORPORATION LTD. ET AL.)

This case was filed on March 14, 2017, in the U.S. District Court for the Northern District of Illinois. Motorola claimed that Hytera, a Chinese competitor of Motorola, stole trade secrets related to its digital two-way communication systems, which Motorola sells to thousands of public safety organizations, emergency response teams, transportation and logistics organizations, and others in the U.S. and worldwide. The complaint alleged that Hytera hired personnel from Motorola who had access to and extensive knowledge of Motorola's proprietary technologies. In this matter, Motorola was ultimately awarded $135.8 million in compensatory damages under the DTSA, $136.3 million in compensatory damages under the Copyright Act, and $271.6 million – the maximum available – in punitive damages.

CODA DEVELOPMENT S.R.O. ET AL. V. GOODYEAR TIRE & RUBBER COMPANY ET AL.

This case was filed on August 9, 2015, in the U.S. District Court for the Northern District of Ohio. Coda alleged misappropriation of trade secrets related to Coda's Self-Inflating Tire (SIT) technology, among other claims. Coda claimed the parties had discussed confidential and proprietary information related to the SIT technology in the interest of potentially pursuing a joint project, at which point Goodyear proceeded to patent the SIT technology without Coda's knowledge or consent. The jury ruled in favor of Goodyear on five out of 12 trade secrets on which Coda alleged misappropriation. Goodyear was awarded $2.8 million in compensatory damages and $61.2 million in punitive damages. The $2.8 million amount was notably less than the between $89 million and $246 million that Coda's lawyers asked for. Additionally, the $62.1 million in punitive damages was expected to be significantly limited to $8.4 million under Ohio law.

Coda filed for appeal on October 6, 2017. The Court of Appeals vacated and remanded the trial on February 22, 2019. On March 31, 2023, Goodyear won a reversal of the $64 million verdict. Judge Sara Lioi ruled that four of the five trade secrets for which damages had previously been awarded were not specific enough to be considered protectable trade secrets, and that the fifth was "no secret at all" because the concept was not new in 2009. Counsel for Coda said that Coda was disappointed with the decision and plans to appeal.

SYNTEL STERLING BEST SHORES MAURITIUS LTD. V. TRIZETTO GROUP, INC.

Plaintiff Syntel filed a breach of contract claim against defendant TriZetto, a software developer and design company focused in heathcare administration software, in the Southern District of New York. TriZetto then countersued, alleging that Syntel misappropriated trade secrets and infringed copyrights related to TriZetto's Facets, a software geared specifically to health plan administration.

In October 2020, the jury found in favor of TriZetto on all claims. With respect to TriZetto's counterclaims, the jury found that TriZetto possessed trade secrets that were misappropriate by Syntel in violation of federal law and New York state law and that Syntel infringed on TriZetto's copyrights.

Trizetto proposed two damages theories for the trade secret claims: (1) Syntel's unjust enrichment in the form of "avoided costs" and (2) TriZetto's "lost profits" in the form of a reasonable royalty.

The jury awarded TriZetto $285 million for misappropriation of trade secrets under federal law; $142 million for misappropriation of trade secrets under New York Law; and $59 million for copyright infringement. It also awarded $570 million in punitive damages, which was not apportioned.

After trial, Syntel filed a motion for Judgement as a Matter of Law and a new trial. In May 2021, the District Court issued a final judgment denying Syntel's motion and awarding TriZetto the entire amount listed in the jury's verdict.

The jury's verdict was appealed to the Second Circuit. On June 1, 2023, the Second Circuit affirmed the District Court in part and reversed in part and remanded. The Second Circuit reversed the unjust enrichment award of avoided costs because its gain was fully "addressed in computing damages for its calculation of actual loss." It stated that avoided costs (a form of unjust enrichment damages) is not available in addition to lost profits, absent evidence that the value of the trade secrets was diminished as a result of the misappropriation. Interestingly, the Second Circuit held that avoided costs is still available for future cases concerning a defendant who has realized only modest profits from its misappropriation of trade secrets but has nevertheless been enriched by avoided costs in a larger amount at the expense of the trade secret holder.

The Second Circuit remanded the remaining issue as to the award based on TriZetto's reasonable royalty back to the District Court. The Second Circuit approved the District Court's rulings on pretrial motions, confirming that an award of development costs is not available in addition to lost profits without evidence that the misappropriation diminished the trade secrets' value.

APPENDIX III:

COMPARING THE UTSA AND DTSA

Much has been written about the DTSA and its specific provisions since its introduction in 2016. Our focus is not to reiterate what has already been published on the topic, but to provide insight into how the DTSA is, and can be, used by companies seeking trade secret remedies. We have summarized certain key differences between the UTSA and DTSA below.[28]

- The DTSA is less specific than the UTSA regarding the "proper means" to obtain a trade secret
- Damages can be trebled under the DTSA, as opposed to doubled under the UTSA
- Preliminary Injunction can occur under both the DTSA and UTSA, but under the DTSA it cannot prevent someone from entering into an employment relationship and cannot be in conflict with state law
- Ex parte civil seizure rights are available under the DTSA in extraordinary circumstances; they are not available under the UTSA
- Under the DTSA, attorney's fees can be awarded based on "circumstantial evidence" that the trade secret litigation was filed in bad faith; the UTSA does not reference "circumstantial evidence"

STATE VS. FEDERAL JURISDICTION

Prior to the UTSA, trade secret law had been primarily governed by state law. However, the UTSA was adopted (in some form) by 47 states in addition to the District of Columbia and Puerto Rico.[29] Thus, differing historical state governing laws and UTSA adoption at the state level have resulted in varying interpretations of trade secret law between jurisdictions.

For the three states that have not adopted the UTSA in some form, New York trade secret law is based on case law, court decisions, and precedents, rather than by statute. In Massachusetts, trade secrets are protected by a blend of statutory and common law. North Carolina enacted its own trade secret statute in July 1981 – the North Carolina Trade Secrets Protection Act (NCTSPA), which is based largely on the UTSA.[30] The NCTSPA defines trade secret misappropriation as "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." As with the DTSA, reverse engineering is lawful under the North Carolina statute. In contrast to the DTSA, the NCTSPA does not make "knowledge or reason to know that the information is a trade secret" an element of misappropriation. However, "knowledge or reason to know" significantly impacts the remedies available under the state's statute.[31]

Additionally, while both the NCTSPA and federal statutes provide for injunctive relief to prevent the use or disclosure of trade secrets, the NCTSPA states: "If the court determines that it would be unreasonable to enjoin use after a judgment finding misappropriation, an injunction may condition such use upon payment of a reasonable royalty for any period the court may deem just."[32]

28 For additional comparison and contrasts between the DTSA and UTSA, see John Carson and Cameron Cushman, Lewis Roca Rothgerber Christie, "DTSA Versus UTSA: A Comparison of Major Provisions," *Law 360*, 2016; "Trade Secrets Laws and the UTSA: 50 State and Federal Law Survey," Beck Reed Riden LLP, October 30, 2016.

29 Massachusetts, New York, and North Carolina did not adopt the UTSA in any form; "Trade Secrets Laws and the UTSA: 50 State and Federal Law Survey," Beck Reed Riden LLP, October 30, 2016.

30 N.C. GEN. STAT. §§ 66-152 to -157 (Supp. 1981).

31 Bob Meynardie, "Comparing Federal and North Carolina Trade Secret Protection," Meynardie & Nanney, PLLC, May 9, 2016.

32 North Carolina Trade Secrets Protection Act; Article 24, § 66-154.

The "knowledge or reason to know" requirement under the NCTSPA also impacts potential damages. For instance, no damages are available for use prior to the time the defendant knew or had reason to know it was a trade secret. If the defendant has materially changed its position prior to knowledge, then it cannot be enjoined, but it may be required to pay a royalty.[33]

While these are just a few examples comparing the law in a state that did not follow the UTSA, these differences attest to the continued relevancy of state law and the important role the UTSA and individual state laws continue to play in determining what constitutes a trade secret and remedies regarding the misappropriation of trade secrets. It is also worth noting that in many states, trade secret case law differs by county, creating increased complexity.

TRADE SECRET MISAPPROPRIATION

Another subtle but noteworthy difference between the UTSA and DTSA concerns the misappropriation of trade secrets. While the definitions of trade secret misappropriation under the UTSA and the DTSA are substantively identical,[34] with both defining "improper means" as "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means,"[35] they differ when it comes to which actions are included under improper means.

Section 1(1) of the UTSA provides that *proper means* include:

1 | Discovery by independent invention

2 | Discovery by "reverse engineering," that is, by starting with the known product and working backward to find the method by which it was developed; the acquisition of the known product must, of course, also be by a fair and honest means, such as the purchase of the item on the open market for reverse engineering to be lawful

3 | Discovery under a license from the owner of the trade secret

4 | Observation of the item in public use or on public display

5 | Obtaining the trade secret from published literature

Whereas DTSA § 2(b)(6) is broader, it is also less specific, providing that improper means "does not include reverse engineering, independent derivation, or any other lawful means of acquisition."[36]

33 Bob Meynardie, "Comparing Federal and North Carolina Trade Secret Protection," Meynardie & Nanney, PLLC, May 9, 2016.
34 "Trade Secrets Laws and the UTSA: 50 State and Federal Law Survey," Beck Reed Riden LLP, October 30, 2016.
35 UTSA § 1[1]; DTSA § 2[b][6][A].
36 James Morrison, "Comparing the Defend Trade Secrets Act and the Uniform Trade Secrets Act," Baker & Hostetler, LLP, May 17, 2016.

Stout's Trade Secret Experience

At Stout, we focus on the damages aspects of trade secret litigation, which includes ongoing analysis of the trade secrets landscape with particular attention to current and evolving trends. Stout experts are leading authorities on quantifying financial damages related to violations of restrictive covenants and trade secret misappropriation. We bring an independent point of view, deep technical expertise, and a track record of credible and compelling testimony in such matters. Our experts regularly work with in-house and outside counsel, government agencies, and courts and mediators to provide analysis and expert testimony on issues including:

- Lost profits resulting from lost sales, convoyed sales, and price erosion
- Financial gains due to alleged misappropriation
- Gains due to saved cost of development and head start
- Reasonable royalties, including the determination of the proper royalty base and rate
- Forensic accounting and analysis pertaining to causational issues
- Economic market analyses
- Irreparable harm analyses
- Mitigation assessments

To learn more about our experience with Trade Secrets, visit
stout.com/en/services/trade-secrets-restrictive-covenants

About the Authors

KEVIN MCELROY is a Managing Director in the Disputes, Claims, & Investigations group. Kevin has extensive experience providing consulting services to corporations, law firms, laboratories, government organizations, universities, and individuals in the areas of intellectual property disputes, valuation, monetization, and other intellectual property management issues. Kevin's expert testimony has been accepted in U.S. District Courts and he has offered written testimony, deposition testimony, and/or testimony before a trier of fact on damages relating to patent infringement, trademark infringement, copyright infringement, trade secret misappropriation, and breach of contract damages. Kevin has published and presented on intellectual property damages and valuation issues as well as on the economics underlying the value of trade secrets.

Kevin can be reached at **+1.312.752.3339** or **kmcelroy@stout.com**

LINDSEY FISHER is a Managing Director in the Disputes, Claims, & Investigations group. Lindsey focuses on assisting clients and counsel with complex financial and damages matters, including providing expert testimony, preparing expert reports, developing damages strategies, and building financial models. Her cases have involved a variety of disputes, including patent infringement, trademark infringement, trade dress infringement, copyright infringement, trade secret misappropriation, breach of contract, valuation, and indemnity disputes.

Lindsey can be reached at **+1.312.763.6244** or **lfisher@stout.com**

Stout is a global advisory firm specializing in corporate finance, accounting and transaction advisory, valuation, financial disputes, claims, and investigations. We serve a range of clients, from public corporations to privately held companies in numerous industries. Our clients and their advisors rely on our premier expertise, deep industry knowledge, and unparalleled responsiveness on complex matters.


STOUT