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Top Developments in Trade Secret Law

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In the ever-evolving landscape of intellectual property law, trade secrets have emerged as a crucial area of focus, particularly in light of recent uncertainties as to the enforceability of non-competes. Since August 2023, significant developments in trade secret law have reshaped strategies and safeguards for businesses worldwide. From landmark court decisions to legislative reforms, here are the top developments to help you stay in the know.

1. The Federal Trade Commission bans non-compete agreements, but the Final Rule may be set aside.
In April, the Federal Trade Commission voted 3-2 to ban most non-competes, adopting a Final Rule set to take effect on September 4th. The Final Rule prohibits an employer from enforcing or entering into a non-compete clause with a "worker" (defined to include employees and independent contractors), making a partial exception for so-called "senior executives" who earn an annual compensation greater than $151,164 and can make policy decisions for the business. There has been significant opposition to the Final Rule, and on August 20, the Northern District of Texas set aside the rule and ordered that it shall not be enforced or otherwise take effect on September 4. It remains to be seen whether it will stand up to scrutiny on appeal or before the Supreme Court, but employers are nonetheless encouraged to protect confidential information through alternative means such as NDAs and Trade Secret protection.

2. The Federal Circuit sets a high bar for obtaining a preliminary injunction.
In *Insulet Corp. v. EOFlow, Co. Ltd.*, the U.S. Court of Appeals for the Federal Circuit overturned a preliminary injunction for trade secret misappropriation. In the precedential decision, the court established a high bar for obtaining a preliminary injunction, finding that the district court erred by, *inter alia*; 1) failing to recognize that information readily ascertainable through reverse engineering does not qualify for trade secret protection; 2) failing to consider the effect of Insulet's patent disclosures on the protectability of their alleged trade secrets; 3) accepting the proponent's a "severely overbroad" and "hazy grouping of information" as trade secrets; and 4) failing to properly evaluate whether the alleged trade secret information had independent economic value. Even though the two companies are direct competitors, the circuit court rejected the district court's assumption of irreparable harm.

3. The federal Defend Trade Secrets Act and extraterritorial damages.
The U.S. Court of Appeals for the Seventh Circuit issued a decision in *Motorola Solutions, Inc. v. Hytera Communications Corp*. affirming that the federal Defend Trade Secrets Act (DTSA) provides for extraterritorial damages. In 2020, the district court found that Motorola was entitled to damages proven to be a proximate and foreseeable result of the misappropriation. These included profits received by Hytera or profits lost by Motorola, anywhere in the world. The district court ultimately awarded $135.8 million in compensatory damages and $271.6 million in punitive damages on the Federal Defend Trade Secrets Act (DTSA) claim, as well as $136.3 million on a copyright infringement claim.

In July 2024, the Seventh Circuit issued an opinion, affirming in part and reversing in part, the district court's ruling. While the Seventh Circuit overturned the copyright damages award, finding those damages were limited to Hytera's domestic sales and that the district court needed to reconsider apportionment, it found that: 1) the DTSA has extraterritorial reach and Motorola could recover all of Hytera's foreign profits from the

misappropriation; and 2) even without such extraterritorial reach, Motorola could recover Hytera's foreign profits because the misappropriation involved domestic acts in furtherance of the offense committed in the United States. This is the first appellate court ruling on the application of the federal Defend Trade Secrets Act (DTSA) to extraterritorial damages. Hytera has indicated that it may be seeking a rehearing and/or rehearing *en banc*.

4. Modern technology and trade secrets.

Artificial intelligence: With the recent developments in AI, specifically Large Language Models (LLMs) like ChatGPT, the intersection of trade secrets and AI has yet to be fully explored. For example, as companies begin training custom LLMs using their own proprietary data, it remains to be seen what will happen whether trade secret protection will extend to confidential information utilized – intentionally or inadvertently – to train the LLMs. As always, companies should take great care to ensure that all confidential data is secure and remains protected from disclosure.

Blockchain: Made famous for being the foundation of cryptocurrency, blockchain technology provides a secure, transparent, and decentralized record of ownership. However, in an era where data breaches increasingly spell disaster for confidential IP, some are looking towards technological solutions such as blockchain to ensure informational security.

5. Trade secrets suits in the EV battery space continue.

A recent trend in the EV battery space continues. Competitors continue to use trade secrets cases to protect their technology from proliferation. This approach, which began about five years ago, shows no signs of slowing down.

6. Zunum Aero Inc. wins $72 million against Boeing.

This case stems from Boeing's 2017 investment in Zunum Aero, an electric jet startup company. Through its investment and negotiations for continued funding, Boeing was granted access to Zunum's trade secrets to vet the startup's technology. However, Zunum later accused Boeing of copying the startup's plans and trade secrets and incorporating them into their own electric jet program. A Seattle jury found in favor of Zunum, resulting in an award of approximately $72 million for trade secret misappropriation and tortious interference. Boeing has indicated that it plans on challenging the judgment.

7. Circuits split on when to award unjust enrichment damages.

In October of 2023, the Supreme Court denied certiorari in *Trizetto v. Syntel*, a trade secret misappropriation case. Absent Supreme Court guidance, circuit courts have split on the issue of when to award unjust enrichment damages for misappropriation. The Second Circuit has interpreted the DTSA to permit unjust enrichment in situations where: 1) the trade secret has lost some value; or 2) the defendant has enjoyed some benefit not compensable as lost profits. As a result, the Second Circuit vacated the $285 million damages judgment under the DTSA, even though it affirmed Syntel's liability for misappropriation of trade secrets under the DTSA. The majority of circuits, in contrast, have awarded unjust enrichment damages more expansively, including in situations where the misappropriation did not decrease the value of the trade secret or result in some not otherwise compensable benefit to the defendant.

8. Trade secret ownership under the DTSA.

Last summer, the U.S. Court of Appeals for the Eleventh Circuit decided *Highland Consulting Group, Inc. v. Minjares*. This decision clarified the requirement for proving ownership of a trade secret under the DTSA. The Eleventh Circuit found that the jury was entitled to find that Highland owned the trade secrets at issue even though the documents themselves utilized a "marketing name" or short-hand name, rather than Highland's full legal name. Based on the evidence presented about Highland's use of the short-hand name and role in

developing and using the trade secrets, the court found that a reasonable jury could find that Highland, rather than any international affiliate, owned the trade secrets at issue.

While Highland ultimately achieved a favorable result, this case highlights the importance of precision in distinguishing trade secret ownership between affiliated entities. For this reason, companies should consult counsel where ownership disputes or ambiguity arise and consider all relevant facts indicating ownership.

9. Federal court in Louisiana adopts local rule requiring early trade secret disclosures.

Effective January 1, 2024, the U.S. District Court for the Eastern District of Louisiana adopted a local rule requiring early disclosures to be filed under seal in trade secret cases, before trade-secret-related discovery is permitted to begin. The party asserting misappropriation must identify the asserted trade secrets with particularity in numbered paragraphs, in sufficient detail to enable the accused party to meaningfully compare the asserted trade secret to information that is generally known or readily ascertainable. The local rule also sets forth procedures for amending and verifying these disclosures and addresses the timing of the disclosures where early injunctive relief is sought. It remains to be seen whether other federal district courts adopt similar early disclosure requirements.

10. Federal Circuit affirms-in-part and reverses-in-part *Alifax v. Alcor* holding.

In June, the Federal Circuit affirmed in part and reversed in part a district court ruling in *Alifax Holding SPA v. Alcor Scientific LLC*. The district court had excluded an alleged signal acquisition trade secret from jury consideration at the liability phase of the trial and then granted a new trial on liability after the jury returned a verdict in favor of Alifax on a conversion algorithm trade secret, finding that Alifax had not shown the conversion algorithm trade secret had no independent economic value derived from its alleged secrecy. The Federal Circuit agreed that the district court properly excluded the alleged signal acquisition trade secret, finding that Alifax had provided only a "high-level summary of the purpose of the alleged trade secret without describing it in detail" and thus "failed to meet its burden of proof to establish the existence and scope" of the alleged trade secret. However, the Federal Circuit reversed the district court's grant of a new trial, holding that the district court abused its discretion in granting a new trial because it did not consider whether the trade secret was acquired through improper means, which alone would be sufficient to satisfy the definition of misappropriation regardless of independent economic value.

If you have any questions, please contact the authors or a member of Baker Donelson's Intellectual Property team.