

Trade Secret Litigation Report Highlights the Importance of Proactive Protection Measures and Robust Contracts

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Lex Machina released its 2020 Trade Secret Litigation Report in April, in which it summarized data from the past decade and compared it against data from the previous year's report. The report, which is published annually, analyzes various aspects of trade secret litigation, to help identify trends and assist trade secret litigators in planning, forecasting, and strategy.

Several of the report's observations provide helpful insight:

- Following a sharp 30% uptick in trade secret cases seen after the passage of the Defend Trade Secrets Act, 72% of trade secret cases filed in federal district court now include a claim under the DTSA.
- Over the last decade, less than 13% of trade secret cases asserted trade secret claims only.
- Not surprisingly, since trade secrets are often protected by non-disclosure agreements, 80% of cases also included a contracts claim.
- Courts awarded damages in fewer cases in 2019 than 2018, but for more money overall.
- The largest damages award in 2019 was a mixed damages award just shy of \$50 million. The largest damages award of all time was nearly \$1 billion.

Recognizing the importance of injunctive relief in trade secret cases, the report also highlights the rates at which injunctive relief is granted.

- Over the past decade, over 1,000 permanent injunctions have been entered by consent judgment, as compared to just 147 which were granted on the merits, likely because individual defendants with less resources are more inclined to settle than litigate.
- The past year saw a slight decline in the rate at which courts granted temporary restraining orders (68% as compared to 70%) and preliminary injunctions (55% as compared to 60%).

The report explained the reasons for denial of expedited relief as two-fold: 1) "claimants are unable to clear the bar for a likelihood of success on the merits because the court is unable to determine if there is a trade secret," which

can include a plaintiff's failure to take sufficient measures to protect the information such that it qualifies as a "trade secret" and 2) courts find no need for injunctive relief where the defendant has already returned the materials.

TIP: Protecting trade secrets requires proactive steps such as utilizing enforceable and robust non-disclosure agreements and ensuring data meets the definition of a trade secret by taking sufficient measures to protect their secrecy, such as limiting access, using appropriate HR protocols, and controlling mechanisms for third-party sharing. Such actions increase the likelihood a court will grant injunctive relief and could lead to larger mixed damages awards.

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[Steven Grimes](#)

[Linda Greene](#)

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